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UNIFORM TRUST ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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UNIFORM TRUST ACT

WITH PREFATORY NOTE AND COMMENTS

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UNIFORM TRUST ACT

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UNIFORM TRUST ACT

PREFATORY NOTE

The Uniform Trust Act is the first comprehensive national codification of the law of trusts. The Uniform Law Commissioners appointed a Study Committee in 1993, and a Drafting Committee in 1994. The Act had its first reading at the Commissioners's 1998 annual meeting, and a second reading at the Commissioners' 1999 annual meeting..

Reasons for Trust Act – There are several reasons why the drafting of a Uniform Trust Act is timely. The primary stimulus is the greater use of trusts in recent years, both in family estate planning and in commercial transactions, both in the United States and internationally. This greater use of the trust, and consequent rise in the number of day-to-day questions involving trusts, has led to a recognition that the trust law in many States is thin. It has also led to a recognition that the existing Uniform Acts relating to trusts, while numerous, are incomplete. The primary source of trust law in most States is thus the Restatement (Second) of Trusts and the multivolume treatises by Scott and Bogert, sources which fail to address numerous practical issues and which on others provide insufficient guidance. While there are numerous Uniform Acts related to trusts, none is comprehensive. The Uniform Trust Act hopefully will provide States with precise guidance on trust law questions in an easily findable place, providing the basis for an efficient system that is fair to both trustees and beneficiaries.

Existing Uniform Laws on Trust Law Subjects – There are numerous Uniform Acts on trusts and related subjects, but none provide comprehensive coverage of trust law issues. Certain of these Acts are incorporated into the larger Uniform Trust Act. Others, addressing more specialized topics, will continue to be available for enactment in free-standing form. The following are the most relevant Acts:

Uniform Trustee Powers Act – approved in 1964, it has been enacted in 16 States. The Act, as its name implies, contains a list of specific trustee powers and deals with selected other issues, particularly relations of a trustee with persons other than beneficiaries. The Trustee Powers Act is badly outdated and is entirely superseded by the Trust Act, principally at Sections 816 and 1012. States enacting the Uniform Trust Act should repeal this other uniform act.

Uniform Prudent Investor Act – approved in 1994, this Act has been enacted in over 30 States. This Act, and variant forms enacted in a number of other States, has displaced the older "prudent man" standard, bringing trust law into line with modern investment practice. States which have enacted the Uniform Prudent Investor Act are encouraged to recodify it as part of this Act. A place for this is provided in Article 9.

Uniform Principal and Income Act – a major revision of this widely enacted Uniform Act was approved in 1997. Because this other uniform act addresses issues with respect to both decedent's estates and trusts, a jurisdiction enacting this other uniform act may wish to codify it either as part of this Act or as part of its probate code.

Uniform Management of Institutional Funds Act – approved in 1972, this Act has been enacted in 46 jurisdictions. This Act governs the administration of endowment funds held by charitable, religious, and other eleemosynary institutions. The Act establishes a standard of prudence for use of appreciation on assets, provides specific authority for the making of investments, authorizes the delegation of this authority, and specifies a procedure, through either donor consent or court approval, for removing restrictions on the use of donated funds.

Uniform Custodial Trust Act – approved in 1987, this Act has been enacted in 15 jurisdictions. This Act, which allows standard trust provisions to be automatically incorporated into the terms of the trust simply by referring to the Act, is not displaced by the Uniform Trust Act but complements it.

Uniform Probate Code Article VII – approved in 1969, Article VII has been enacted in about 15 jurisdictions. Article VII, although titled "Trust Administration," is a modest statute, addressing only a limited number of topics, including trust registration, jurisdiction, and trustee liability to persons other than beneficiaries. The substance of Article VII is absorbed into the Uniform Trust Act, portions of its provisions on jurisdiction in Article 2, and the provision on trustee liability to persons other than beneficiaries at Section 1011.

Uniform Common Trust Fund Act – approved in 1938, this Act has been enacted in 34 States. The drafters of the Uniform Trust Act have elected not to address the subject of common trust funds and will leave this other Act undisturbed. In recent years, many banks have replaced their common trust funds with proprietary mutual funds that may also be made available to non-trust customers. The Uniform Trust Act addresses the use of proprietary funds, principally at Section 802.

Uniform Trusts Act (1937) – this largely overlooked Act of the same name was enacted in only six States, none within the past several decades. Despite a title suggesting comprehensive coverage of its topic, this Act, like Article VII of the UPC, addresses only a limited number of topics. These include the duty of loyalty, the registration and voting of securities, and trustee liability to persons other than beneficiaries. States enacting the current Uniform Trust Act should repeal this earlier namesake.

Uniform Supervision of Trustees for Charitable Purposes Act – approved in 1954, this Act has been enacted in four States. This Act is limited to mechanisms for monitoring the actions of charitable trustees and does not address the substantive law of charitable trusts, including the doctrine of cy pres. Cy pres is addressed in Section 408 of the Uniform Trust Act.

Uniform Testamentary Additions to Trusts Act – this Act is available in two versions: the 1960 Act, with 28 enactments; and the 1991 Act, with 16 enactments through 1997. This Act validates pourover devises to trusts. While not incorporated into the Uniform Trust Act, the Testamentary Additions to Trusts Act, like the Uniform Trust Act, is designed to facilitate use of the revocable living trust.

Uniform Probate Code – approved in 1969, and enacted in close to complete form in about 20 States but influential in virtually all, the UPC overlaps with trust topics in several areas. One area of overlap, already mentioned, is UPC Article VII. Another area of overlap concerns representation of beneficiaries. UPC Section 1-403 provides principles of representation for achieving binding judicial settlements of matters involving both estates and trusts. The Uniform Trust Act adopts these representation principles, and extends them to nonjudicial settlements concerning trusts and to and optional notices and consents. See Uniform Trust Act, Sections 109, 203 and Article 3. A final area of overlap between the UPC and trust law topics concerns rules of construction. The UPC, in Article II, Part 7, extends the rules on the construction of wills to trusts and other nonprobate instruments. The Uniform Trust Act similarly extends to trusts the rules on the construction of wills. However, unlike the UPC, the Trust Act does not prescribe the exact rules. Instead, Section 110 extends to trusts whatever rules the enacting jurisdiction already has in place on the construction of wills.

Role of Restatement of Trusts – The Restatement (Second) of Trusts was approved by the American Law Institute in 1957. Beginning in the late 1980s, work on the Restatement Third began. The portion of Restatement Third relating to the prudent investor rule and other investment topics was completed and approved in 1990. A tentative draft of the portion of Restatement Third relating to the rules on the creation and validity of trusts was approved in 1996, and the portion relating to the office of trustee, trust purposes, spendthrift provisions and the rights of creditors was approved in May, 1999. The Uniform Trust Act is being drafted in close coordination with the writing of the Restatement Third.

Models for Drafting – While the Uniform Trust Act is the first comprehensive *Uniform* Act on the subject of trusts, comprehensive trust statutes are already in effect in several States. Notable examples include the statutes in California, Georgia, Indiana, Texas, and Washington, all of which have been referred to in the drafting process. Most influential has been the 1986 California statute, found at Division 9 of the California Probate Code (Sections 15000 *et seq*.), which was used by the Drafting Committee as its initial model.

Overview of Act

Article 1 – General Provisions and Definitions – In addition to definitions (Section 102), this article addresses miscellaneous but important issues, including clarification that the common law of trusts supplements the Act (Section 105), and that the settlor, absent overriding public policy concerns, is free to select the governing law with respect to the effect and interpretation of the trust's terms (Section 106). The settlor, if minimum contacts are present, may also designate the trust's principal place of administration, and the trustee, if consistent with the trustee's duty to administer the trust at a place appropriate to its purposes, its administration and the interests of the beneficiaries, may transfer the principal place of administration to another State or country (Section 107). To confirm the principal place of administration, the trustee may, but is not required to, register the trust (Section 108). The Act is primarily default law. A settlor, within specified limitations, is free to vary the effect of the Act (Section 103). To encourage nonjudicial resolution of disputes, the Act provides a test for determining when such settlements are binding. A binding nonjudicial settlement can be entered into as to any matter a court could properly approve (Section 109). While the Act does not attempt to prescribe the exact rules to be applied to the construction of trusts, it does extend to trusts whatever rules the enacting jurisdiction has on the construction of wills (Section 110).

Article 2 - Judicial Proceedings -This article addresses selected issues involving judicial proceedings concerning trusts, particularly trusts with contacts to more than one State or country. The courts in the trust's principal place of administration or place of registration have jurisdiction over both the trustee and beneficiaries as to any matter relating to the trust (Section 202). The requirements for who must receive notice of a judicially approved settlement are specified (Section 203). The article concludes with optional provisions on subject-matter jurisdiction (Section 204) and venue (Section 205). The minimal coverage of this article was deliberate. The drafting committee concluded that most issues related to jurisdiction and procedure are not appropriate to a Trust Act, but are best left to the courts and to other bodies of law.

Article 3 - Representation – This article deals with the important topic of representation of beneficiaries, both representation by fiduciaries (personal representatives, guardians and conservators), and what is known as virtual representation. The representation principles of the article apply to settlement of disputes, whether by a court or nonjudicially. They apply for the giving of required notices. They apply for the giving of consents to certain actions. The article also authorizes a court to appoint a representative if the court concludes that representation of a person might otherwise be inadequate. The court may appoint a representative to represent and approve a settlement on behalf of a minor, incapacitated, or unborn person or person whose identity or location is unknown and not reasonably ascertainable.

Article 4 – Creation, Validity, Modification and Termination of Trust – This article specifies the requirements for creating, modifying and terminating trusts. Most of the requirements relating to creation of trusts (Sections 401 through 407) track traditional doctrine, including intention to create a trust, the requisite capacity, a requirement of property, and a permitted trust purpose. The Act articulates a three-part classification system for trusts; noncharitable, charitable, and trusts for noncharitable purposes. Noncharitable trusts require an ascertainable beneficiary and an appropriate purpose. Charitable trusts, on the other hand, are by their very nature created to benefit the public at large. A trust for a noncharitable purpose is a noncharitable trust which is valid and enforceable despite the absence of an ascertainable beneficiary. These trusts, which under the common law were honorary only, binding only the trustee's conscience, are valid and enforceable under this Act. Examples include a trust for the care of an animal and a trust for the maintenance of a cemetery lot.

Sections 408 through 415 provide a series of interrelated rules on when a trust may be terminated or modified other than by its express terms. The overall objective of these sections is to enhance flexibility consistent with the principle that preserving the settlor's intent is paramount. Termination or modification may be allowed upon beneficiary consent if the trust no longer serves a material purpose or if the settlor concurs (Section 410), by the court in response to unanticipated circumstances or to remedy ineffective administrative terms (Section 411), or if the trust is of insufficient size to justify continued administration under its existing terms (Section 412). Trusts may be reformed to correct a mistake of law or fact (Section 413), or modified to achieve the settlor's tax objectives (Section 414). Trusts may be combined or divided (Section 415). Charitable trusts may be modified or terminated under cy pres to better achieve the settlor's charitable purposes (Section 408). A trustee or beneficiary has standing to petition the court with respect to a proposed termination or modification (Section 409).

Article 5 – Spendthrift Provisions and Claims by Creditors – This article addresses the validity of a spendthrift provision and other issues relating to the rights of creditors, both of the settlor and beneficiaries, to reach the trust to collect a debt. Sections 501 and 502 state the general rules. To the extent a trust is protected by a spendthrift provision, a beneficiary's creditor may not reach the beneficiary's interest until distribution is made by the trustee. To the extent not protected by a spendthrift provision, however, the creditor can reach the beneficiary's interest, subject to the court's power to provide for the beneficiary's actual needs and the needs of legal dependents. Section 503 lists the categories of creditors whose claims are not subject to a spendthrift bar. Sections 504 through 507 address situations where the rights of a beneficiary's creditors are the same whether or not the trust contains a spendthrift provision. These include creditor claims against discretionary trusts and trusts which provide for a standard of distribution, or both; creditor claims against a settlor, whether the trust is revocable or irrevocable, and the rights of creditors should a creditor fail to make a required distribution within a reasonable time. The Act also clarifies that the fact a trustee holds legal title to trust property does not imply that the trust property is subject to the trustee's personal debts.

Article 6 - Revocable Trusts – This short article deals with issues of significance not totally settled under current law. The basic policy of this article and the Act in general is to treat the revocable trust as the functional equivalent of a will. The article specifies a standard of capacity, provides that a trust is presumed revocable unless its terms provide otherwise, prescribes the procedure for revocation or modification of a revocable trust, addresses the rights of beneficiaries during the settlor's lifetime, and provides a statute of limitations on contests.

Article 7 - Office of Trustee – This article contains a series of default rules dealing with the office of trustee, all of which may be modified by the terms of the trust. Sections 701 and 702 address the process for getting a trustee into office, including the procedure for the trustee to accept the office and whether bond will be required. Section 703 covers the office of cotrustee, permitting cotrustees to act by majority action, specifying the extent to which one trustee may delegate to another, and describing the circumstances under which a cotrustee may be held responsible for the actions of the other trustee or trustees. Sections 704 through 707 address changes in the office of trustee, specifying the circumstances when a vacancy must be filled, the procedure for resignation, the grounds for removal, and the process for appointing a successor. Sections 708 and 709 prescribe the standards for determining trustee compensation and reimbursement for expenses.

Article 8 - Duties and Powers of Trustee – This article states the fundamental duties of a trustee and lists the trustee's powers. The duties listed are not new, but the particulars have changed in detail over the years. This article was drafted where possible to conform with the 1994 Uniform Prudent

Investor Act. The Uniform Prudent Investor Act prescribes a trustee's responsibilities with respect to the management and investment of trust property. This article also addresses a trustee's duties regarding distributions to beneficiaries.

Article 9 - Uniform Prudent Investor Act – This article provides a place for the enacting state to codify its version of the Uniform Prudent Investor Act. While trustee investment is central to the law of trusts, due to the widespread enactment of the Uniform Prudent Investor Act, no effort has been made to integrate it into the other portions of this Act. States adopting this Act which have previously enacted the Prudent Investor Act are encouraged to recodify their version of the Prudent Investor Act by reenacting it in this article.

Article 10 - Liability of Trustees and Rights of Beneficiaries – Sections 1002 through 1010 list the remedies for breach of trust, describe how money damages are to be determined, provide a statute of limitations on claims against a trustee, and specify other defenses, including consent of a beneficiary and recognition of and limitations on the effect of an exculpatory clause. Sections 1011 through 1013 address trustee relations with persons other than beneficiaries. The emphasis is on encouraging trustees and others to engage in commercial transactions with respect to the trust property to the same extent as if the property were not held in trust. Section 1013 permits a trustee to rely on a certification of trust, thereby hopefully reducing requests by financial institutions and others for copies of the complete trust instrument.

Article 11 - Transitional and Miscellaneous Provisions – The Act is intended to have the widest possible application, consistent with constitutional limitations. The Act applies not only to trusts created on or after the effective date, but also to trusts in existence on the date of enactment.

UNIFORM TRUST ACT

ARTICLE 1

GENERAL PROVISIONS AND DEFINITIONS

General Comment

In addition to definitions (Section 102), this article collects several provisions of importance which are not amenable to codification elsewhere in the Act. The Act is primarily a default statute. Most of the Act's provisions may be completely overridden in the terms of the trust. The exceptions are collected in Section 103. The exceptions to default treatment include the fundamental duty that a trustee act in good faith and with regard to the purposes of the trust and the interests of the beneficiaries, public policy exceptions to enforcement of spendthrift provisions, the requirements for creating a trust, and the provisions relating to termination or modification of trusts.

Section 104 addresses notice to beneficiaries, allowing beneficiaries with remote interests to request notice of certain actions, such as notice of a trustee resignation, which are normally given only to the "qualified beneficiaries" (defined at Section 102(12)). The section also excludes from the Act's notice requirements persons whose identity or location is unknown and not reasonably ascertainable.

Section 105 clarifies that despite the Act's comprehensive scope, not all aspects of the law of trusts have been codified. The Act is supplemented by the common law of trusts and principles of equity.

Section 106 addresses choice of law. Subsection (b) allows a settlor, absent overriding public policy concerns, to select the law that will determine the meaning and effect of a trust's terms. Subsection (a) provides that a trust not created by will is validly created if its creation complied with the law of specified jurisdictions in which the settlor or trustee had a significant contact. Trusts created by will are excluded from subsection (a) because the validity of their creation is controlled by the law applicable to wills.

Changing a trust's principal place of administration is sometimes desirable, particularly to lower a trust's state income tax. Such transfers are authorized by Section 107. The trustee, following notice to the qualified beneficiaries, may transfer the principal place of administration to another place if the transfer is consistent with the trustee's duty to administer the trust at a place appropriate to is purposes, its administration, and the interests of the beneficiaries. The settlor, if minimum contacts are present, may also designate the trust's principal place of administration.

Section 108 grants a trustee the option to register the trust at its principal place of administration. Registration confirms the jurisdiction of the court at the principal place of administration. The jurisdiction of this court will continue until registration is released by the court or by the unanimous agreement of the trustee and the qualified beneficiaries.

Section 109 ratifies the use of nonjudicial settlement agreements. While the judicial settlement procedures may be used in all court proceedings relating to the trust, the nonjudicial settlement procedures will not always be available. First, the terms of the trust may direct that the procedures not be used, or settlors may negate or modify them by specifying their own methods for obtaining consents. Second, a nonjudicial settlement may not be used to approve actions that would otherwise be illegal, such as to improperly terminate a trust. Only such matters as a court could properly approve may be made the subject of a nonjudicial settlement.

The Act does not prescribe the rules of construction to be applied to trusts created under the Act. The Act instead recognizes that enacting jurisdictions are likely to take a diversity of approaches, just as they have with respect to the rules of construction applicable to wills. Section 110 accommodates this variation by providing that the state's specific rules on construction of wills, whatever they may be, also apply to the construction of trusts.

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

SECTION 102. DEFINITIONS. In this [Act]:

(1) "Beneficiary" means a person who:

(A) has a present or future beneficial interest in a trust, vested or contingent, whether or not subject to the discretion of the trustee; or

(B) in a capacity other than that of trustee, holds a presently exercisable power of appointment or general testamentary power of appointment over trust property.

(2) "Charitable trust" means a trust created for a charitable purpose described in Section 408. The term does not include the beneficial interest of a noncharitable beneficiary.

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

(4) "Fiduciary," used as a noun, includes a personal representative, [conservator], [guardian], and trustee.

(5) "[Guardian]" means a person appointed by a court [, a parent, or a spouse] to make decisions regarding the support, care, education, health, and welfare of a minor or adult individual. The term does not include a guardian ad litem.

(6) "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust.

(7) "Know," with respect to a fact, means to have knowledge of the fact or have reason to know that the fact exists based upon all of the facts and circumstances known to the person at the time.

(8) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(9) “Petition” includes complaint and statement of claim.

(10) “Power of withdrawal” means a presently exercisable general power of appointment other than a power exercisable only upon consent of the trustee or person holding an adverse interest.

(11) “Property” means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein. The term includes a chose in action, a claim, and a beneficiary designation under a policy of insurance, financial instrument, employees’ trust, or deferred compensation or other retirement arrangement, whether revocable or irrevocable.

(12) “Qualified beneficiary” means a beneficiary who, on the date the beneficiary’s qualification is determined:

(A) is entitled or eligible to receive a distribution of trust income or principal; or

(B) would be entitled to receive a distribution if the event causing the trust to terminate occurred on that date.

(13) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(14) “Settlor” means a person who creates an inter vivos or testamentary trust. If more than one person creates a trust, each person is a settlor of the portion of the trust property attributable to that person’s contribution except to the extent someone else has the power to revoke that portion.

(15) “Spendthrift provision” means a term of a trust which restrains both the voluntary and involuntary transfer of a beneficiary’s interest.

(16) “State” means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or Alaska native village, recognized by federal law or formally acknowledged by a State.

(17) “Terms of a trust” means the manifestation of the settlor’s intent regarding a trust’s provisions as expressed in the trust instrument or by other proof admissible in a judicial proceeding.

(18) "Trust" means:

(A) an express trust, charitable or noncharitable, with additions thereto, wherever and however created; or

(B) a trust created pursuant to a statute, judgment, or decree which requires the trust to be administered in the manner of an express trust.

(19) "Trustee" includes an original, additional and successor trustee, and a cotrustee.

Comment

"Beneficiary" (paragraph (1)) refers only to a beneficiary of a trust as defined in the Act. The term includes not only beneficiaries who received their interests under the terms of the trust but also beneficiaries who received their interests by any other means, including by an assignment, the exercise of a power of appointment, by a resulting trust upon the failure of an interest or gap in a disposition, or through the operation of an antilapse statute upon the predecease of a named beneficiary. The fact that a person incidentally benefits from the trust does not mean that the person is a beneficiary. For example, neither a trustee nor persons hired by the trustee become beneficiaries merely because they receive compensation from the trust. See Restatement (Third) of Trusts § 48 (Tentative Draft No. 2, 1999). See also Restatement (Second) of Trusts § 126 cmt. f (1959).

While the holder of a power of appointment was not a trust beneficiary under the common law of trusts, holders of certain powers are classified as beneficiaries under the Act. Included are holders of presently exercisable powers, whether general or nongeneral, and the holders of general testamentary powers of appointment. The holders of such powers are included on the assumption that their interests are significant enough that they should be afforded the rights of beneficiaries under the Act.

The definition of "beneficiary" includes only those who hold beneficial interests in the trust. Because a charitable trust is not created to benefit ascertainable beneficiaries but to benefit the community at large (see Sections 402(a)(3), 408(a)), persons receiving distributions from a charitable trust are not beneficiaries as that term is defined in this Act. However, charitable organizations expressly entitled to receive benefits under the terms of a charitable trust, even though not beneficiaries as defined, are granted the rights of qualified beneficiaries under the Act. See Section 408(f).

Also not traditionally classified as beneficiaries were individuals eligible to receive distributions in the discretion of the trustee. However, under paragraph (1), individuals who may receive distributions in the discretion of the trustee are classified as beneficiaries rather than as objects of a fiduciary power of appointment.

The Act leaves certain issues concerning beneficiaries to the common law. Any person with capacity to take and hold legal title to intended trust property has capacity to be a beneficiary. See Restatement (Third) of Trusts § 43 (Tentative Draft No. 2, 1999); Restatement (Second) of Trusts §§ 116-119 (1959). Absent a violation of public policy, the extent of a beneficiary's interest is determined solely by the settlor's intent. See Restatement (Third) of Trusts § 49 (Tentative Draft No. 2, 1999); Restatement (Second) of Trusts §§ 127-129 (1959). While most beneficial interests terminate upon a beneficiary's death, the interest of a beneficiary may devolve by will or intestate succession the same as a corresponding legal interest. See Restatement (Third) of Trusts § 55 (Tentative Draft No. 2, 1999); Restatement (Second) of Trusts §§ 140, 142 (1959).

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

The definition of "fiduciary" (paragraph (4)) refers to the person holding a fiduciary office as opposed to the duties or obligations of the office. A trustee may engage in transactions with another trust, decedent's estate or conservatorship estate of which the trustee is the fiduciary. See Section 802(g)(2). A trustee has a duty to redress a breach of trust known to the trustee to have been committed by a former trustee or other fiduciary from whom the trustee received trust property. See Section 812.

Under the Act, a "guardian" (paragraph (5)) makes decisions with respect to personal care; a "conservator" (paragraph (3)) manages property. The terminology used is that employed in Article V of the Uniform Probate Code, and in its free-standing Uniform Guardianship and Protective Proceedings Act. Enacting jurisdictions not using these terms in the defined sense should substitute their own terminology. For this reason, both terms have been placed in brackets. The definition of "guardian" accommodates those jurisdictions which allow appointment of a guardian by a parent or spouse in addition to appointment by a court. Enacting jurisdictions which allow appointment of a guardian solely by a court should delete the bracketed language "[, a parent, or a spouse]."

The phrase "interests of the beneficiaries" (paragraph (6)) is used with some frequency in the Act. While a settlor is free in the terms of the trust to alter the duties of the trustee which would otherwise apply, in no event may the settlor alter the duty, stated in Section 801, that a trustee administer the trust with regard to the interests of the beneficiaries. See Section 103(b)(2). Similarly, absent an overriding provision in the terms of the trust, a trustee may not change a trust's principal place of administration if such transfer would violate the trustee's duty to administer the trust at a place appropriate to the interests of the beneficiaries. See Section 107(b). Other places where the phrase is used are Section 706(c), authorizing the court to order such relief as necessary to protect the interests of the beneficiaries pending a final determination on a petition for removal, and Section 813(c), negating a requirement to disclose certain transactions in advance if such disclosure would be seriously detrimental to the interests of the beneficiaries. The definition of "interests of the beneficiaries " clarifies that the interests are as determined by the settlor and not by the beneficiaries.

The fact that a person does not have actual knowledge of a particular fact does not mean that the person did not "know" the fact (paragraph (7)). But neither is a person charged with knowledge of facts the person would have discovered upon investigation. This definition takes an intermediate approach. A fact is known to a person if the person had actual knowledge of the fact or had reason to know of the fact's existence based on all of the circumstances and other facts actually known to the person. "Know" is used in its defined sense in Sections 203 (notice of judicial settlement), 305 (appointment of representative), 605 (limitation on contest of revocable trust), 812 (duty to redress breach of trust committed by predecessor), and 1012 (protection of person dealing with trustee). But as to certain actions, a person is charged with knowledge of facts the person would have discovered upon reasonable inquiry. See Sections 1006 (limitation of action against trustee following report), and 1010 (nonliability of trustee upon beneficiary's consent, release, or ratification).

The definition of "property" (paragraph (11)) removes any lingering uncertainty that a revocable designation under an employee plan or life insurance contract is not a sufficient property interest to activate a trust. See also Section 401 and Comment (methods of creating trust).

Because of the difficulty of identifying beneficiaries with remote contingent interests and their probable lack of interest in the day-to-day affairs of the trust, the Act uses the concept of "qualified beneficiary" (paragraph (12)) to limit the class of beneficiaries to whom certain notices must be given or consents received. The definition of qualified beneficiaries is used to define the class to whom notice must be given of a trustee resignation. See Section 705(a)(1). A qualified beneficiary must receive the trustee's annual report and other notices required by Section 813. Notice to the qualified beneficiaries is also required before a trust may be combined or divided. See Section 415. Actions which may be accomplished by the consent of the qualified beneficiaries include the appointment of a successor trustee. See Section 704 (filling vacancy in trusteeship). Prior to transferring a trust's principal place of administration, the trustee must give at least 60 days notice to the qualified beneficiaries.

The qualified beneficiaries are limited to the beneficiaries currently eligible to receive a distribution from the trust as well as to what might be termed the first line remaindermen, that is, the beneficiaries who would receive the principal were the event triggering the trust's termination to occur on the date in question. Such a terminating event will typically be the death or deaths of the beneficiaries currently eligible to receive the income. Should a qualified beneficiary be a minor, incapacitated, or unknown, or a beneficiary whose identity or location is not reasonably ascertainable, the representation and virtual representation principles of Article 3 may be employed, including the possible appointment by the court of a representative to represent the beneficiary's interest.

Charitable trusts and trusts for a valid noncharitable purpose do not have beneficiaries in the usual sense. However, certain persons, while not technically beneficiaries, do have an interest in seeing that the trust is enforced. In the case of a charitable trust, this includes the Attorney General and charitable organizations designated to receive benefits under the terms of the trust. To permit such organizations to protect their interests, Section 408(f) provides that charitable organizations expressly designated to receive benefits under the terms of a charitable trust have the rights of qualified beneficiaries. Similarly granted the rights of qualified beneficiaries are persons appointed by the terms of the trust or by the court to enforce a trust created for an animal or other noncharitable purpose. See Sections 406(b), 407(2).

The definition of "record" (paragraph (13)) is derived from the proposed Uniform Electronic Transactions Act § 102. The definition recognizes that trust instruments may be prepared in forms other than typewritten pages with a signature in pen. Because of the novelty of a trust instrument executed in electronic form and the ease with which the term "record" can be confused with recording of documents, the Act does not use the term "record" in isolation but consistently refers to "writing or other record."

The definition of "settlor" (paragraph (14)) refers to the person who creates a trust, whether by will, self-declaration, transfer of property to another person as trustee, or exercise of a power of appointment. See Section 401(a). Determining the identity of the "settlor" is usually not an issue. The same person will both sign the trust instrument and fund the trust. Ascertaining the identity of the settlor becomes more difficult when more than one person signs the trust instrument or funds the trust. The fact that a person is designated as the "settlor" by the terms of the trust is not necessarily determinative. For example, the person who executes the trust instrument may be acting as the agent for the person who will be funding the trust. In that case, the person funding the trust, and not the person signing the trust instrument, will be the settlor. Similarly, should more than one person contribute to a trust, all of the contributors will ordinarily be treated as settlors in proportion to their respective contributions, regardless of which one signed the trust instrument. However, in the case of a revocable trust, transfers made to the trust by a person who did not participate in the trust's creation will frequently be intended as a donative transfer to the person who originally created the trust. In that event, only the person who created the trust, and not the later donor, will be the settlor.

Ascertaining the identity of the settlor is important for a variety of reasons. It is important for determining rights in revocable trusts. See Sections 505(a)(1), (3) (creditor claims against settlor of revocable trust), 602 (revocation or modification of revocable trust), and 605 (limitation on contest of revocable trust). It is also important for determining rights of creditors in irrevocable trusts. See Section 505(a)(2) (creditor can reach maximum amount trustee could distribute to settlor). While the settlor of an irrevocable trust traditionally has no continuing rights over the trust except for a right to terminate the trust with the beneficiaries' consent (see Section 410), under the Act the settlor of an irrevocable trust may petition for removal of the trustee and to enforce or modify a charitable trust. See Sections 706 (removal of trustee) and 408 (charitable trusts).

"Spendthrift provision" (paragraph (15)) means a term of a trust which restrains the transfer of a beneficiary's interest, whether by a voluntary act of the beneficiary or by an action by a beneficiary's creditor or assignee, which at least as far as the beneficiary is concerned, would be involuntary. The effect of a valid spendthrift provision is addressed in Article 5. The presence of a spendthrift provision may also constitute a material purpose sufficient to prevent the termination of a trust by agreement of the beneficiaries, although the Act does not presume this result. See Section 410(a).

"Terms of a trust" (paragraph (17)) is a defined term used frequently in the Act. While the wording of a written trust instrument is almost always the most important determinant of a trust's terms, the definition is not so limited. Oral statements, the settlor's family circumstances, and, to the extent the settlor was otherwise silent, rules of construction, all may have a bearing on determining a trust's meaning. If a trust established by order of court is to be administered as an express trust, the terms of the trust are determined from the court order as interpreted in light of the general rules governing interpretation of judgments. See Restatement (Third) of Trusts § 4 and cmt. f (Tentative Draft No. 1, 1996). See also Restatement (Second) of Trusts § 4 (1959).

Not all evidence may necessarily be considered in determining the terms of a trust. A manifestation of a settlor's intention does not constitute evidence of a trust's terms if it would be inadmissible in a judicial proceeding in which the trust's terms are in question. See Restatement (Second) of Trusts § 4 cmt. a, b (1959); Restatement (Third) of Trusts § 4 cmt. b (Tentative Draft No. 1, 1996). See also Restatement (Third) Property: Wills and Other Donative Transfers §§ 10.2, 11.1-11.3 (Tentative Draft No. 1, 1995). For example, in many States a trust of real property is unenforceable unless evidenced by a writing, although this Act does not so require, leaving this issue to be covered, if the enacting jurisdiction so elects, by separate statute. See Section 405 (evidence of oral trust). Evidence otherwise relevant to determining the terms of a trust may also be excluded under other principles of law, such as the parol evidence rule.

To allow a trustee to administer a trust with some dispatch without concern about liability if the terms of a written trust instrument are contradicted by evidence outside of the instrument, Section 1007 protects a trustee from liability to the extent a breach of trust resulted from reasonable reliance on such written terms.

Under the Act, a "trust" (paragraph (18)) means an express trust, whether private or charitable, including a trust created by statute, court judgment or decree which is to be administered in the manner of an express trust. Excluded from the Act's coverage are resulting and constructive trusts, which are not express trusts but remedial devices imposed by law. The Act is directed primarily at express trusts which arise in an estate planning or other donative context, but the definition of "trust" is not so limited. A trust created pursuant to a divorce action would be included, even though such a trust is not donative but is created pursuant to a bargained for exchange. The extent to which even more commercially-oriented trusts are subject to the Act will vary depending on the type of trust and the laws, other than this Act, under which the trust is created. Commercial trusts come in various forms, including trusts created pursuant to a state business trust act and trusts created to administer specified funds, such as to pay a pension or to manage pooled investments. See John H. Langbein, The Secret Life of the Trust: The Trust as an Instrument of Commerce, 107 Yale L.J. 165 (1997).

The definition of "trustee" (paragraph (19)) includes not only the original trustee but also an additional and successor trustee as well as a cotrustee. Because the definition of trustee includes trustees of all types, a trustee of any type, whether original or succeeding, single or cotrustee, has the powers of a trustee and is subject to the duties imposed on trustees under the Act. Any natural person, including a settlor or beneficiary, has capacity to act as trustee if the person has capacity to hold title to property free of trust. See Restatement (Third) of Trusts § 32 (Tentative Draft No. 2, 1999); Restatement (Second) of Trusts § 89 (1959). State banking statutes normally impose additional requirements before a corporation may act as trustee.

SECTION 103. MANDATORY RULES.

(a) Except as otherwise provided in subsection (b), the terms of the trust govern the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.

(b) The terms of a trust may not alter:

(1) the requirements for creating a trust as provided in Sections 401 through 408;

(2) the requirement that a trustee act as a fiduciary, in good faith, and in accordance with the purposes of the trust and the interests of the beneficiaries;

(3) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice, including:

(A) appointing a [representative] pursuant to Section 305;

(B) requiring a trustee to furnish bond pursuant to Section 702;

(C) removing a trustee pursuant to Section 706;

(D) entertaining actions for breach of trust pursuant to Sections 1002 through 1005;

(4) the ability of the beneficiaries pursuant to Section 410(a) to terminate a trust that no longer serves a material purpose;

(5) the power of the court to terminate or modify a charitable trust pursuant to Section 408, and the power of the court to terminate or modify any trust, whether charitable or noncharitable, pursuant to Sections 410 through 414;

(6) the validity and effect of a spendthrift provision and the rights of creditors as provided in [Article] 5;

(7) the period under Section 605 for contesting a revocable trust;

(8) the duties to keep the beneficiaries informed and to report to beneficiaries, as required by Section 813; [and]

(9) the rights under Sections 1011 through 1013 of a person other than a beneficiary[; and

(10) the subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in Sections 204 and 205].

Comment

With only limited exceptions, the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary are as specified in the terms of the trust. Subsection (a) states this general principle; subsection (b) lists the exceptions.

Similar to other legal arrangements, such as the execution of a will, the requirements for a trust's creation, such as the necessary level of capacity, are controlled by the statute and by the common law, not by the settlor. See subsection (b)(1). Nor may the terms of the trust alter the period for contesting the validity of a trust. See subsection (b)(7).

Similarly, a settlor may not so negate the responsibilities of a trustee that the trustee would no longer be acting in a fiduciary capacity. The terms may not eliminate a trustee's duty to act as a fiduciary, in good faith, and in accordance with the purposes of the trust and the interests of the beneficiaries. See subsection (b)(2)). This duty is fundamental to the Act. See Sections 801 (duty to administer trust), 814 (duties with regard to discretionary power), 1009 (exculpation of trustee).

Nor may the terms of a trust deny a court authority to take such action as necessary in the interests of justice. See subsection (b)(3). Additionally, should the enacting jurisdiction elect to enact the optional provisions on subject-matter jurisdiction and venue, such provisions likewise cannot be altered in the terms of the trust. See subsection (b)(10).

Certain provisions relating to trust termination or modification are not subject to variation in the terms of the trust. However, all of these provisions involve situations which the settlor could have addressed had the settlor had sufficient foresight. These include situations where the purpose of the trust has been achieved, a mistake was made in the trust's creation, or circumstances have arisen which were not anticipated by the settlor. See subsections (b)(4)-(5) and Sections 410-414.

While the settlor is generally free to determine the rights and interests of the beneficiaries, a settlor may negate the obligation to keep the qualified beneficiaries reasonably informed only to the extent provided in Section 813. See subsection (b)(8). Furthermore, a settlor is not free to limit the rights of other persons, such as purchasers of trust property (see subsection (b)(9)), nor, except to the extent a spendthrift bar is allowed, the rights of a beneficiary's creditors. See subsection (b)(6).

SECTION 104. NOTICE TO BENEFICIARIES.

(a) Whenever notice to the qualified beneficiaries of a trust is required under this [Act], the trustee must also give notice to a beneficiary not otherwise entitled to notice who has delivered to the trustee a request for special notice.

(b) Whenever notice to a person is required under this [Act], a trustee need not give notice to a person whose identity or location is unknown to and not reasonably ascertainable by the trustee.

Comment

Under the Act, certain notices must be given only to the "qualified" beneficiaries. For the definition of "qualified beneficiary," see Section 102(12). Among these notices are notice of a trustee resignation (Section 705(a)(1)), notice of a trustee's annual report (Section 813(d)), notice of a trust division or combination (Section 415), and notice of a transfer of the trust's principal place of administration (Section 107(b)). Subsection (a) of this section authorizes other beneficiaries to receive one or more of such notices by filing a request for special notice with the trustee.

Subsection (b) relieves a trustee of responsibility for what would otherwise be an impossible task, the giving of notice to a person whose identity or location is unknown and not reasonably ascertainable by the trustee.

Under the Act, certain actions, such as the appointment of a successor trustee, can be accomplished by the consent of the qualified beneficiaries. See Section 704 (filling vacancy in trusteeship). This section only addresses notice, not required consent. A person who makes a request for special notice does not thereby acquire a right to participate in actions that can be taken only by the qualified beneficiaries. Nor does the fact a qualified beneficiary is missing mean that the consent of that qualified beneficiary is no longer required. However, the fact a beneficiary cannot be located may be a sufficient basis for the consent to be given by another person on the beneficiary's behalf under the representation principles of Article 3.

SECTION 105. COMMON LAW OF TRUSTS. The common law of trusts and principles of equity supplement this [Act], except to the extent modified by this [Act] or another statute of this State.

Comment

The Act codifies those portions of the law of express trusts that are most amenable to codification. The Act is supplemented by the common law of trusts, including principles of equity, particularly as articulated in the Restatement of Trusts, Restatement of Property 3d: Wills and Other Donative Transfers, and the Restatement of Restitution. The common law of trusts is not static but includes the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions.

SECTION 106. CHOICE OF LAW.

(a) A trust not created by will is validly created if its creation complies with the law of this State, or the law of the place where, at the time of creation, the settlor was domiciled, had a place of abode, or was a national, a trustee was domiciled or had a place of business, or any trust property was located.

(b) The meaning and effect of the terms of a trust are determined by:

(1) the law of the State designated in those terms unless the designation of that State's law is contrary to a strong public policy of this State applicable to the trust; or

(2) in the absence of a controlling designation in the terms of the trust, the law of the State most significantly related to the matter at issue.

Comment

Subsection (a) is comparable to Section 2-506 of the Uniform Probate Code, which validates wills executed in compliance with the law of a variety of places where the testator had a significant contact. Unlike the UPC, however, this provision is not limited to execution of the instrument but applies to the entire process of a trust's creation, which includes the requirement of trust property. See Section 402 (requirements for trust creation). In addition, unlike the UPC, this section validates a trust if valid under the law of the domicile or place of business of the designated trustee, or if valid under the law of the place where any of the trust property is located.

Subsection (b), which is derived in part from Section 2-703 of the Uniform Probate Code, allows a settlor to select the law to govern the meaning and effect of the terms of a trust, regardless of where the trust property may be physically located, whether it consists of real or personal property, and whether the trust was created by will or during the settlor's lifetime.

Subsection (b) does not attempt to specify the particular public policies sufficient to override a settlor's expression of intent. These public policies will vary depending upon the locale and may change over time. But certain examples do recur. Trusts which seek to defeat the marital property rights of a surviving spouse or to encourage a beneficiary to divorce are examples of trusts which, depending on the particular jurisdiction, may be overridden on public policy grounds. The mere fact that a term of a trust is contrary to a public policy of the forum jurisdiction does not necessarily mean that the term is invalid. The public policy violated must also have some connection to the trust. The fact that the forum is a convenient location to resolve a dispute does not mean that the court in the forum jurisdiction should apply its own public policy restrictions if the forum is neither the trust's principal place of administration nor a jurisdiction otherwise having a significant connection with the trust or its beneficiaries.

SECTION 107. PRINCIPAL PLACE OF ADMINISTRATION.

(a) Without precluding other means for establishing a sufficient connection with the designated jurisdiction, terms of a trust designating the principal place of administration are valid and controlling if:

(1) a trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction; and

(2) all or part of the administration occurs in the designated jurisdiction.

(b) The trustee is under a continuing duty to administer a trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries. Without precluding the right of the court to order, approve, or disapprove a transfer, a trustee, in fulfilling this duty, may transfer a trust's principal place of administration to another State or country. The trustee must notify the qualified beneficiaries of the proposed transfer not less than 60 days before initiating the transfer.

(c) In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed pursuant to Section 704.

Comment

This section prescribes rules for determining a trust's principal place of administration. Locating a trust 's principal place of administration will ordinarily determine where the trustee and beneficiaries are subject to suit concerning the trust. It may also be important for other matters, such as payment of state income tax.

Under the Act, the fixing of a trust's principal place of administration will determine where the trustee and beneficiaries have consented to suit (Section 202), and the rules for locating venue within a particular State (Section 205). It may also be considered by a court in another jurisdiction in determining whether it has jurisdiction, and if so, whether it is a convenient forum.

Settlors who expect to name a trustee or cotrustees with significant contacts in more than one State may wish to specify the principal place of administration in the terms of the trust. Pursuant to subsection (a), a designation in the terms of the trust is controlling if (1) a trustee is a resident of or has its principal place of business in the designated jurisdiction, and (2) all or part of the administration occurs in the designated jurisdiction. Designating the principal place of administration should be distinguished from designating the law to determine the meaning and effect of the trust's terms, as allowed by Section 106. A settlor is free to designate one jurisdiction as the principal place of administration and another to control the meaning of the dispositive provisions.

Subsection (b) addresses changing the principal place of administration. Such a change may be desirable to secure a lower state income tax rate, for example. Other reasons may include the relocation of the trustee or beneficiaries, the appointment of a new trustee, or a change in the location of the trust investments. This section is not limited to transfers of jurisdiction to or from other States of the United States. It may include a transfer of jurisdiction to or from a different country. The procedure specified in subsection (b) for transferring a trust's principal place of administration applies only in the absence of a contrary provision in the terms of the trust. See Section 103. Absent such contrary intent, the trustee, before initiating the transfer, must give at least 60 days notice to the qualified beneficiaries. This allows the qualified beneficiaries time to express any disapproval and, if necessary, take appropriate action to block the transfer.

In connection with a transfer of the principal place of administration, the trustee may transfer some or all of the trust property to a new trustee located outside of the State. However, in conformity with Section 704(c), and as provided in subsection (c) of this section, such an appointment may be made only if approved by all of the qualified beneficiaries or by the court. Also, the procedure provided in this section may not be used to bypass the succession provided in the terms of the trust. As long as a successor designated in those terms is able and willing to act in the new jurisdiction, the designated successor is entitled to act.

While transfer of the principal place of administration will normally change the governing law with respect to administrative matters, a transfer does not normally alter the controlling law with respect to the validity of the trust and the construction of its beneficial provisions.

SECTION 108. TRUST REGISTRATION.

(a) A trustee may register a trust in the court of this State at its principal place of administration. Registration is accomplished by filing a statement indicating the name and address of the trustee and:

(1) in the case of a testamentary trust, the name of the testator and the date and place of domiciliary probate;

(2) in the case of a written inter vivos trust, the name of each settlor and the original trustee and the date of the trust instrument; or

(3) in the case of an oral trust, information identifying the settlor or other source of funds and describing the time and manner of the trust's creation and the terms of the trust, including the subject matter, beneficiaries and time of performance.

(b) If a trust has been registered elsewhere, registration in this State is ineffective until the earlier registration is released by order of the court located in the prior place of registration, or by a writing or other record executed by the trustee and all of the qualified beneficiaries.

(c) Registration in this State continues until released by order of court or by a writing or other record executed by the trustee and all of the qualified beneficiaries.

(d) Registration of a trust does not result in continuing court supervision.

SECTION 109. NONJUDICIAL SETTLEMENTS

(a) An interested person may be represented and bound with respect to a settlement agreement concerning a trust, whether or not the agreement is approved by the court.

(b) Nonjudicial settlement agreements may include only terms and conditions a court could properly approve. The agreement is binding, even if it affects a trust or an inalienable interest.

(c) In connection with a nonjudicial settlement, the consent of a person who may represent another person under [Article] 3 is the consent of the person represented.

(d) Nonjudicial settlement agreements may extend to any question or dispute involving a trust, including:

(1) the interpretation or construction of the terms of the trust;

(2) the approval of a trustee's report or accounting;

(3) direction to a trustee to refrain from performing a particular act or the grant to the trustee of any necessary or desirable power;

(4) a change of trustee or determination of a trustee's compensation;

(5) a change in a trust's principal place of administration or registration;

(6) the modification of the trust to comply with federal and state statutes and regulations to achieve qualification for deductions, elections, or other tax provisions; and

(7) the liability of a trustee for actions or failures to act relating to the trust.

Comment

While the Act recognizes that a court may intervene in the administration of a trust to the extent its jurisdiction is invoked by interested persons or otherwise exercised as provided by law (see Section 201(a)), resolution of disputes by nonjudicial means is encouraged. The purpose of this section is to facilitate the making of such agreements by giving them the same effect as if approved by the court.

To achieve such certainty, however, the nonjudicial settlement must concern a matter that the court could properly approve. Under this section, a nonjudicial settlement cannot be used to produce a result not authorized by law, such as to terminate a trust in an impermissible manner.

Trusts ordinarily have beneficiaries who are minors, incapacitated, unborn or unascertained. Because such beneficiaries cannot signify their consent to an agreement, binding settlements can ordinarily be achieved only through the application of doctrines such as virtual representation or appointment of a guardian ad litem, doctrines traditionally available only in the case of judicial settlements. The effect of this section and the Act more generally is to allow for such binding representation even if the agreement is not approved by the court. For the rules on representation, including appointments of representatives by the court to approve particular settlements, see Article 3.

Subsection (d) is a nonexclusive list of matters to which a nonjudicial settlement may pertain. Other matters which may be made the subject of a nonjudicial settlement are listed in the Article 3 General Comment.

SECTION 110. RULES OF CONSTRUCTION. The rules of construction that apply in this State to the interpretation of and disposition of property by will also apply to the extent pertinent to the interpretation of the terms of a trust and the disposition of the trust property.

Comment

This section is patterned after Restatement (Third) of Trusts § 25(2) and comment e (Tentative Draft No. 1, 1996), although this section, unlike the Restatement, also applies to irrevocable trusts. 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. Given this functional equivalence between the revocable trust and a will, the rules for interpreting the disposition of property at death should be the same whether the individual has chosen a will or revocable trust as the individual's primary estate planning instrument. Over the years, the legislatures of the states and the courts have developed a series of rules of construction reflecting the legislative or judicial guess as to how the average testator would wish to dispose of property in cases where the will is silent or insufficiently clear. Few legislatures have yet to extend these rules of construction to revocable trusts, and even fewer to irrevocable trusts, although a number of courts have done so as a matter of judicial construction. See Restatement (Third) of Trusts §

25, Reporter's Note to cmt. e (Tentative Draft No. 1, 1996).

Because there is wide variation among the states on the rules of construction applicable to wills, this Act does not attempt to prescribe the exact rules but instead, similar to the Restatement, states a philosophy that the rules applicable to trusts ought to be the same, whatever those rules might be. Instead of enacting this section, a jurisdiction enacting this Act may wish to enact detailed rules on the construction of trusts, either in addition to its rules on the construction of wills or as part of one comprehensive statute applicable to both wills and trusts. For possible models, see Uniform Probate Code, Article 2, Parts 7 and 8; and California Probate Code §§ 21101-21630. The topics addressed by the California Probate Code, the more comprehensive of the two models, includes rules relating to:

(1) Equitable conversion of real into personal property (CPC § 21107);

(2) Abolition of doctrine of worthier title (CPC § 21108);

(3) Antilapse upon predecease of beneficiary (CPC § 21109-21111);

(4) Meaning of death "with" or "without" issue (CPC § 21112);

(5) Persons included within class gifts (CPC § 21113);

(6) Meaning of transfers to "heirs" (CPC § 21114);

(7) Inclusion of halfbloods, adoptees, persons born out of wedlock, and others within terms of family relationship (CPC § 21115);

(8) Nonexoneration of gifts of encumbered property (CPC §21131);

(9) Gifts of securities (CPC § 21132)

(10) Ademption by extinction (CPC § 21133-21139);

(11) Perpetuities (CPC § 21200-21231);

(12) No contest clauses (CPC §21300-21333);

(13) Limitations on transfers to drafters (CPC § 21350-21356);

(14) Abatement (CPC § 21400-21406);

(15) Omitted spouses and children (CPC § 21600-21623).

Other rules of construction applicable to both wills and trusts are codified elsewhere in the California Probate Code.

Rules of construction applicable to both wills and trusts which are found in the cited sections of the Uniform Probate Code (UPC) and which are not mentioned on the above list, include:

(1) Requirement of survival for 120 hours (UPC § 2-702);

(2) Choice of law as to meaning and effect of governing instrument (UPC § 2-703);

(3) Meaning of specific reference requirement in power of appointment (UPC § 2-704);

(4) Representation among descendants (UPC § 2-709);

(5) Effect of homicide on property interests (UPC § 2-803);

(6) Revocation of probate and nonprobate transfers by divorce (UPC § 2-804).

ARTICLE 2

JUDICIAL PROCEEDINGS

General Comment

This article addresses selected issues involving judicial proceedings concerning trusts, particularly trusts with contacts in more than one State or country. This article is not intended to provide comprehensive coverage of court jurisdiction or procedure with respect to trusts. Many such issues are better addressed elsewhere, such as in the State's rules of civil procedure or as provided by court rule.

The jurisdiction of the court is available as invoked by interested persons or as otherwise provided by law (Section 201). Proceedings involving the administration of a trust will normally be brought in the court at the trust's principal place of administration. The trustee and beneficiaries are deemed to have consented to the jurisdiction of the court at the principal place of administration as to any matter relating to the trust (Section 202). Section 203 specifies the persons who must be notified of a judicial settlement in order to bind a beneficiary represented under Article 3. Sections 204 and 205 are optional, bracketed provisions relating to subject-matter jurisdiction and venue.

SECTION 201. ROLE OF COURT IN ADMINISTRATION OF TRUST.

(a) The court may intervene in the administration of a trust to the extent its jurisdiction is invoked by interested persons or otherwise exercised as provided by law.

(b) The commencement of a judicial proceeding involving a trust need not result in continuing judicial supervision.

(c) A judicial proceeding involving a trust may relate to any matter concerning the trust's administration and distribution, including a petition for instructions and an action to declare rights.

Comment

While the Act encourages the resolution of disputes without resort to the courts through such options as the nonjudicial settlement authorized by Section 109, the court is always available to the extent its jurisdiction is invoked by interested persons. The jurisdiction of the court with respect to trust matters is inherent and historical and includes the ability to act on its own initiative, to appoint a special master to investigate the facts of a case, and to provide a trustee with instructions even in the absence of a dispute.

Contrary to the trust statutes in some states, the Act does not create a system of court supervision. While a court may direct that a particular trust be subject to continuing court supervision, subsection (b) makes clear that invoking the court's jurisdiction to decide a particular matter does not necessitate this result.

Subsection (c) makes clear that the court's jurisdiction may be invoked even absent an actual dispute. Traditionally, courts in equity have heard petitions for instructions and have issued declaratory judgments. This section makes clear that this Act does not limit this historic jurisdiction. Beyond mentioning petitions for instructions and actions to declare rights, subsection (c) does not attempt to list the types of judicial proceedings involving trust administration that might be brought by a trustee or beneficiary. But such an effort is made in California Probate Code § 17200. Excluding matters not germane to the Uniform Trust Act, the California statute lists the following as items relating to the "internal affairs" of a trust:

(1) Determining questions of construction;

(2) Determining the existence or nonexistence of any immunity, power, privilege, duty, or right;

(3) Determining the validity of a trust provision;

(4) Ascertaining beneficiaries and determining to whom property will pass upon final or partial termination of the trust;

(5) Settling accounts and passing upon the acts of a trustee, including the exercise of discretionary powers;

(6) Instructing the trustee;

(7) Compelling the trustee to report information about the trust or account to the beneficiary;

(8) Granting powers to the trustee;

(9) Fixing or allowing payment of the trustee's compensation or reviewing the reasonableness of the compensation;

(10) Appointing or removing a trustee;

(11) Accepting the resignation of a trustee;

(12) Compelling redress of a breach of trust by any available remedy;

(13) Approving or directing the modification or termination of a trust;

(14) Approving or directing the combination or division of trusts; and

(15) Authorizing or directing transfer of a trust or trust property to or from another jurisdiction.

SECTION 202. JURISDICTION OVER TRUSTEE AND BENEFICIARY.

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

(b) A beneficiary of a trust having its principal place of administration in this State, or which is properly registered in this State, is subject to the jurisdiction of the courts of this State as to any matter relating to the trust.

Comment

This section, which is based in part on Arizona Revised Statutes § 14-7202, clarifies that the courts of the principal place of administration or trust registration have jurisdiction to enter orders relating to the trust that will be binding on both the trustee and beneficiaries. Consent to jurisdiction does not dispense with any required notice, however. With respect to jurisdiction over a beneficiary, the Comment to Uniform Probate Code § 7-103, upon which the Arizona statute is based, is instructive:

> It also seems reasonable to require beneficiaries to go to the seat of the trust when litigation has been instituted there concerning a trust in which they claim beneficial interests, much as the rights of shareholders of a corporation can be determined at a corporate seat. The settlor has indicated a principal place of administration by its selection of a trustee or otherwise, and it is reasonable to subject rights under the trust to the jurisdiction of the Court where the trust is properly administered.

Obtaining jurisdiction over the trustee and beneficiaries pursuant to this section does not preclude jurisdiction elsewhere on some other basis. Furthermore, the fact that the courts in the new State acquire jurisdiction following a change in a trust's principal place of administration does not mean that the courts of the former principal place of administration necessarily lose jurisdiction, particularly as to matters involving events which occurred prior to the removal.

SECTION 203. NOTICE OF JUDICIALLY APPROVED SETTLEMENT.

(a) Notice of a judicially approved settlement must be given to every interested person or to one who can bind an interested person as provided in [Article] 3.

(b) Notice to a person who may be represented and bound under [Article] 3 of an agreement to be approved by the court must be given:

(1) directly to the person or to one who may bind the person if the person may be represented and bound under Section 302 or 303; or

(2) in the case of a person who may be represented and bound under Section 304 and who is unborn or whose identity or location is unknown and not reasonably ascertainable, to all persons whose interests in the judicial proceedings are substantially identical and whose identities and locations are known.

(3) in the case of other persons who may be represented and bound under Section 304, directly to the person.

Comment

This section, which owes its origins to Section 1-403(3) of the Uniform Probate Code, specifies the notice that must be provided to achieve a binding judicial settlement when one or more interested persons are being represented by others as authorized by Article 3. If, as authorized by Section 302, the holder of a general testamentary power of appointment is representing those whose interests are subject to the power, notice to the permissible appointees, takers in default, or others whose interests are subject to the power is achieved by giving notice to the holder. If, as authorized by Section 303, the person to be bound is represented by a conservator, guardian, agent, trustee, personal representative, or parent, notice to the person represented is achieved by giving notice to the fiduciary or parent. If virtual representation is being relied on, as authorized by Section 304, notice to the person represented is required if the person's identity and location is known or reasonably ascertainable. Otherwise, notice must be given to all persons whose interests in the judicial proceedings are substantially identical and whose identities and locations are known.

[**SECTION 204. SUBJECT-MATTER JURISDICTION.**

(a) The [designate] court has exclusive jurisdiction of proceedings brought by a trustee or beneficiary concerning the administration of a trust.

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

Comment

This section provides a means for distinguishing the jurisdiction of the court with primary jurisdiction for trust matters from the jurisdiction of other courts, whether that court is denominated the probate court, chancery court, or by some other name. The section has been placed in brackets because subject-matter jurisdiction may already be addressed by other statute or court rule and may be unnecessary to address in States having unified court systems.

For an explanation of types of proceedings which may be brought concerning the administration of a trust, see the Comment to Section 201. Subsection (a) of this section is derived from Section 7-201(a) of the Uniform Probate Code. Subsection (b) is based on Section 7-204 of the Uniform Probate Code.

The section is placed in brackets because in many States the subject of jurisdiction is addressed by separate legislation. Also, many states have only one category of trial court, making this section irrelevant.

[**SECTION 205. VENUE.**

(a) A judicial proceeding concerning a trust may be commenced in the [county] in which the trust is registered. If the trust is not registered, a judicial proceeding concerning a trust may be commenced in the [county] in which the trust's principal place of administration is or is to be located and, if the trust is created by will, in the [county] in which the decedent's estate is being administered.

(b) If a trust has no trustee, a judicial proceeding for the appointment of a trustee must be commenced in the [county] in which the trust is registered, or if the trust is not registered, in a [county] in which a beneficiary resides, in a [county] in which the trust property, or some portion of the trust property, is located, and if the trust is created by will, in the [county] in which the decedent's estate was or is being administered..

(c) A judicial proceeding other than one described in subsection (a) or (b) must be commenced in accordance with the rules of venue applicable to civil actions.]

Comment

This optional, bracketed section is based in part on Section 17005 of the California Probate Code and is made available for States which conclude that venue for a judicial proceeding involving a trust is not adequately addressed in the State's rules of civil procedure.

Subsection (c) provides venue rules applicable in cases not covered by subsections (a) and (b). This would include proceedings where jurisdiction over a trust, trust property, or parties to a trust is based on a factor other than the place of registration or principal place of administration. When the place of registration or principal place of administration of a trust is in another State, but jurisdiction is proper in this State, the general rules governing venue apply.

ARTICLE 3

REPRESENTATION OF OTHERS

General Comment

This article deals with representation of beneficiaries, both representation by fiduciaries (personal representatives, guardians and conservators), and what is known as virtual representation. Virtual representation is a doctrine which allows binding representation by others of beneficiaries who are unborn or whose identities are not reasonably ascertainable, and under more modern versions, beneficiaries who may be alive and known but who are minors or otherwise legally incapacitated.

Section 301 is the general and introductory section, laying out the scope of the article. The representation principles of this article have numerous applications under this Act. The representation principles of the article apply for purposes of settlement of disputes, whether by a court or nonjudicially. They apply for the giving of required notices. They apply for the giving of consents to certain actions. The representation principles of this article may be used to facilitate:

(1) Modification or termination of a trust upon the consent of the beneficiaries, with or without the consent of the settlor (Section 410);

(2) Notice to qualified beneficiaries of a proposed trust combination or division (Section 415);

(3) Notice to qualified beneficiary of temporary assumption of duties without accepting trusteeship (Section 701(c)(1));

(4) Appointment of successor trustee upon agreement of qualified beneficiaries (Section 704(c)(1));

(5) Notice to qualified beneficiaries of resignation of trustee (Section 705);

(6) Notice of trustee's report (Section 813); and

(7) Nonliability of trustee upon consent, release, or affirmance of beneficiary (Section 1010).

Section 301(b) deals with the effect of a consent, whether by actual or virtual representation. A consent bars a later objection by the person represented, but a consent is not binding if the person represented raises an objection prior to the date the consent would otherwise become effective. The possibility that a beneficiary might object to a consent given on the beneficiary's behalf will not be germane in many cases because the person represented will be unborn or unascertained. However, the representation principles of this article will sometimes apply to adult and competent beneficiaries. For example, while the trustee of a revocable trust entitled to a pourover devise has authority under Section 303 to approve the personal representative's account on behalf of the trust beneficiaries, such consent would not be binding on a trust beneficiary who registers an objection.

Section 301(c) clarifies that an agent with authority, a conservator, and a guardian, if no conservator has been appointed, may receive notices and give consents on behalf of the person represented. However, Sections 410 and 602, both of which are referred to in Section 301, limit the agent's, conservator's and guardian's authority to revoke or terminate a trust that was created by the person represented.

Section 302 deals with the effect of a consent by the holder of a general testamentary power of appointment. (Revocable trusts and presently exercisable general powers of appointment are covered by Section 604, which grant the settlor or holder of the power all rights of the beneficiaries or persons whose interests are subject to the power). Absent a conflict of interest, the holder of a general testamentary power of appointment may bind those whose interests are subject to the power.

Section 303 provides that a fiduciary, absent conflict of interest, may represent and bind the beneficiary or beneficiaries of the respective fiduciary relationship, whether of an estate, trust, conservatorship, or guardianship. Drawing from Section 1-403 of the Uniform Probate Code, the section also allows a parent without a conflict of interest to represent and bind a minor or unborn child. A typical example of conflict of interest is a trustee who seeks the approval of an accounting for an estate of which the trustee is acting as personal representative.

Section 304 is the virtual representation provision. It provides for representation of and the giving of a binding consent by another person having a substantially identical interest with respect to the particular issue. Under this section, a minor, incapacitated, or unborn person, or a person whose identity or location is unknown and not reasonably ascertainable, can be bound by a virtual representative only if (1) the beneficiary is not otherwise represented under another section of the article; and (2) there is no conflict of interest between the representative and the person represented.

Section 305 authorizes the court to appoint a representative to represent the interests of unrepresented persons or persons for whom the court concludes the other available representation might be inadequate. To encourage the court to make such appointments only when really needed, the court must first find that representation of the beneficiary might otherwise be inadequate. Also, to encourage some flexibility in how the representative approaches the job, the representative, in approving a settlement, may consider general family benefit.

The provisions of this article are subject to modification in the terms of the trust. See Section 103. Settlors are free to specify their own methods for providing substituted notice and obtaining substituted consent.

SECTION 301. REPRESENTATION: BASIC PRINCIPLES.

(a) Whenever under this [Act] notice to a beneficiary is required or permitted, notice to a person who may represent and bind the beneficiary under this [article] is notice to the beneficiary.

(b) Whenever under this [Act] consent may be given by a beneficiary, the consent of a person who may represent and bind the beneficiary under this [article] is the consent of and is binding on the beneficiary unless the person represented objects to the representation before the consent would otherwise have become effective..

(c) Except as otherwise provided in Section 410 and 602, a person who under this [article] may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor's behalf.

SECTION 302. REPRESENTATION BY HOLDERS OF GENERAL TESTAMENTARY

POWER OF APPOINTMENT. To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.

SECTION 303. REPRESENTATION BY FIDUCIARIES AND PARENTS. To the extent there is no conflict of interest between the representative and the person represented with respect to a particular question or dispute:

(1) a [conservator] may represent and bind the estate the [conservator] controls;

(2) a [guardian] may represent and bind the ward if a [conservator] of the ward's estate has not been appointed;

(3) an agent having authority to do so may represent and bind the principal;

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

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

(6) if a [conservator] or [guardian] has not been appointed, a parent may represent and bind the parent's minor or unborn child.

SECTION 304. REPRESENTATION BY PERSON HAVING SUBSTANTIALLY IDENTICAL INTEREST. Unless otherwise represented, a minor, incapacitated, or unborn person, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.

SECTION 305. APPOINTMENT OF REPRESENTATIVE.

(a) Even if there is representation under this [article], if the court determines that representation of the interest might otherwise be inadequate, the court may appoint a [representative] to represent the interest of and approve an agreement on behalf of a minor, incapacitated, or unborn person, or a person whose identity or location is unknown.

(b) If not precluded by conflict of interest, a [representative] may be appointed to represent several persons or interests. In approving a settlement agreement, a [representative] may consider general family benefit accruing to the living members of the family of the person represented.

ARTICLE 4

CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

General Comment

Sections 401 through 407, which specify the requirements for the creation of a trust, track traditional doctrine. Section 401 specifies the methods by which trusts are created, that is by transfer of property, self-declaration, or exercise of a power of appointment. Section 402 lists the requirements for creation of a trust whatever method may have been employed. The requirements include intention, capacity and, for certain types of trusts, an ascertainable beneficiary. Section 403 enumerates purposes, such as illegality, for which a trust cannot be created, and further requires that a trust, its terms, and its administration must be for the benefit of its beneficiaries. Section 404 lists some of the grounds for contesting a trust; Section 405 validates oral trusts. The remaining sections address what are traditionally referred to as "honorary" trusts, although such trusts are valid and enforceable under this Act. Section 406 covers a trust for the care of an animal; Section 407 a trust created for another noncharitable purpose such as maintenance of a cemetery lot.

Section 408 lists special requirements for the creation, modification and termination of charitable trusts. Most significant are the provisions relating to cy pres. Absent contrary intent in the terms of the trust, upon failure of a particular charitable purpose, the trust does not revert to the settlor or settlor's successors in interest, but instead must be distributed in accordance with the settlor's charitable purposes.

Sections 409 through 415 provide a series of interrelated rules on when a trust may be terminated or modified other than by its express terms. The overall objective of these sections is to further the settlor's intent. Termination or modification may be allowed upon beneficiary consent if the trust no longer achieves a material purpose or if the settlor concurs (Section 410), by the court in response to unanticipated circumstances or due to ineffective administrative terms (Section 411), or by the court or trustee if continued administration under the trust's existing terms would be uneconomical (Section 412). Trusts may be reformed to correct a mistake of law or fact (Section 413), or modified to achieve the settlor's tax objectives (Section 414). Trusts may be combined or divided (Section 415). A trustee or beneficiary has standing to petition the court with respect to a proposed termination or modification (Section 409).

Because a trust must first exist before a settlor may specify its terms, the requirements for the creation of a trust may not be altered in the terms of the trust. See Section 103(b)(1). Nor may the settlor negate the court's ability to apply cy pres as provided in Section 408, the beneficiaries' ability to terminate a trust if continuation of the trust no longer achieves a material purpose as provided in Section 410(a), or the court's ability to modify or terminate a trust as provided in Sections 410 through 414. See Section 103(b)(5). However, a settlor is free to vary the trustee's ability to terminate an uneconomic trust as provided in Sections 408(d) and 412(a), and the trustee's ability to combine and divide trusts as provided in Section 415.

SECTION 401. METHODS OF CREATING TRUST.

(a) A trust may be created by:

(1) transfer of property to another person as trustee during the settlor's lifetime or by will or

other disposition taking effect upon the settlor's death;

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

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

(b) A trust instrument may contain language conveying identified property to a trustee or subjecting identified property to a self-declared trust.

Comment

Subsection (a) follows Restatement (Second) of Trusts § 17 (1959) and Restatement (Third) of Trusts § 10 (Tentative Draft No. 1, 1996). Under all three methods specified in this section for creating a trust, the trust is not created until it receives property. For what constitutes an adequate property interest, see Restatement (Third) of Trusts §§ 40-41 (Tentative Draft No. 2, 1999). See also Restatement (Second) of Trusts §§ 74-86 (1959). The property interest necessary to fund and create a trust need not be substantial. A revocable designation of the trustee as beneficiary of a life insurance policy or employee benefit plan has long been understood to be a property interest sufficient to create a trust. See Section 102(11) ("property" defined). Furthermore, the property interest need not be transferred contemporaneously with the signing of the trust instrument. A trust created by means of an instrument signed during the settlor's lifetime is not invalid simply because the trustee does not receive property until a later date, including by will or by contract after the settlor's death. A pourover devise to such a trust is also valid. See Uniform Testamentary Additions to Trusts Act § 1 (1991), codified at Uniform Probate Code § 2-511 (pourover devise to trust valid regardless of existence, size, or character of trust corpus).

While a trust created by will may come into existence immediately at the testator's death and not necessarily only upon the later transfer of title from the personal representative, the nominated trustee does not have a duty to act until there is an acceptance of the trusteeship, express or implied. See Section 701 (acceptance or declination of trusteeship). To avoid an implied acceptance, a nominated testamentary trustee who is monitoring the actions of the personal representative but who has not yet made a final decision on acceptance should inform the beneficiaries that it has assumed only a limited role. The failure so to inform the beneficiaries could result in liability if misleading conduct by the nominated trustee causes harm to the trust beneficiaries. See Restatement (Third) of Trusts § 35 cmt. b (Tentative Draft No. 2, 1999). See also Restatement (Second) of Trusts § 102 cmt. c (1959).

Consideration is not ordinarily required to create a trust, but a promise to create a trust in the future is enforceable only if the requirements for a contract are satisfied. See Restatement (Third) of Trusts § 15 (Tentative Draft No. 1, 1996); see also Restatement (Second) of Trusts §§ 28-30 (1959). If the right to enforce the contract is held by the trustee, however, the chose in action thus created in the trustee is itself a property interest sufficient to create a present trust. Otherwise, the enforceable right, if held by another, does not create a present trust but may give rise to an action for breach of contract. A trust created by means of a promise enforceable by the trustee is valid notwithstanding that the trustee may resign or die before the promise is fulfilled. Unless expressly made personal, the promise can be enforced by a successor trustee. For examples of trusts created by means of promises enforceable by the trustee, see Restatement (Third) of Trusts § 10 cmt. g (Tentative Draft No. 1, 1996); Restatement (Second) of Trusts §§ 14 cmt. h, 26 cmt. n (1959).

While this section confirms the familiar principle that a trust may be created by means of the exercise of a power of appointment (subsection (a)(3)), this Act does not attempt to legislate comprehensively on the subject of powers of appointment but addresses only selected issues. See Sections 302 (representation by holder of general testamentary power of appointment), 505(b) (creditor claims against holder of presently exercisable power to withdraw), and 604(c) (rights of holder of presently exercisable power to withdraw). For the law on powers of appointment generally, see Restatement (Second) of Property: Donative Transfers §§ 11.1-24.4 (1986); Restatement (Third) of Property: Wills and Other Donative Transfers (in progress).

While trusts are usually created by a transfer of property by the settlor or by a self-declaration, trusts may also be created by the courts or by special statute. See, e.g., Unif. Probate Code § 2-212 (elective share of incapacitated surviving spouse to be held in trust on terms specified in statute); Unif. Probate Code § 5-407 (conservator may create trust with court approval); Restatement (Second) of Trusts § 17 cmt. i (1959) (trusts created by statutory right to bring wrongful death action); Restatement (Third) of Trusts § 10 cmt. b (Tentative Draft No. 1, 1996).

Subsection (b) addresses some of the practical funding concerns that arise with respect to self-declarations of trust. The very nature of the self-declaration of trust negates a requirement that title to trust assets be reregistered and retransferred into the name of the settlor as trustee. See, e.g., *In re Estate of Heggstad*, 20 Cal. Rptr. 2d 43 (Ct. App. 1993) (citing relevant sections from Restatement (Second) of Trusts). See also Restatement (Second) of Trusts § 17 cmt. a (1959); Restatement (Third) of Trusts § 10 cmt. e (Tentative Draft No. 2, 1996). This subsection validates the practice of merely attaching a schedule listing the assets that are to be subject to the trust without executing separate instruments of transfer. To avoid possible later problems with third party transferees and to better protect the interests of the beneficiaries, it is recommended that settlors not rely on this subsection but instead perfect title to the trust assets by executing separate instruments of transfer.

Subsection (b) also addresses a similar issue which sometimes arises with respect to asset transfers to trusts in which someone other than the settlor is named as trustee. While the execution of separate instruments of transfer for each asset is recommended, this section recognizes that the trust instrument may itself contain language effectively conveying assets to the trustee.

Subsection (b), by allowing property to be subjected to or transferred to a trust without reregistering the specific trust assets out of the name of the settlor, is an exception to the duty to earmark assets stated in Section 810(b).

SECTION 402. REQUIREMENTS FOR CREATION.

(a) A trust is created only if:

(1) the settlor has capacity to create a trust;

(2) the settlor indicates an intention to create a trust;

(3) the trust has a definite beneficiary or:

(A) is a charitable trust, as provided in Section 408;

(B) a trust for the care of an animal, as provided in Section 406;

(C) or a trust for a noncharitable purpose, as provided in Section 407; and

(4) except for a trust over which the settlor holds a power of revocation or a power of

wthdrawal, the same person is not the sole trustee and sole beneficiary, present and future.

(b) A beneficiary is definite if the beneficiary can be validly ascertained now or in the future.

(c) A power in a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.

Comment

Subsection (a) codifies the basic requirements for the creation of a trust. To create a valid trust, the settlor must indicate an intention to create a trust. Restatement (Second) of Trusts § 23 (1959); Restatement (Third) of Trusts § 13 (Tentative Draft No. 1, 1996). But only such manifestations of intent as are admissible as proof in a judicial proceeding may be considered. See Section 102(17) ("terms of a trust" defined).

To create a trust, a settlor must have the requisite mental capacity. To create a revocable or testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have capacity during lifetime to transfer the property free of trust. See Section 601 (capacity of settlor to create revocable trust), and see generally Restatement (Third) of Trusts § 11 (Tentative Draft No. 1, 1996).

Subsection (a)(3) requires that a trust, other than a charitable trust, a trust for the care of an animal, or a trust for another valid noncharitable purpose, have a definite or definitely ascertainable beneficiary. While some beneficiaries will often be definitely ascertained as of the trust's creation, subsection (b) recognizes that others may be ascertained in the future. A trust is not created if the beneficiary can only be ascertained beyond the applicable perpetuities period. The definite beneficiary requirement does not prevent a settlor from making a disposition in favor of a class of persons. Such a designation by its very nature is usually to a group whose membership can change. Class designations are valid so long as the membership of the class will be finally determined within the applicable perpetuities period. For background on the definite beneficiary requirement, see Restatement (Second) of Trusts §§ 112-115, 120-121 (1959); Restatement (Third) of Trusts §§ 44-45 (Tentative Draft No. 2, 1999).

Subsection (a)(4) addresses the doctrine of merger, which, as traditionally stated, provides that a trust is not created if the settlor is the sole trustee and sole beneficiary of *all* beneficial interests. The doctrine of merger has been inappropriately applied by the courts in some jurisdictions to invalidate self-declarations of trust in which the settlor is the sole life beneficiary but other persons are designated as beneficiaries of the remainder. The doctrine of merger is properly applicable only if all beneficial interests, both life interests and remainders, are vested in the same person, whether in the settlor or someone else. On the doctrine of merger generally, see Restatement (Second) of Trusts § 341 (1959).

Subsection (a)(4) goes further than does the common law and the Restatement, negating the application of the doctrine of merger in a situation where its application would serve no purpose. Trusts are sometimes created which name the settlor as trustee, name the settlor as sole beneficiary during the settlor's lifetime, and provide for distribution to the settlor's estate upon the settlor's death. Under the doctrine of merger, as traditionally stated, such a trust could never come into existence because the settlor, following the attempted creation of the trust, would continue to hold all legal and equitable interests. Section (a)(4), however, adopting the approach taken by Virginia Statutes § 55-7.1, validates such a trust. The doctrine of merger is not to be applied to a trust in which the settlor holds a power of revocation or a presently exercisable power of withdrawal. Because the settlor is free to terminate the trust at will, there is no reason to prevent its creation as a matter of law.

Subsection (c) allows a settlor to empower the trustee to select the beneficiaries even if the class from whom the selection may be made is indefinite. Such a provision would fail under traditional doctrine; it is an imperative power with no designated beneficiary capable of enforcement. But such a provision is valid under both this Act and the Restatement. If the power is not exercised within a reasonable time, the power will fail and the property will pass by resulting trust. See Restatement (Third) of Trusts § 46 (Tentative Draft No. 2, 1999). See also Restatement (Second) of Trusts § 122 (1959); Restatement (Second) of Property: Donative Transfers § 12.1 cmt. e (1986).

SECTION 403. TRUST PURPOSES. A trust may be created only if its purposes are lawful, not contrary to public policy, and possible to achieve. A trust, its terms, and its administration must be for the benefit of its beneficiaries.

Comment

For an explication of the requirement that a trust must not have a purpose that is unlawful or against public policy, see Restatement (Second) of Trusts §§ 60-65; Restatement (Third) of Trusts §§ 27-30 (Tentative Draft No. 2, 1999). A trust with a purpose that is unlawful or against public policy is invalid. Depending on when the violation occurred, the trust may be invalid at its inception or the invalidity may occur at a later date. The invalidity may also be limited to particular provisions. Generally, a trust has a purpose which is illegal or against public policy if: (1) its performance involves the commission of a criminal or tortious act by the trustee; (2) its enforcement would otherwise be against public policy even though not criminal or tortious; (3) the settlor's purpose in creating the trust was to defraud creditors or others; or (4) the consideration for the creation of the trust was illegal. See Restatement (Second) of Trusts § 60 cmt. a (1959); Restatement (Third) of Trusts § 28 cmt. a (Tentative Draft No. 2, 1999).

The requirement that a trust, its terms, and its administration must be for the benefit of its beneficiaries is copied from Restatement (Third) of Trusts § 27 (Tentative Draft No. 2, 1999).

For a provision allowing reformation of certain trusts which fail to comply with this section, see Section 413.

SECTION 404. CREATION OF TRUST INDUCED BY UNDUE INFLUENCE, DURESS, OR FRAUD. A trust is void to the extent its creation was induced by undue influence, duress, or fraud.

Comment

This section is based on Restatement (Third) of Trusts § 12 (Tentative Draft No. 1, 1996), although the Restatement provides more generally that a trust can be set aside or reformed on the same grounds as those which apply to a transfer of property not in trust, among which include undue influence, duress, and fraud. See also Restatement (Second) of Trusts § 333 (1959), which is similar to Restatement (Third) of Trust § 12 (Tentative Draft No. 1, 1996), and Restatement (Second) Property: Donative Transfers § 34.7, which closely tracks the language above. For reformation of a trust on grounds of mistake, which is also covered by the language of the respective Restatements of Trusts, see Section 413.

Similar to a will, the invalidity of a trust on grounds of undue influence, duress, or fraud may be in whole or in part.

SECTION 405. EVIDENCE OF ORAL TRUST. Except as required by a statute other than this [Act], a trust need not be evidenced by a writing or other record, but the creation of an oral trust may be established only by clear and convincing evidence.

Comment

While it is always advisable for a settlor to reduce a trust to writing, the Act follows established law in recognizing oral trusts. Such trusts are viewed with caution, however. The requirement of this section that an oral trust can be established only by clear and convincing evidence is not part of the common law.

Absent some specific statutory provision, such as a provision requiring that transfers of real property be in writing, a trust need not be evidenced by a writing. States with statutes of frauds or other provisions requiring that the creation of certain trusts must be evidenced by a writing may wish specifically to cite such provisions.

For the Statute of Frauds generally, see Restatement (Second) of Trusts §§ 40-52. For a description of what the writing must contain, assuming that a writing is required, see Restatement (Third) of Trusts § 22 (Tentative Draft No. 1, 1996). For a discussion of when the writing must be signed, see Restatement (Third) of Trusts § 23 (Tentative Draft No. 1, 1996). For the law of oral trusts, see Sarajane Love, Imperfect Gifts as Declarations of Trust: An Unapologetic Anomaly, 67 Ky. L. J. 309 (1979).

SECTION 406. TRUST FOR CARE OF ANIMAL.

(a) A trust for the care of an animal or animals living at the settlor's death is valid. The trust terminates upon the death of all animals covered by the terms of the trust.

(b) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if there is none, by a person appointed by the court. A person appointed to enforce the trust has the rights of a qualified beneficiary under this [Act]. A person having an interest in the welfare of the animal may petition for an order appointing a person to enforce the trust or to remove that person.

(c) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor or settlor's successors in interest.

Comment

This section and the next section of the Act validate so-called honorary trusts. Unlike honorary trusts created pursuant to the common law of trusts, which are arguably no more than unenforceable powers of appointment, the trusts created by this and the next section are valid and enforceable and not dependent on whether the trustee decides to honor the settlor's wishes. For a discussion of the common law doctrine, see Restatement (Second) of Trusts § 124 (1959); Restatement (Third) of Trusts § 47 (Tentative Draft No. 2, 1999).

This section addresses a particular type of honorary trust, the trust for the care of an animal. Section 407 specifies the requirements for trusts created for other noncharitable purposes. A trust for the care of an animal may last for the life of the animal. While the animal will ordinarily be alive on the date the trust is created, an animal may be added as a beneficiary after that date as long as the addition is made prior to the settlor's death. Animals in gestation but not yet born at the time of the trust's creation may also be covered by its terms. A trust authorized by this section may be created to benefit one designated animal or multiple animals.

Subsection (b) addresses enforcement. Noncharitable trusts ordinarily may be enforced by their beneficiaries. Charitable trusts may be enforced by the State Attorney General or by a person deemed to have a special interest. See Restatement (Second) of Trusts § 391 (1959). But at common law, trusts for the care of an animal or a trust without an ascertainable beneficiary created for another noncharitable purpose were unenforceable because there was no person authorized to enforce the trustee's obligations.

This section and the next section close this gap. The intended use of a trust authorized by either section may be enforced by a person designated in the terms of the trust or, if none, by a person appointed by the court. In either case, the person appointed is given the rights of a qualified beneficiary for the purpose of receiving notices and consenting to certain actions. If the trust is created for the care of an animal, persons with an interest in the welfare of the animal have standing to petition for such an appointment, either of themselves or of others. The person appointed by the court to enforce the trust should also be a person who has exhibited an interest in the animal's welfare. The concept of granting standing to a person with a demonstrated interest in the animal's welfare is derived from the Uniform Guardianship and Protective Proceedings Act (1997), which allows a person interested in the welfare of a ward or protected person to file petitions on the ward's or protected person's behalf.

Subsection (c) addresses the problem of excess funds. If the court determine that the trust property exceeds the amount needed for the intended purpose and the terms of the trust do not direct the disposition, a resulting trust is ordinarily created in the settlor or settlor's successors in interest. See Restatement (Third) of Trusts § 47 (Tentative Draft No. 2, 1999). The settlor should also anticipate the problem of excess funds by directing their disposition in the terms of the trust. Like most other provisions in the Act, the disposition of excess funds is within the settlor's control. See Section 103. To make that clear, subsection (c) provides for a reversion only in the absence of a contrary provision in the terms of the trust.

This section and the next section are suggested by Section 2-907 of the Uniform Probate Code, but much of this and the following section is new.

SECTION 407. TRUST FOR NONCHARITABLE PURPOSE. Except as otherwise provided by another statute:

(1) A trust for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable purpose to be selected by the trustee is valid. The trust may not be enforced for more than 21 years;

(2) A trust authorized by this section may be enforced by a person appointed in the terms of the

trust or, if there is none, by a person appointed by the court. A person appointed to enforce the trust has the rights of a qualified beneficiary under this [Act];

(3) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor or settlor's successors in interest.

Comment

This section authorizes two types of trusts without ascertainable beneficiaries; trusts for general but noncharitable purposes, and trusts for a specific noncharitable purpose other than the care of an animal, which is covered by Section 406. Examples of trusts for general noncharitable purposes might include a bequest of money to be distributed to such objects of benevolence as the trustee might select. Unless such trust was interpreted as charitable, such a trust at common law was honorary only. Under this section, however, such a trust is enforceable for a period of up to 21 years, the maximum period allowed under the rule against perpetuities for a disposition without lives in being.

The most common example of a trust for a specific noncharitable purpose is a trust for the care of a cemetery plot. Trusts and other funding devices for the perpetual care of cemetery plots is a topic frequently addressed by separate legislation. Such legislation will typically endeavor to provide for truly perpetual care as opposed to care limited for 21 years.

For the requirement that a trust, particularly the type of trust authorized by this section, must have a purpose that is not capricious, see Section 403 Comment. For examples of the types of trusts authorized by this section, see Restatement (Second) of Trusts § 124 (1959); Restatement (Third) of Trusts § 47 (Tentative Draft No. 2, 1999).

This section is similar to Section 406, although less detailed. Much of the Comment to Section 406 also applies to this section.

SECTION 408. CHARITABLE TRUSTS.

(a) A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purpose the achievement of which is beneficial to the community. If the purposes of a trust are charitable but the terms of the trust do not indicate a particular purpose or beneficiary, the trustee may select one or more charitable purposes or beneficiaries.

(b) Except as otherwise provided in subsections (c) and (d), if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful:

(1) the trust does not fail, in whole or in part;

(2) the trust property does not revert to the settlor or the settlor's successors in interest; and

(3) the court shall modify or terminate the trust and direct that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.

(c) The power of the court to modify or terminate a charitable trust, as provided in subsection (b), is subject to a contrary provision in the terms of the trust only if the provision directs that the trust property be distributed to a charitable organization or used by the trustee for another charitable purpose or, if the provision directs that the trust property be distributed to a noncharitable beneficiary and fewer than 30 years have elapsed since the date of the trust's creation.

(d) If the trustee determines that the value of a charitable trust does not exceed [$50,000], upon at least [30] days' notice to the attorney general of this State, the trustee may modify or terminate the trust in the manner prescribed in subsection (b).

(e) A settlor may maintain an action to modify a charitable trust under this section or to enforce a charitable trust under this or any other section.

(f) A charitable organization expressly entitled to receive benefits under the terms of a charitable trust has the rights of a qualified beneficiary under this [Act].

Comment

This section broadens the authority of courts and trustees to make charitable gifts more effective. Many of the concepts implemented in this section have long been advocated by commentators. See, e.g., Roger G. Sisson, Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres, 74 Va. L. Rev. 635 (1988); Report, Cy Pres and Deviation: Current Trends and Application, 8 Real Prop. Prob. & Trust J. 391 (1971); Joseph A. DiClerico, Jr., Cy Pres: A Proposal for Change, 47 B.U.L. Rev. 153 (1967); Kenneth L. Karst, The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility, 73 Harv. L. Rev. 433 (1960). This broadening of the ability of a court to apply cy pres is also reflected in a number of the state statutes, See, e.g., Wis. Stat. § 701.10.

Subsection (b) codifies the court's inherent authority to apply cy pres. The power may be applied to modify an administrative or beneficial term. The court may order the trust terminated and distributed to other charitable entities. Partial termination may also be ordered if the trust property is more than sufficient to satisfy the trust's current purposes.

Subsection (b) modifies the doctrine of cy pres by presuming that the settlor had a general charitable intent. Traditional doctrine does not supply that presumption, leaving it to the courts, when a specific charitable purpose becomes impossible to achieve, to determine whether the settlor had a general charitable intent. If so, the trust property is diverted to other charitable purposes. If not, the charitable trust fails. In the great majority of cases the settlor would prefer that the gift not fail but be used for other charitable purposes. As a consequence, upon failure of a particular charitable purpose, courts rarely divert the trust property to a noncharitable use. Courts are almost always able to find a general charitable purpose to which to apply the property, no matter how vaguely such purpose may have been expressed by the settlor. Unless the terms of the trust provide 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, impossible to achieve, or wasteful. The court must instead either modify the terms of the trust or direct that the property of the trust be distributed in whole or in part in a manner consistent with the settlor's charitable purposes.

Subsection (c) clarifies that cy pres is generally a default option. The settlor, with one exception, is free to designate who is to receive the trust property upon failure of a specific charitable purpose. The exception prohibits a gift over to a noncharitable beneficiary if the failure of the charitable purpose occurs more than 30 years after the trust's creation. Because most charitable trusts are created to secure a charitable tax deduction, the application of this subsection will be rare. Also, this subsection would not apply to a charitable lead trust, under which a charity receives payments for a term certain with a remainder to a noncharity. In this case the settlor's specific charitable purpose does not fail. Upon the completion of the term the settlor's specific charitable purpose has instead been fulfilled.

The doctrine of cy pres is also applied in the law applicable to other types of charitable dispositions, including charitable corporations. This section, because it is part of a Uniform Trust Act, does not control charitable dispositions made in nontrust form. However, in formulating the rules for such dispositions the courts commonly refer to the principles governing charitable trusts.

The required purposes of a charitable trust specified in subsection (a) restate the well-established categories of charitable purposes listed in Restatement (Second) of Trusts § 368 (1959), and ultimately derived from the Statute of Charitable Uses, 43 Eliz. I, c.4 (1601). Subsection (a) also restates an established estate planning technique under which the trustee is permitted to select the charitable beneficiary or purposes for which distributions are to be made. See Restatement (Second) of Trusts § 396 (1959).

Subsection (d) allows a trustee to automatically terminate a charitable trust with a value of less than $50,000, although the amount is placed in brackets to signal that an enacting jurisdiction may select a different amount. For the comparable provision on termination of small noncharitable trusts, see Section 412(a). Separate provisions are provided because of the significant differences between the two provisions, including the requirement in this section that notice of the intention to terminate be given to the State Attorney General. While the Attorney General under this Act is generally not required to receive notices concerning a charitable trust because comprehensive reporting to the State is normally required by other law, few charitable trust statutes require notice to the Attorney General of the termination of small charitable trusts.

Subsection (e), unlike Restatement (Second) of Trusts § 391 (1959), authorizes the settlor to maintain an action to enforce or modify a charitable trust. The settlor may enforce the trust under any section. However, a petition to modify may only be brought by a settlor under this section.

Charitable trusts do not have beneficiaries in the usual sense. However, certain persons, while not technically beneficiaries, do have an interest in seeing that the trust is enforced. In the case of a charitable trust, this includes the Attorney General and charitable organizations designated to receive benefits under the terms of the trust. To permit such organizations to protect their interests, Section 408(f) provides that charitable organizations expressly designated to receive benefits under the terms of a charitable trust have the rights of qualified beneficiaries. Because reporting to the State Attorney General is already required by other law, the Attorney General is not granted a similar right.

SECTION 409. TERMINATION OF TRUST; PETITIONS FOR APPROVAL OR DISAPPROVAL.

(a) In addition to the methods specified in Sections 410 through 412, a trust terminates if the trust is revoked or expires pursuant to its terms or the purposes of the trust are achieved or become unlawful, impossible to achieve, or contrary to public policy.

(b) A proceeding to approve or disapprove a proposed action under Sections 410 through 415 may be initiated by a trustee or beneficiary, and a proceeding to approve or disapprove a proposed action under Section 410 may be initiated by a settlor.

Comment

Subsection (a) lists the various methods and grounds by which trusts typically terminate. In addition to other powers granted under this Act or by the terms of the trust, upon termination of a trust a trustee has the powers appropriate to wind up the trust's administration. See Section 816(28).

For the requirement that a trust must have a purpose that is not illegal, impossible to achieve, or contrary to public policy, see Section 403 and Comment.

Subsection (b) provides that petitions for approval or disapproval of proposed actions under this Sections 410 through 415 may be filed by the trustee or a beneficiary. The effect of this is to make clear that court approval or disapproval may be sought for an action which can be accomplished without court permission. This would include petitions to approve or disapprove modification or termination by beneficiary consent (Section 410), a petition questioning the trustee's distribution upon termination of a trust under $50,000 (Section 412), and a petition for approval or disapproval of a proposed trust division or consolidation (Section 415).

Subsection (b) also makes clear that the settlor is an interested person with respect to actions under Section 410 to terminate or modify a trust by beneficiary action, whether or not the settlor agrees with the beneficiary's decision.

SECTION 410. MODIFICATION OR TERMINATION OF IRREVOCABLE TRUST BY CONSENT.

(a) An irrevocable trust may be modified or terminated with the consent of all of the beneficiaries if continuance of the trust on its existing terms is not necessary to achieve a material purpose of the trust. The inclusion of a spendthrift provision in the terms of the trust may, but is not presumed to, constitute a material purpose of the trust.

(b) Whether or not continuance of the trust on its existing terms is necessary to achieve a material purpose of the trust, an irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries. A settlor's power to consent to a trust's termination may be exercised by an agent under a power of attorney only to the extent the power of attorney or the terms of the trust expressly authorize the agent to do so, or by a [conservator] with the approval of the court supervising the [conservatorship] if the agent is not so authorized. A settlor's power to consent to a trust's termination may not be exercised by the settlor's [guardian].

(c) Upon termination of a trust pursuant to subsection (a) or (b), the trustee shall distribute the trust property as agreed by the beneficiaries.

(d) If a beneficiary does not consent to a proposed modification or termination of a trust by the other beneficiaries or by the settlor and other beneficiaries, the court may approve the proposed modification or termination only if the court is satisfied that:

(1) if all beneficiaries had consented, the trust could have been terminated or modified under this section; and

(2) the interests of a beneficiary who does not consent will be adequately protected.

Comment

This section describes the circumstances under which an irrevocable trust may be terminated or modified by the beneficiaries, with or without the concurrence of the settlor. For provisions governing modification or termination of trusts without the need to seek beneficiary consent, see Sections 411 (modification or termination due to unanticipated circumstances or inability to effectively administer trust) and 412 (termination or modification of uneconomic noncharitable trust). If the trust is revocable by the settlor, the method of revocation specified in Section 602 applies.

Subsection (a) states the test for termination or modification by unanimous consent without the concurrence of the settlor. Subsection (b) states the test for termination or modification by the beneficiaries with the concurrence of the settlor. Subsection (c) directs how the trust property is to be distributed following a termination under either subsection (a) or (b). Subsection (d) creates a procedure for judicial approval of a proposed termination or modification when the consent of less than all of the beneficiaries is available.

A trust may be modified or terminated pursuant to this section over a trustee's objection and, except as provided in subsection (d), without court approval. However, the court is available to indicate its approval or disapproval of a proposed termination or modification upon petition of the settlor, beneficiary, or trustee. See Section 409.

Subsection (a) of this section is based on Section 337 of the Restatement (Second) of Trusts (1959), except that this subsection, unlike the Restatement, deals expressly with the effect of a spendthrift provision. While the inquiry on whether continuation of a trust is necessary to achieve a material purpose should focus on the material purpose or purposes of the particular settlor, the courts have tended to preclude termination based on whether the trust contains particular language without examining its context. For the case law, see Austin W. Scott & William F. Fratcher, The Law of Trusts § 337 (4th ed. 1988).

The insertion of a spendthrift provision, which is often added to instruments with little thought, has been a particular problem. Subsection (a) does not negate the possibility that continuation of a trust to assure spendthrift protection might have been a material purpose of the particular settlor. It instead negates the assumption that inserting such a clause is always a bar to termination or modification. Whether a spendthrift provision bars termination or modification of a particular trust is a question of fact to be determined based on the totality of the circumstances.

Subsection (b), which is based on Restatement (Second) of Trusts § 338 (1959), permits termination upon the joint action of the settlor and beneficiaries. While the beneficiaries alone cannot terminate a trust unless continuation of the trust is no longer necessary to achieve the settlor's material purposes in creating the trust, such a finding is not required if the settlor also consents. No finding is required because all parties with a possible interest in the trust's continuation, both the settlor and beneficiaries, are agreed there is no further need for the trust.

Subsection (b) also addresses the authority of an agent, conservator, or guardian to act on a settlor's behalf. Consistent with Section 602 on revocation or modification of a revocable trust, the section assumes that a settlor, in granting an agent general authority, did not intend for the agent to have authority to consent to the termination or modification of a trust and possibly undo the settlor's estate plan. In order for an agent to validly consent to a termination or modification, such authority must be expressly conveyed either in the power or in the terms of the trust.

Subsection (b) does not, however, impose restrictions on consent by a conservator, other than prohibiting such action if the settlor is represented by an agent. The Act instead leaves the authority of a conservator to local law. Many conservatorship statutes, in fact, recognize that termination or modification of the settlor's trust is a sufficiently important transaction that a conservator should not be allowed to consent without first consulting with and obtaining the approval of the court supervising the conservatorship. See, e.g., Unif. Probate Code § 5-407.

Subsection (c) denies a guardian the right to consent to the termination of an irrevocable trust created by the ward. A "guardian," as defined in Section 102(5), does not have authority to manage property. Also, in most states statutory provisions authorizing a court to revise the ward's estate plan apply only to the authority of the person appointed to manage the ward's property, described as a "conservator" under this Act. Should it be desired to have the guardian participate on the settlor's behalf in the termination of the ward's irrevocable trust, the appropriate course of action in most states is to request that the court grant the guardian conservatorship powers.

The provisions of Article 3 on representation, virtual representation and the appointment and approval of guardians ad litem and special representatives apply for determining whether all beneficiaries have signified consent under this section. The authority to consent on behalf of another person, however, does not include the authority to consent over the other person's objection. See Section 301(b). For a listing of who may consent on behalf of a beneficiary, see Sections 302, 303, and 304. A consent obtained by virtual representation is valid only if there is no conflict of interest between the representative and the person represented. Given this limitation, virtual representation will rarely be available in a trust termination case, although its use will be frequent in cases involving trust modification, such as a grant to the trustee of additional powers. If virtual representation is unavailable, Section 305 of the Act permits the court to appoint a representative who may give the necessary consent to the proposed modification or termination on behalf of the minor, incapacitated, unborn, or unascertained beneficiary.

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

Subsection (d), which is based on Restatement (Second) of Trusts § 338(2) (1959), addresses situations in which a termination or modification is requested by less than all of the beneficiaries, either because a beneficiary objects, the consent of a beneficiary cannot be obtained, or virtual representation is either unavailable or its application uncertain. Subsection (d) allows the court to fashion an appropriate order protecting the interests of the nonconsenting beneficiaries while at the same time permitting the remainder of the trust property to be distributed without restriction. The order of protection for the nonconsenting beneficiaries might include partial continuation of the trust, the purchase of an annuity, or the valuation and cashout of the interest.

SECTION 411. MODIFICATION OR TERMINATION BECAUSE OF UNANTICIPATED CIRCUMSTANCES OR INABILITY TO ADMINISTER TRUST EFFECTIVELY.

(a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if:

(1) because of circumstances not anticipated by the settlor, modification or termination will substantially further the settlor's purposes in creating the trust; or

(2) the purposes of the trust have been fulfilled or have become illegal or impossible to fulfill.

(b) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable, wasteful, or impair the trust's administration.

(c) Upon termination of a trust under this section, the trust property must be distributed in accordance with the settlor's purposes in creating the trust.

Comment

This section broadens the court's ability to apply equitable deviation to terminate or modify a trust. Subsection (a) is based on Restatement (Second) of Trusts §§ 167 and 336. Unlike the Restatement, however, subsection (a) allows a court to modify the beneficial provisions of the trust as well as its administrative terms. For example, modification of the beneficial provisions to increase support of a beneficiary might be appropriate if the beneficiary has become unable to provide for support due to poor health or serious injury.

While it is necessary there be circumstances not anticipated by the settlor before the court may grant relief under subsection (a), it is not essential that circumstances have changed. The circumstances not anticipated by the settlor may have been in existence when the trust was created. This section thus complements Section 413, which allows for reformation of a trust based on mistake of fact or law at the creation of the trust.

Relief under subsection (a) should not be lightly granted. Reasonable minds can disagree on the purposes of a trust and on whether the settlor chose the appropriate means of implementation. For this reason, the petitioner must demonstrate that the proposed termination or modification will substantially further the settlor's objectives in creating the trust.

Subsection (b) broadens the court's ability to modify the administrative terms of a trust. Subsection (b) applies, with respect to the administrative terms, the same standard as the standard under Section 408(b) for modifying a charitable trust. Just as a charitable trust may be modified if its particular charitable purpose becomes impracticable or wasteful, so can the administrative terms of any trust, charitable or noncharitable.

Subsection (b) is also an application of the principle that a trust have a purpose which is for the benefit of its beneficiaries, both in its terms and in how it is administered. See Restatement (Third) of Trusts § 27(2) & cmt. b (Tentative Draft No. 2, 1999). Although the settlor is granted considerable latitude in defining the purposes of the trust, the principle that a trust have a purpose which is for the benefit of its beneficiaries preclude unreasonable restrictions on the use of trust property. Owners may deal without restraint with their own property but not when impressed with a trust for the benefit of others. See Restatement (Second) of Trusts § 124 cmt. g (1959). Thus, attempts to impose unreasonable restrictions on the use of trust property, such as a provision severely impairing the use of real property, will fail. See, e.g., *Colonial Trust v. Brown*, 135 A. 555 (Conn. 1926). See also Restatement (Third) of Trusts § 27 Reporter's Note to cmt. b (Tentative Draft No. 2, 1999).

Upon termination of a trust under this section, subsection (c) requires that the trust be distributed in accordance with the settlor's purposes in creating the trust. This requirement, which is similar to the doctrine of cy pres, will require an examination of what the settlor probably would have done had the settlor been aware of the unanticipated circumstances. Typically, such terminating distributions will be made to the qualified beneficiaries, perhaps in proportion to the actuarial value of their interests, although the section does not so prescribe. For the definition of qualified beneficiary, see Section 102(12).

SECTION 412. TERMINATION OF UNECONOMIC NONCHARITABLE TRUST.

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

(b) The court may modify or terminate a noncharitable trust or remove the trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.

(c) Upon termination of a trust under this section, the trust property must be distributed in accordance with the settlor's purposes in creating the trust.

Comment

Subsection (a) presumes that a trust with a value of $50,000 or less is inherently uneconomical and may be terminated without the expense of a judicial termination proceeding. This provision is a default rule. While the creation of small charitable trusts is not encouraged, this subsection does not interfere with the right of a settlor to do so. The settlor is free to set a higher or lower figure or to specify different procedures or to prohibit termination without a court order. See Section 103 and General Comment to

Article 4.

Subsection (b) allows the court to modify or terminate a trust if the costs of administration would otherwise be excessive in relation to the size of the trust. The court may terminate a trust under this section even if a settlor has forbidden such action. See Section 103(b)(5). A court termination procedure may be utilized for a trust of any size.

When considering whether to terminate a noncharitable trust under this section, the trustee or court should consider the trust purposes. Termination under this section is not always wise. Even if administrative costs may seem expensive in relation to the size of the trust, protection of the assets from beneficiary mismanagement may indicate that the trust be continued.

While this section is not principally directed at honorary trusts, it may be applied to such trusts. See Sections 406, 407.

In order to reduce the costs of administering a trust, the court, instead of terminating the trust, may appoint a new trustee. Upon termination of a trust under this section, subsection (c) requires that the trust property be distributed in accordance with the settlor's purposes in creating the trust.

This section is limited to noncharitable trusts because the subject of termination of small or inefficient charitable trusts is fully addressed in Section 408.

SECTION 413. REFORMATION TO CORRECT MISTAKES. The court may reform the terms of a trust, even if unambiguous, to conform to the settlor's intention if the failure to conform was due to a mistake of fact or law, whether in expression or inducement, and the settlor's intent can be established by clear and convincing evidence.

Comment

Reformation of inter vivos instruments to correct for a mistake of law or fact is a long-established remedy. Restatement (Third) of Property: Wills and Other Donative Transfers § 12.1 (Tentative Draft No. 1, 1995), upon which this section is based, clarifies that this doctrine also applies to wills.

This section applies whether the mistake is one of expression or one of inducement. A mistake of expression occurs when the terms of the trust misstate the settlor's intention, fail to include a term that was intended to be included, or include a term that was not intended to be excluded. A mistake in the inducement occurs when the terms of the trust accurately reflect what the settlor intended to be included or excluded but this intention was based on a mistake of fact or law. Restatement (Third) of Property: Wills and Other Donative Transfers § 12.1 cmt. i (Tentative Draft No. 1, 1995).

Reformation is different from clarification of an ambiguity. Clarification of an ambiguity involves the interpretation of language already in the instrument. Reformation, on the other hand, involves the addition of language not originally in the instrument, or the deletion of language originally included by mistake. Because reformation involves the addition of language to the instrument, or deletion of language in an instrument that may appear clear on its face, reliance on extrinsic evidence is essential. To guard against the possibility of unreliable or contrived evidence in such circumstance, the higher standard of clear and convincing proof is required. See Restatement (Third) of Property: Wills and Other Donative Transfers § 12.1 cmt. e (Tentative Draft No. 1, 1995).

In determining the settlor's original intent, the court should not be bound by the so-called "plain meaning" rule, which often produces a meaning plain only in the eye of the beholder. For this reason, under leading American case law and scholarly analysis, evidence contradicting the so-called plain meaning of the text is admissible. The objective of the plain meaning rule, to protect against fraudulent testimony, is satisfied by the requirement in this section that clear and convincing evidence be presented before a requested reformation may be granted. See Restatement (Third) of Property: Wills and Other Donative Transfers § 12.1 cmt. d (Tentative Draft No. 1, 1995).

SECTION 414. MODIFICATION TO ACHIEVE SETTLOR'S TAX OBJECTIVES. To achieve the settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention. The court may provide that a modification has retroactive effect.

Comment

This section is based on Restatement (Third) of Property § 12.2 (Tentative Draft No. 1, 1995). "Modification" under this section is to be distinguished from the "reformation" authorized by Section 413. Reformation under Section 413 is available when the terms of a trust fail to reflect the donor's original, particularized intention. The mistaken terms are then reformed to match this specific intent. The modification authorized here is more general, allowing documents to be changed to meet the settlor's tax-saving objective as long as the resulting terms, particularly the beneficial provisions, are not inconsistent with the settlor's probable intent. The modification allowed by this subsection is similar in concept to the cy pres doctrine for charitable trusts (see Section 408), and the deviation doctrine for unanticipated circumstances (see Section 411).

Whether a modification made by the court under this section will be recognized under federal tax law is a matter of federal law. Among the modifications recognized under federal law have been the revision of split-interest trusts to qualify for the charitable deduction, modification of a trust for a noncitizen spouse to become eligible as a qualified domestic trust, and the splitting of a trust to better utilize the exemption from generation-skipping tax.

For further discussion of the issues raised by a desire to modify a trust to achieve the settlor's tax objectives, see the Comments and Reporter's Notes to Restatement (Third) of Property § 12.2 (Tentative Draft No. 1, 1995).

SECTION 415. COMBINATION AND DIVISION OF TRUSTS. On written notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, if the combination or division does not impair the rights of any beneficiary or adversely affect the achievement of the trust purposes.

Comment

This section, which authorizes the combination or division of trusts, applies only in the absence of an express provision in the terms of the trust. See Section 103 and Article 4 General Comment. Many trust instruments and standardized estate planning forms include comprehensive provisions governing combination and division of trusts.

This section allows a trustee to combine two or more trusts even though their terms are not identical, although typically the trusts to be combined will have been created by different members of the same family and vary on only insignificant details, such as the presence of different perpetuities savings periods. The more the beneficial provisions of the trusts to be combined differ from each other the more likely it is that a combination will result in the reduction of some beneficiary's interest and the less likely it is that the settlor's purposes will be accomplished and the combination can be approved. Combining trusts may prompt more efficient trust administration and is sometimes an alternative to terminating the trusts as permitted by Section 412. Administrative economies promoted by combining trusts include a potential reduction in trustee's fees, particularly if the trustee charges a minimum fee per trust, the ability to file one trust income tax return instead of multiple returns, and the ability to invest more efficiently because of a larger pool of available capital.

Division of trusts is often beneficial and, in certain circumstances, almost routine. Division of trusts is frequently undertaken due to a desire to obtain maximum advantage of exemptions available under the federal generation-skipping tax. While the terms of the trusts which result from such a division are identical, the division will permit differing investment objectives to be pursued and allow for discretionary distributions to be made from one trust and not the other.

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

This section does not require that a combination or division be approved by either the court or beneficiaries. Prudence may dictate, however, that court approval under Section 409 be sought and beneficiary consent obtained whenever the terms of the trusts to be combined or the trusts that will result from a division differ substantially one from the other. For the provisions relating to beneficiary consent or ratification of a transaction, or release of trustee from liability, see Section 1010.

While the consent of the beneficiaries is not necessary before a trustee may combine or divide trusts under this section, advance notice to the qualified beneficiaries of the proposed combination or division is required. This is consistent with Section 813, which requires that the trustee keep the beneficiaries reasonably informed of trust administration, including the giving of advance notice to the qualified beneficiaries of several specified actions that may have a major impact on their interests.

For a list of statutes authorizing division of trusts, either by the trustee or court order, see Restatement (Third) Property: Wills and Other Donative Transfers § 12.2 statutory note (Tentative Draft No. 1, 1995). For a provision authorizing a trustee, in distributing the assets of the divided trust, to make non-pro-rata distributions, see Section 816(23).

ARTICLE 5

CREDITOR’S CLAIMS; SPENDTHRIFT PROVISIONS; DISCRETIONARY TRUSTS

General Comment

This article addresses the validity of a spendthrift provision and the rights of creditors, both of the settlor and beneficiaries, to reach a trust to collect a debt. Sections 501 and 502 state the general rules. To the extent a trust is protected by a spendthrift provision, a beneficiary’s creditor may not reach the beneficiary’s interest until distribution is made by the trustee. To the extent not protected by a spendthrift provision, however, the creditor can reach the beneficiary’s interest subject to the court’s power to provide for the beneficiary’s actual needs and the needs of legal dependents. Section 503 lists the categories of creditors whose claims are not subject to a spendthrift bar. Sections 504 through 507 address special categories where the rights of a beneficiary’s creditors are the same whether or not the trust contains a spendthrift provision. Section 504 deals with discretionary trusts and trusts for which distributions are subject to a standard. Section 505 covers creditor claims against a settlor, whether the trust is revocable or irrevocable, and if revocable, whether the claim is made during the settlor’s lifetime or incident to the settlor’s death. Section 506 provides a creditor with a remedy if a trustee fails to make a required distribution within a reasonable time. Section 507 clarifies that the fact a trustee holds legal title to trust property does not imply that the trust property is subject to the trustee’s personal debts.

The provisions of this article relating to the validity and effect of a spendthrift provision and the rights of creditors may not be modified by the terms of the trust.

SECTION 501. RIGHTS OF BENEFICIARY’S CREDITOR OR ASSIGNEE: GENERAL To the extent a beneficiary’s interest is not protected by a spendthrift provision, a creditor or assignee of the beneficiary may reach the beneficiary’s interest in an appropriate judicial proceeding, including a proceeding to attach present or future distributions to or for the benefit of the beneficiary. The court shall award the creditor or assignee such relief as is appropriate under the circumstances, following consideration of the beneficiary’s actual needs and the needs of those legally dependent on the beneficiary for support.

Comment

Absent a valid spendthrift provision, the interest of a beneficiary may be reached the same as any other of the beneficiary’s assets. This does not necessarily mean that the creditor can collect all distributions made to the beneficiary. Other creditor law of the State may limit the creditor to a specified percentage of a distribution. See, e.g., Cal. Prob. Code § 15306.5.

This section does not prescribe the procedures for reaching a beneficiary’s interest, leaving that issue to the enacting State’s laws on creditor rights. Consequently, the section provides that a creditor or assignee may pursue collection in “an appropriate judicial proceeding.” The section does clarify, however, that an order obtained against the trustee, whatever state procedure may have been used, may extend to future distributions whether made directly to the beneficiary or to others for the beneficiary's benefit. By allowing an order to extend to future payments, the need for the creditor periodically to return to court will be reduced.

While this section does not prescribe creditor procedure, the creditor typically will serve an order on the trustee attaching the beneficiary's interest, although the particular State's law may use other terms, such as garnishment or creditor bill. Assuming the validity of the order cannot be contested, the trustee will then pay to the creditor instead of to the beneficiary any payments the trustee would otherwise be required to make to the beneficiary, such as a required payment of income, as well as payments the trustee might otherwise decide to make, such as a discretionary distribution of principal. The creditor may also, in theory, force a judicial sale of a beneficiary's interest.

SECTION 502. SPENDTHRIFT PROVISION: GENERAL.

(a) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.

(b) A term of a trust providing that the interest of a beneficiary is held subject to a "spendthrift trust," or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.

(c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision, and, except as otherwise provided in this [article], a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

(d) A voluntary assignment by a beneficiary of distribution to which the beneficiary is or may become entitled to receive may be honored by the trustee but is revocable by the beneficiary at any time.

Comment

Under this section, a settlor has the power to restrain the transfer of a beneficiary's interest, regardless of whether the beneficiary has an interest in income, in principal, or both. Unless one of the exceptions under this article applies, a creditor of the beneficiary is prohibited from attaching a protected interest and may only attempt to collect directly from the beneficiary after payment is made. This section is similar to Restatement (Second) of Trusts §§ 152-153 (1959), and Restatement (Third) of Trusts § 58 (Tentative Draft No. 2, 1999). For the definition of spendthrift provision, see Section 102(15).

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

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

While a valid spendthrift provision makes it impossible for a beneficiary to make a legally binding transfer, a trustee is not penalized for voluntarily honoring the assignment.

SECTION 503. EXCEPTIONS TO SPENDTHRIFT PROVISION.

(a) Even if a trust contains a spendthrift provision, a beneficiary's child, spouse, or former spouse who has a judgment against the beneficiary for support or maintenance, or a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust, may obtain, in an appropriate judicial proceeding, an order attaching present or future distributions to or for the benefit of the beneficiary.

(b) A spendthrift provision is unenforceable against a claim of this State or the United States to the extent a statute of this State or federal law so provides.

Comment

For trusts with spendthrift provisions, the effect of this section is to enable certain creditors to bypass a spendthrift restriction but only with respect to their particular claims. Under this section, exceptions are recognized for court orders for the support of a child or a current or former spouse and for certain governmental claims.

The exception in subsection (a) for orders to support a beneficiary's child or current or former spouse is in accord with Restatement (Second) of Trusts § 157 (1959), Restatement (Third) of Trusts § 59 (Tentative Draft No. 2, 1999), and numerous state statutes. It is also consistent with federal bankruptcy law, which exempts such support orders from discharge. The effect of this exception is to permit the claimant for unpaid support to attach present or future distributions that would otherwise be made to the beneficiary. Distributions subject to attachment include distributions required by the express terms of the trust, such as mandatory payments of income, and distributions the trustee has otherwise decided to make, such as through the exercise of discretion. Subsection (a), unlike Section 504, does not authorize the spousal or child claimant to compel a distribution from the trust. Section 504 authorizes a spouse or child claimant to compel a distribution to the extent the trustee has abused a discretion or failed to comply with a standard for distribution.

Subsection (b), which is similar to Restatement (Third) of Trusts § 59 cmt. a (Tentative Draft No. 2, 1999), exempts certain governmental claims from a spendthrift bar. Federal preemption guarantees that certain federal claims, such as claims by the Internal Revenue Service, may bypass a spendthrift provision no matter what this Act might say. The case law and relevant Internal Revenue Code provisions on the exception for federal tax claims are collected in 2A Austin W. Scott & William F. Fratcher, The Law of Trusts § 157.4 (4th ed. 1987). Regarding claims by state governments, this subsection recognizes that States take a variety of approaches with respect to collection, depending on whether the claim is for unpaid taxes, for care provided at an institution, or for other charges. Acknowledging this diversity, subsection (b) does not prescribe a definite rule, but instead refers to other statutes of the State on whether a particular claim is barred or exempted from a spendthrift provision.

Unlike Restatement (Second) of Trusts § 157 (1959), and Restatement (Third) of Trusts § 59 (Tentative Draft No. 2, 1999), this Act does not create an exception to the spendthrift bar for creditors who have furnished necessary services or supplies to the beneficiary. For a discussion of this and other exceptions to the spendthrift bar, recognized in some States, see 2A Austin W. Scott & William F. Fratcher, The Law of Trusts §§ 157-157.5 (4th ed. 1987).

SECTION 504. DISCRETIONARY TRUSTS AND TRUSTS SUBJECT TO STANDARD.

(a) Except as otherwise provided in subsection (b), whether or not a trust contains a spendthrift provision, 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, in the discretion of the trustee, or both, a creditor of a beneficiary may not compel a distribution from the trust, even if the trustee has failed to comply with the standard or abused the discretion.

(b) To the extent a trustee has failed to comply with a standard or abused a discretion:

(1) a distribution may be compelled in an appropriate judicial proceeding by a child, spouse, or former spouse who has a judgment against a beneficiary for support or maintenance; and

(2) the court shall direct the trustee to pay to the child, spouse, or former spouse, such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

(c) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

Comment

Pursuant to Section 502, the effect of a valid spendthrift provision, where applicable, is to prohibit a creditor from collecting on a distribution prior to its receipt by the beneficiary. If the trust is not protected by a spendthrift provision, or should the creditor fit within one of the exceptions created by Section 503, the creditor may attach a distribution the trustee is required to or has otherwise decided to make to the beneficiary. If the trust does not contain a spendthrift provision, the creditor may also conceivably force a sale of the beneficiary's interest. See Section 501. But the mere power to attach an interest does not mean that a creditor can force a trustee to exercise discretion or make a distribution based on a standard.

Subsection (a), which establishes the general rule, forbids a creditor from compelling a distribution from the trust, even if the trustee has failed to comply with the standard of distribution or has abused a discretion. Per subsection (c), the power to force a distribution due to an abuse of discretion or failure to comply with a standard belongs solely to the beneficiary. Under Section 814, a trustee must always exercise a discretionary power in good faith and with regard to the purposes of the trust and the interest of the beneficiaries.

Subsection (b) creates an exception for support claims of a child, spouse, or former spouse who has a judgment against a beneficiary for support or maintenance. While a creditor of a beneficiary may not in general assert that a trustee has abused discretion or failed to comply with a standard of distribution, such a claim may be asserted by the beneficiary's child, spouse, or former spouse, but only if made in an appropriate judicial proceeding. The court must direct the trustee to pay the child, spouse or former spouse such amount as is equitable under the circumstances but not in excess of the amount the trustee was otherwise required to distribute to or for the benefit of the beneficiary. Before fixing this amount, the court with jurisdiction over the trust should consider that in setting the respective support award, the family court has already considered the respective needs and assets of the family. The Act does not attempt to prescribe the particular procedural method for enforcing a support judgment against the trust, leaving that matter to local collection law. For an example, see Cal. Prob. Code § 15305.

SECTION 505. CREDITOR'S CLAIM AGAINST SETTLOR.

(a) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

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

(2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(3) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances.

(b) For purposes of this section:

(1) during the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and

(2) upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property subject to the power, at the time of the lapse, release, or

waiver, exceeds the greater of the amount specified in (i) Section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, or (ii) Section 2503(b) of the Internal Revenue Code of 1986; in either case as in effect on January 1, [_____], or as later amended.

Comment

Subsection (a)(1) states what is now a well accepted conclusion, that a revocable trust is subject to the settlor's creditors while the settlor is living. Such claims were not allowed at common law, however. See Restatement (Second) of Trusts § 330, cmt. o (1959). Because a settlor usually also retains a beneficial interest which a creditor may reach under subsection (a)(2), the common law rule, in states still adhering to this approach, is normally of little significance. See Restatement (Second) of Trusts § 156(2) (1959).

Subsection (a)(2), which is based on Section 156 of the Restatement (Second) of Trusts (1959), and Restatement (Third) of Trusts § 58(2) & cmt. e (Tentative Draft No. 2, 1999), follows traditional doctrine in providing that a settlor who is also a beneficiary may not use the trust as a shield against the settlor's creditors. Whether the trust contains a spendthrift provision or not, a creditor of the settlor may reach the maximum amount that the trustee could have paid to the settlor-beneficiary. Should the trustee have discretion to distribute the entire income and principal to the settlor, the effect of this subsection is to place the settlor's creditors in the same position as if the trust had not been created. For the definition of "settlor," see Section 102(14).

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

Subsection (a)(3) recognizes that a revocable trust is usually employed as a will substitute. As such, the trust assets, following the death of the settlor, should be subject to the settlor's debts and other charges. However, in accordance with traditional doctrine, the assets of the settlor's probate estate must normally first be exhausted before the assets of the revocable trust can be reached.

This section does not attempt to address the procedural issues raised by the need to first exhaust the decedent's probate estate to reach the assets of the revocable trust. Nor does this section address the priority of the creditor claims or the possible liability of the decedent's other nonprobate assets for the decedent's debts and other charges. Subsection (a)(3), however, does ratify the typical pourover will, revocable trust plan. Such a plan will usually shift a portion if not all of the death-related liabilities from the probate estate to the revocable trust. As long as the rights of the creditor or family member claiming a statutory allowance are not impaired, the settlor is free to shift liability from the probate estate to the revocable trust.

This section does not cover all creditor issues that may arise in connection with revocable trusts, in particular the possible liability of other nonprobate assets for unpaid claims. These issues, which extend well beyond the law of trusts, are addressed in Section 6-102 of the Uniform Probate Code, which was approved at the Commissioners' 1998 Annual Meeting.

Subsection (b)(1) treats a presently exercisable general power of appointment as the functional equivalent of a power of revocation because the two powers are functionally the same. This is also the approach taken in Restatement (Third) of Trusts § 56 cmt. b (Tentative Draft No. 2, 1999). If the power is unlimited, the property subject to the power will be fully subject to the claims of the power holder's creditors, the same as the power holder's other assets. If the power holder retains the power until death, the property subject to the power may be liable for claims and statutory allowances to the extent the power holder's probate estate is insufficient to satisfy those claims and allowances. For powers limited either in time or amount, such as a right to withdraw a $10,000 annual exclusion contribution within 30 days, this subsection would limit the creditor to the $10,000 contribution and require the creditor to take action prior to the expiration of the 30-day period.

Following the release or lapse of a presently exercisable general power of appointment, the property formerly subject to the power will normally remain subject to the claims of the power holder's creditors as provided in subsection (a)(2). A creditor or assignee of the power holder may reach the maximum amount that can be distributed to or for the now former power holder's benefits. Following the lead of Arizona and Texas, however, subsection (b)(2) creates an exception for trust property which was subject to a Crummey or a 5 or 5 power. Upon the lapse, release, or waiver of a power, the holder is treated as the settlor of the trust only to the extent the value of the property subject to the power at the time of the lapse, release, or waiver exceeds the greater of the amounts specified in IRC §§ 2041(b)(2) or 2514(e) [greater of 5% or $5,000], or IRC § 2503(b) [$10,000 in 1999]. See Ariz. Rev. Stat. § 14-7705; Tex. Prop. Code Ann. § 112.035.

This Act does not address creditor issues with respect to property subject to a special power of appointment or testamentary general power of appointment. For creditor rights against such interests, see Restatement (Property) Second: Donative Transfers §§ 13.1-13.7 (1986).

SECTION 506. OVERDUE DISTRIBUTION. Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a distribution directed to be made to the beneficiary by the terms of the trust if the trustee has failed to make the distribution within a reasonable time.

Comment

The effect of a spendthrift provision is generally to totally insulate a beneficiary's interest until a distribution is made and has been received by the beneficiary. See Section 502. But this section, along with several other sections in this article, recognize exceptions to this general rule. Whether a trust contains a spendthrift provision or not, a trustee should not be able to avoid creditor claims against a beneficiary by refusing to make a distribution required to be made by the express terms of the trust. On the other hand, a spendthrift provision would become largely a nullity were a beneficiary's creditors able to attach all required payments as soon as they became due. This section reflects a compromise between these two competing principles. A creditor can reach a distribution required to be made to the beneficiary by the express terms of the trust only if the trustee has failed to make the payment within a reasonable time after the required distribution date. Following this reasonable period, payments required to be made by the express terms of the trust are in effect being held by the trustee as agent for the beneficiary and should be treated the same as any other of the beneficiary's personal assets.

SECTION 507. PERSONAL CREDITORS OF TRUSTEE. Even if a trustee becomes insolvent or bankrupt, the beneficiary's interest in the trust property is protected as against the general creditors of the trustee.

Comment

Because the beneficiaries of the trust hold the beneficial interest in the trust property and the trustee holds only legal title without the benefits of ownership, the creditors of the trustee have only a personal claim against the trustee. See Restatement (Second) of Trusts § 12 cmt. a (1959). See also Restatement (Third) of Trusts § 5 cmt. k (Tentative Draft No.1, 1996). Similarly, a personal creditor of the trustee who attaches trust property to satisfy the debt does not acquire title as a bona fide purchaser even if the creditor is unaware of the trust. See Restatement (Second) of Trusts § 308 (1959). The protection afforded by this section is consistent with that provided by the Bankruptcy Code. Property in which the trustee holds legal title as trustee is not part of the trustee's bankruptcy estate. 11 U.S.C. § 541(d).

ARTICLE 6

REVOCABLE TRUSTS

General Comment

Each section of this article deals with issues of significance not totally settled under current law. Because of the widespread use in recent years of the revocable trust as an alternative to a will, this short article is one of the more important parts of the Act. This article and of the other parts of this Act treat the revocable trust as the functional equivalent of a will. Section 601 provides that the capacity standard for wills is to apply in determining whether the settlor had capacity to create a revocable trust. Section 602, after providing that a trust is presumed revocable unless stated otherwise, prescribes the procedure for revocation or modification, whether the trust contains one or multiple settlors. Section 603 authorizes the trustee to follow a direction of the settlor, even if contrary to the terms of the trust. Section 604 provides that while a trust is revocable and the settlor has capacity, the settlor has all rights that would otherwise be granted to the beneficiaries. Section 605 prescribes a statute of limitations on contest of a trust that was revocable at death.

Sections 601 and 605, because they address requirements relating to creation and contest of trusts, are not subject to alteration in the terms of the trust. See Section 103. Sections 602, 603, and 604 are not so limited and are fully subject to modification by the settlor.

SECTION 601. CAPACITY OF SETTLOR OF REVOCABLE TRUST. An individual who has capacity to make a will has capacity to create, amend, revoke, or add property to a revocable trust.

Comment

This section is patterned after Restatement (Third) of Trusts § 11 (Tentative Draft No. 1, 1996). 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. The use of a pourover will assures that property not transferred to the trust during life will be combined with any trust property which the settlor did manage to convey.

Given this primary use of the revocable trust as a device for disposing of property at death, the capacity standard for wills, and not for lifetime gifts, should apply. If the standard of capacity affects lifetime management of the trust, this 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. See Restatement (Third) of Trusts § 11 cmt. b (Tentative Draft No. 1, 1996).

The application of the capacity standard for wills does not mean that the revocable trust must be executed with the formalities of a will. There are no execution requirements under this Act for a trust not created by will, and a trust, at least one containing personal property, may be created by an oral statement. See Section 405 and Comment.

The Act does not explicitly spell out the standard of capacity necessary to create other types of trusts, although Section 402 does require that the settlor have capacity. This section expressly states a capacity standard for the creation of revocable trusts because of the lack of clarity in the case law and the importance of the issue in modern estate planning. No such uncertainty exists with respect to the capacity standard for other types of trusts. To create a testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have the capacity during lifetime to transfer the property free of trust. See generally Restatement (Third) of Trusts § 11 (Tentative Draft No. 1, 1996).

SECTION 602. REVOCATION OR AMENDMENT OF REVOCABLE TRUST.

(a) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This subsection does not affect a trust created under an instrument executed before [the effective date of this [Act]].

(b) If a revocable trust is created or funded by more than one settlor:

(1) to the extent the trust consists of community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses; and

(2) to the extent the trust consists of other property, each settlor may revoke or amend the trust as to the portion of the trust property attributable to that settlor's contribution.

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

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

(2) unless the terms of the trust expressly make the prescribed method exclusive, by a will or any other method manifesting clear and convincing evidence of the settlor's intent.

(d) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.

(e) A settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust or the power.

(f) A [conservator] may revoke or amend a revocable trust with the approval of the court supervising the [conservatorship]. A [guardian] may not revoke the settlor's revocable trust.

Comment

Subsection (a), which provides that a settlor may revoke or modify a trust unless the terms of the trust expressly state that the trust is irrevocable, is contrary to the common law of trusts. The common law presumes that a trust is irrevocable absent evidence of contrary intent. See Restatement (Second) of Trusts § 330 (1959). This subsection does not govern trusts created prior to the effective date of this Act. Nor does this subsection govern trusts created in another State whose validity, under choice of law rules, is governed by the law of a State following the common law rule. In addition, this subsection does not prevent a trust from being reformed to make it irrevocable if the settlor was proceeding under a mistake of law at the time of its creation. See Section 413 (reformation of trust). But far easier than relying on this statute, choice of law rules, or reformation is for the drafter to simply express in the terms of the trust whether the trust is revocable or irrevocable.

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

Subsection (b) provides default rules for revocation or modification of a trust with multiple settlors. The settlor's authority to revoke or modify the trust varies depending on the extent to which the trust contains community property. To the extent the trust contains community property, the trust may be revoked by either spouse acting alone but may be modified only by joint action of both spouses. The purpose of this provision, and the reason for the use of joint trusts in community property States, is to preserve the community character of property transferred to the trust. While community property does not prevail in a majority of States, contributions of community property to trusts created in noncommunity property States does occur. This is due to the mobility of settlors, and the fact that community property retains its community character when a couple move from a community to a noncommunity property State. For this reason, subsection (b), and its provision on contributions of community property, should be enacted in all States, whether community or noncommunity.

With respect to separate property contributed to the trust, or all property of the trust if none of the trust property consists of community property, each settlor may revoke or modify the trust as to the portion of the trust contributed by that settlor. The inclusion of a rule for contributions of separate property does not mean that the drafters of this Act concluded that the use of joint trusts should be encouraged. The rule is included because of the widespread use of joint trusts in noncommunity property States in recent years. Due to the desire to preserve the community character of trust property, joint trusts are a necessity in community property States. Unless community property will be contributed to the trust, no such motivating reason exists for their creation in a noncommunity property State.

This section does not explicitly require that the other settlor or settlors be notified if a joint trust is revoked by less than all of the settlors, but such notice would be required under Section 813(g). While the trust is revocable and the settlor has capacity, Section 813(g) provides that the trustee's duty to keep the beneficiaries reasonably informed of developments is owed exclusively to the settlor. To avoid an issue on how this duty applies to a trust with multiple settlors, subsection (f) further provides that in the case of a trust with multiple settlors, this duty to keep the *settlor* informed extends to *all* of the settlors. Notifying the other settlor or settlors of the revocation or modification will place them in a better position to protect their interests. If the revocation or modification by less than all of the settlors breaches an implied agreement not to revoke or modify the trust, those harmed by the action could sue for breach of contract. If the trustee fails to notify the other settlor or settlors of the revocation, the parties aggrieved by the trustee's failure could sue the trustee for breach of trust.

Under subsection (c), the settlor may revoke a revocable trust by substantially complying with the method specified in the terms of the trust or by a will or any other method manifesting clear and convincing evidence of the settlor's intent to revoke. Only if the method specified in the terms of the trust is exclusive is use of the other methods prohibited. Even then, a failure to comply with a technical requirement, such as required notarization, may be excused as long as compliance with the method specified in the terms of the trust is otherwise substantial.

While revocation of a trust is ordinarily accomplished by signing and delivering a written document to the trustee, other methods, such as by physical act or by oral statement coupled with a withdrawal of the property, may also demonstrate the necessary intent. These less formal methods, because they provide less reliable indicia of intent, are not to be encouraged.

Subsection (c) does not require that a trustee concur in a revocation or modification of a trust. Such a concurrence would be necessary only if expressly required by the terms of the trust. If the trustee concludes that a modification unacceptably changes the trustee's duties, the trustee is free to resign. See Section 705.

Subsection (d), providing that upon revocation the trust property is to be distributed as the settlor directs, codifies a provision commonly included in revocable trust instruments.

Subsection (e) allows an agent under a power of attorney to revoke or modify a revocable trust only to the extent the terms of the trust or power of attorney expressly so permit. An express provision is required because most settlors usually intend the revocable trust, and not the power of attorney, to function as the settlor's principal property management device. The power of attorney is usually intended as a backup for assets not transferred to the revocable trust or to address specific topics, such as the power to sign tax returns or apply for certain government benefits, which are questionably beyond the authority of a trustee or which are not customarily granted to a trustee.

Many States allow a conservator to exercise the settlor's power of revocation with the prior approval of the court supervising the conservatorship. See, e.g., Unif. Prob. Code § 5-407. Section 103 allows a settlor to direct in the terms of the trust that this other law not apply. The fact that a conservator may be prohibited from revoking the trust does not mean that the conservator is prohibited from taking appropriate action to protect the settlor's interest if the settlor, now under conservatorship, is also a beneficiary of the trust. For example, the conservator could petition for removal of the trustee. See Section 706. The conservator, acting on the settlor-beneficiary's behalf, could also bring an action to enforce the trust according to its terms. Pursuant to Section 303, a conservator may act on behalf of the beneficiary whose estate the conservator controls whenever a consent or other action by the beneficiary is required or may be given under the Act.

Subsection (f) denies a guardian the right to revoke a revocable trust created by the ward. A "guardian," as defined in Section 102(5), does not have authority to manage property. Also, in most states statutory provisions authorizing a court to revise the ward's estate plan only apply to the person appointed to manage the ward's property, described as a "conservator" under this Act. Should it be desired to have the guardian participate on the settlor's behalf in the revocation of the ward's revocable trust, the appropriate course of action in most states is to request that the court grant the guardian conservatorship powers.

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

SECTION 603. DIRECTION OF SETTLOR. While a trust is revocable, the trustee may follow a direction of the settlor, even if contrary to the terms of the trust.

Comment

This section will have limited application upon a settlor's incapacity. Unless the agent or conservator succeeds to the settlor's powers with respect to revocation, amendment, or distribution as provided in Section 602, the agent or conservator does not have authority to give the trustee instructions contrary to the terms of the trust. Because a guardian cannot succeed to the settlor's powers with respect to revocation, amendment, or distribution unless the terms of the trust expressly so provide, a guardian under the Act rarely would have authority to give the trustee instructions contrary to the terms of the trust.

SECTION 604. SETTLOR'S EXERCISE OF RIGHTS OF BENEFICIARIES; PRESENTLY

EXERCISABLE POWERS OF WITHDRAWAL.

(a) Except as otherwise provided in subsection (b), while a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

(b) While a trust is revocable and the settlor does not have capacity to revoke the trust, rights of the beneficiaries are held by the beneficiaries unless the settlor is represented by an agent under a durable power of attorney, a [conservator], or a [guardian] who is someone other than the trustee.

(c) During the period the power may be exercised, the holder of a power of withdrawal has the rights of a settlor of a revocable trust under this section to the extent of the property subject to the power.

Comment

This section has the effect of postponing the enjoyment of rights of beneficiaries of revocable trusts until the death or incapacity of the settlor or other person holding the power to revoke the trust. This section thus recognizes that the settlor of a revocable trust is in control of the trust and should have the right to enforce the trust. Because of this degree of control, the trustee may also rely on a written direction of the settlor, even if contrary to the terms of the trust. Alternatively, the written direction of the settlor might be regarded as a modification of the trust.

Under this section, the duty to inform and report to beneficiaries is owed to the settlor of a revocable trust as long as the settlor has capacity. See also Section 813 (trustee's duty to inform and report to beneficiaries).

If the settlor loses capacity, subsection (b) provides that the duty to inform and report to beneficiaries is owed to the beneficiaries and not the settlor unless the settlor is represented by an agent under a durable power of attorney, conservator, or guardian who is someone other than the trustee. If the settlor is so represented, per Article 3, notices which would have been provided to the settlor may be given to the agent, conservator, or guardian, as applicable, and the agent, conservator, or guardian may give a consent on behalf of the person represented.

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

SECTION 605. LIMITATION ON ACTION CONTESTING VALIDITY OF REVOCABLE TRUST.

(a) Upon the death of the settlor of a trust that was revocable at the settlor's death, a judicial proceeding to contest the validity of the trust may not be initiated later than the first to occur of:

(1) [120] days after the date the trustee notified the person of the trust's existence, of the trustee's name and address, of whether the person is a beneficiary; and of the time allowed for initiating

a judicial proceeding to contest the trust; (2) two years following the settlor's death; or

(3) the date the person's right to contest was precluded by adjudication, consent, or limitation.

(b) Upon the death of the settlor of a trust that was revocable at the settlor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. This distribution may be made without liability unless the trustee knows of a pending judicial proceeding contesting the validity of the trust, or is notified by a potential contestant of a possible contest, followed by its initiation within 30 days.

(c) Until a contest is barred under subsection (a), a beneficiary of what later turns out to have been an invalid trust is liable to return any distribution received.

Comment

This section provides finality to when a contest of a revocable trust may be brought. The section is designed to allow an adequate time in which to bring a contest while at the same time allowing for the expeditious distribution of the trust property following the settlor's death.

A trust can be contested on a variety of grounds. The contestant may allege that no trust was created due to lack of intent to create a trust or lack of capacity (see Section 402), that undue influence, duress, or fraud was involved in the trust's creation (see Section 404), or that the trust had been revoked or modified (see Section 602). This section applies not only to contests to invalidate trusts in their entirety but also to contests to invalidate trusts in part.

Subsection (a) specifies the time period in which a contest can be brought. A contest is barred upon the first to occur of four possible events. The maximum possible time for bringing a contest is two years following the death of the settlor. Even without having received notice of the trust, this should provide potential contestants with ample time in which to determine whether they have an interest that will be affected by the trust. Many trustees may wish to shorten the contest period, however. They may do so by giving notice. Drawing from California Probate Code § 16061.7, subsection (a)(1) provides that a contest by a particular person is barred 120 days after the date the trustee informed the person of the trust's existence, of the trustee's name and address, and of whether the person is a beneficiary. The reference to "120" days has been placed in brackets to suggest that the enacting jurisdiction insert its statutory time period for contesting a will. Because two years from the settlor's death is the outside time limit for filing a contest, a contest is automatically barred two years after the settlor's death even if notice is sent by the trustee less than 120 days prior to the end of the period.

The statute of limitations provided in this section is not intended to supersede any other statute of limitations that might apply to bar contest of the trust. Consequently, under subsection (a)(3) the bringing of a contest is not only precluded by a prior adjudication or consent but also by another statute of limitations.

Because only a tiny minority of trusts are actually contested, trustees should not be restrained from making distributions because of concern about possible liability should a contest later be filed.

Subsection (b) facilitates the expeditious distribution of the trust. Upon the death of the settlor of a trust that was revocable at the settlor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust absent actual knowledge of a pending judicial proceeding contesting the validity of the trust, or notification by a potential contestant of a possible contest, followed by the filing of the contest within 30 days. While a distribution in compliance with subsection (b) discharges the trustee from potential liability, per subsection (c) the beneficiaries of what may later turn out to have been an invalid trust are liable to return any distribution received. Issues as to whether the distribution must be returned with interest, or with income earned or profit made are not addressed in this section but are left to the common law and the courts.

This section does not address possible liability for the debts of the deceased settlor nor a trustee's possible liability to creditors for distributing trust assets. For possible liability of the trust, see Section 505(a)(3) and Comment. Whether a trustee can be held liable for creditor claims following distribution of trust assets is addressed in proposed Uniform Probate Code § 6-102, which was approved by the Uniform Law Commissioners at its 1998 Annual Meeting.

ARTICLE 7

OFFICE OF TRUSTEE

General Comment

This article contains a series of default rules dealing with the office of trustee, all of which may be superseded by the terms of the trust. Sections 701 and 702 address the process for getting a trustee into office, including the procedures for indicating an acceptance and whether bond will be required. Section 703 addresses cotrustees, permitting the cotrustees to act by majority action and specifying the extent to which one trustee may delegate to another. Sections 704 through 707 address changes in the office of trustee, specifying the circumstances when a vacancy must be filled, the procedure for resignation, the grounds for removal, and the process for appointing a successor. Sections 708 and 709 prescribe the standards for determining trustee compensation and reimbursement for expenses advanced.

Except for the court's authority to require bond, all of the provisions of this article are subject to modification in the terms of the trust. See Section 103.

SECTION 701. ACCEPTANCE OR DECLINATION OF TRUSTEESHIP.

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

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

(2) unless the terms of the trust make the specified method exclusive, accepting delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating an acceptance of the trusteeship.

(b) A person designated as trustee who has not yet accepted the trusteeship may decline the trusteeship. A failure to accept the trusteeship within a reasonable time after the person knows of the designation is a declination of the trusteeship.

(c) A person designated as trustee, without accepting the trusteeship, may:

(1) act to preserve the trust property if, within a reasonable time after acting, the person sends a written declination of the trusteeship to the settlor or, if the settlor is dead or lacks capacity, to a qualified beneficiary; and

(2) inspect or investigate trust property to determine potential environmental liability.

Comment

This section, specifying the requirements for a valid acceptance of the trusteeship, implicates many of the same issues as arise in determining whether a trust has been revoked. Consequently, the two provisions track each other closely. Compare Section 701(a) with Section 602(c) (procedure for revoking or modifying trust). Procedures specified in the terms of the trust are recognized, but only substantial, not literal compliance is required. A failure to meet technical requirements, such as notarization of the trustee's signature, does not result in a failure to accept. Ordinarily, the trustee will indicate an acceptance by signing the trust instrument or signing a separate written instrument. However, this section recognizes any other method indicating the necessary intent, such as by knowingly exercising trustee powers, unless the terms of the trust make a specified method exclusive. This section also does not preclude an acceptance by estoppel or damages for an unreasonable delay in signifying a decision as to an acceptance or declination. For general background on issues relating to trustee acceptance and declination, see Restatement (Second) of Trusts § 102 (1959); Restatement (Third) of Trusts § 35 (Tentative Draft No. 2, 1999). Consistent with Section 201(b), which emphasizes that continuing judicial supervision of a trust is the rare exception, not the rule, the Act does not require that a trustee qualify in court.

To avoid the inaction that can result if the person designated as trustee fails to communicate a decision to either accept or decline the trusteeship, subsection (b) provides that a failure to accept within a reasonable time constitutes a declination of the trusteeship. A trustee's declination normally precludes a later acceptance but does not cause the trust to fail. See Restatement (Third) of Trusts § 35 cmt. c (Tentative Draft No. 2, 1999). As to filling vacancies in the event of a declination, see Section 704.

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

Subsection (c)(1) makes clear that a nominated trustee may act expeditiously to protect the trust property without being considered to have accepted the trusteeship. However, upon conclusion of the intervention, the nominated trustee must send a written declination of office to the settlor, if living and competent, otherwise to a qualified beneficiary.

Because of the costly liability often at issue, subsection (c)(2) allows a person designated as trustee to inspect the trust property for environmental hazards without accepting the trusteeship. See also Sections 816(14) (trustee powers with respect to environmental conditions), and 1011(b) (trustee nonliability for violation of environmental law arising from ownership and control of trust property). The Act does not provide for reimbursement of expenses incurred prior to a trustee's acceptance of office. Reimbursement of the costs of an environmental inspection is normally a subject for negotiation by the parties.

SECTION 702. TRUSTEE'S BOND.

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

(b) The court may specify the amount of a bond, its liabilities, and whether sureties are necessary. The court may modify or terminate a bond at any time.

(c) The cost of a bond is an expense of the trust.

Comment

This provision is consistent with the Restatement and with the bonding provisions of the Uniform Probate Code. See Restatement (Third) of Trusts § 34 cmt. a (Tentative Draft No. 2, 1999); Unif. Probate Code §§ 3-604 (personal representatives), 5-410 (conservators), and 7-304 (trustees). Because a bond is required only if the terms of the trust require bond or a bond is found by the court to be necessary to protect the interests of beneficiaries, bond should rarely be required under the Act. This section does not specifically excuse bond for financial-service institutions with trust powers, preferring instead to leave this topic to separate legislation.

This section does not attempt to detail all of the technical requirements that the court may impose although such requirements are listed in the Uniform Probate Code sections cited above. The amount of a bond otherwise required may be reduced by the value of trust property deposited in a manner that prevents its unauthorized disposition, and by the value of real property which the trustee, by express limitation of power, lacks power to convey without court authorization. Also, the court may excuse or otherwise modify a requirement of a bond, reduce or increase the amount of a bond, release a surety, or permit the substitution of another bond with the same or different sureties.

SECTION 703. COTRUSTEES.

(a) Cotrustees who are unable to reach a unanimous decision may act by majority decision. If a cotrustee is unable to participate in a decision because of conflict of interest, the decision may be made by a majority of the remaining trustees.

(b) If a vacancy occurs in a cotrusteeship, the remaining cotrustees may act for the trust.

(c) If a cotrustee is unavailable to perform duties because of absence, illness, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining cotrustee or cotrustees may act for the trust as though they were the only trustees.

(d) If a trust has more than one trustee:

(1) each trustee shall participate in the administration of the trust, and take reasonable steps to prevent a cotrustee from committing a breach of trust and compel a cotrustee to redress a breach of trust; and

(2) neither trustee may delegate to a cotrustee the performance of a function not normally delegated by a trustee if it a function the settlor reasonably expected the trustees to perform jointly unless the inability to delegate would result in adverse tax consequences to the trustee or the trust.

(e) A trustee who does not join in an action of another trustee is not treated as having participated in the action. A dissenting trustee who joins in an action at the direction of a majority of the trustees is not treated as having participated in the action if the dissenting trustee, at or before the time of the action, expressed the dissent by written or other record to any other cotrustee.

Comment

Subsection (a) is in accord with Restatement (Third) of Trusts § 39 (Tentative Draft No. 2, 1999), which rejects earlier Restatement formulations requiring unanimity among the trustees of a private trust. See Restatement (Second) of Trusts § 194 (1959). This section is consistent with the prior Restatement rule applicable to charitable trusts, which allowed for action by a majority. See Restatement (Second) of Trusts § 383 (1959). As provided in Section 103, the rules of this section are subject to a contrary provision in the terms of the trust.

Under subsection (b), a majority of the remaining trustees may act for the trust when a vacancy occurs in a cotrusteeship. Per Section 704, a vacancy in a cotrusteeship need be filled only if there is no trustee remaining in office.

By permitting the trustees to act by a majority, this section contemplates that there may be a trustee or trustees who might dissent. Subsection (e) protects the dissenting cotrustee by providing that the dissenter is not treated as having participated in the action. As long as the trustee expressed the dissent in writing or by other record to a cotrustee at or before the time of the action in question, the dissenting trustee is protected even if the dissenter joined the action at the direction of the majority, such as to satisfy the demand of the other side to the transaction. For the definition of "record," see Section 102(13). However, should an action by the other trustee or trustees constitute a material breach of trust, the dissenting trustee may be held liable under subsection (d) for failing to take reasonable steps to rectify the improper action. The responsibility to take action against a cotrustee codifies the substance of Sections 184 and 224 of the Restatement (Second) of Trusts (1959).

Subsection (d) also addresses the extent to which a trustee may delegate the performance of functions to a cotrustee. The standard differs from the standard for delegation to an agent as provided in Section 807 because the two situations are different. This provision is premised on the assumption that most settlors wish all of their cotrustees to participate in the trust's management. Utilizing language from Restatement (Second) of Trusts § 171 (1959), the former provision of the Restatement governing delegation to both agents and cotrustees, subsection (d) prohibits a trustee from delegating to another trustee functions the settlor reasonably expected the trustees to perform jointly unless it is the sort of ministerial act that trustees normally delegate to agents. The exact extent to which a trustee may delegate functions to another trustee in a particular case will vary depending on the reasons the settlor decided to appoint cotrustees. The better practice is to address the division of functions in the terms of the trust, as allowed by Section 103.

Also, because of the serious tax consequences that can sometimes result when a beneficiary or a person legally obligated to support a beneficiary is named as trustee, subsection (d) creates an exception to the general rule on delegation allowing a cotrustee to delegate any function that would cause adverse tax consequences to the trustee or trust.

A cotrustee's assumption of duties because of a trustee's inability to perform the trusteeship is not a delegation. Under subsection (c), a cotrustee may assume some or all of the functions of another trustee who is unavailable to perform duties because of absence, illness, or other temporary incapacity.

SECTION 704. VACANCY IN TRUSTEESHIP; APPOINTMENTS BY BENEFICIARIES

OR COURT.

(a) A vacancy in a trusteeship occurs if:

(1) a person designated as trustee declines the trusteeship;

(2) a person designated as trustee cannot be identified or does not exist;

(3) a trustee resigns;

(4) a trustee is disqualified or removed;

(5) a trustee dies; or

(6) a [guardian] or [conservator] is appointed for an individual serving or eligible to serve as trustee.

(b) A trustee must be appointed to fill a vacancy in a trusteeship only if the trust has no remaining trustee.

(c) A vacancy in a trusteeship required to be filled must be filled in the following order of priority:

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

(2) by a person appointed by the court.

(d) Whether or not there is a vacancy in a trusteeship required to be filled, the court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust.

Comment

This section lists the ways in which a trusteeship becomes vacant and the rules on filling the vacancy. See also Sections 701 (acceptance or declination of trusteeship), 705 (resignation of trustee), and 706 (removal of trustee). Good drafting practice suggests that the terms of the trust deal expressly with the problem of vacancies, naming successors and addressing the procedure for filling a vacancy in the absence of a named successor. Per Section 103, this section applies only if the terms of the trust fail to specify a procedure..

Subsection (b) provides that a vacancy in the cotrusteeship need be filled only if the trust has no remaining trustee. If a vacancy in the cotrusteeship is not filled, Section 703 authorizes the remaining cotrustees to continue to administer the trust. However, as provided in subsection (d), the court, exercising its inherent equity authority, can always appoint additional trustees if the appointment would promote better administration of the trust. See Restatement (Second) of Trusts § 108 cmt. e (1959); Restatement (Third) of Trusts § 34 cmt. e (Tentative Draft No. 2, 1999).

Absent an effective provision in the terms of the trust, subsection (c)(1) permits a vacancy in the trusteeship to be filled, without the need for court approval, by a person selected by unanimous agreement of the qualified beneficiaries, who, per Section 705(a), may also receive the trustee's resignation. If a trustee resigns following notice to the beneficiaries as provided in Section 705(a), the trust may be transferred to a successor appointed pursuant to subsection (c)(1), all without court involvement. Per Section 706, a beneficiary without authority to join in a beneficiary appointment may petition the court for removal of the trustee appointed by the qualified beneficiaries.

Subsection (c)(2) authorizes the court to fill a vacancy if the qualified beneficiaries have failed to make an appointment. Factors for the court to consider in making its selection are found in Restatement (Second) of Trusts § 108 cmt. d (1959); and Restatement (Third) of Trusts § 34 cmt. f (Tentative Draft No. 2, 1999).

In the case of a revocable trust, the appointment of a successor will normally be made directly by the settlor. As to the duties of a successor trustee, see Section 812.

SECTION 705. RESIGNATION OF TRUSTEE.

(a) A trustee may resign:

(1) upon at least 30 days' notice, by written or other record, to the qualified beneficiaries; or

(2) with the approval of the court.

(b) A trustee who plans to resign must inform all cotrustees of the proposed resignation.

(c) A qualified beneficiary by a writing or other record may waive a notice otherwise required under this section.

(d) In approving a resignation, the court may impose orders and conditions reasonably necessary for the protection of the trust property, including the appointment of a special fiduciary.

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

Comment

This section provides several alternative methods by which a trustee may resign. As authorized by Section 103, a trustee may always resign as provided in the terms of the trust. If the terms of the trust do not provide a method for resignation or if the method for whatever reason is not followed, subsection (a) provides that a trustee may resign by giving notice to the qualified beneficiaries. A resigning trustee may also seek approval of the court.

Section 813 requires a trustee's report whenever there is a change of trustees. See also Restatement (Second) of Trusts § 106 cmt. b, and Restatement (Third) of Trusts § 36 cmt. d (Tentative Draft No. 2, 1999), which, like subsection (e), provide that resignation does not release the resigning trustee from potential liabilities.

SECTION 706. REMOVAL OF TRUSTEE.

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

(b) The court may remove a trustee if:

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

(2) lack of cooperation among cotrustees substantially impairs the administration of the trust;

(3) investment decisions of the trustee, although not constituting a breach of trust, have resulted in investment performance persistently and substantially below that of comparable trusts;

(4) because of changed circumstances, unfitness, or unwillingness or inability to administer the trust, removal of the trustee is in the best interest of the beneficiaries.

(c) Pending a final decision on a petition to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under Section 1002(b) as may be necessary to protect the trust property or the interests of the beneficiaries.

Comment

Subsection (a), unlike the Restatement, grants the settlor of an irrevocable trust the right to petition for removal of a trustee. See Restatement (Second) of Trusts § 107 (1959); Restatement (Third) of Trusts § 37 (Tentative Draft No. 2, 1999). The right to petition for removal does not give the settlor of an irrevocable trust any other rights, such as the right to an annual report or to receive other information concerning administration of the trust. The right of a beneficiary to petition for removal does not apply to a revocable trust while the settlor has capacity. While the trust is revocable and the settlor has capacity, the settlor holds all rights that would otherwise be granted to the beneficiaries. See Section 604.

While removal is ordinarily ordered by a court, the topic may also be addressed in the terms of the trust. See Section 103. In fashioning a removal provision for an irrevocable trust, the drafter should remain cognizant of the potential inclusion of the trust in the settlor's federal gross estate if the settlor retains the power to be appointed as trustee.

Subsection (b) allows removal for untoward action on the part of a trustee, such as for a breach of trust, but the section is not so limited. The grounds listed in subsection (b) allow for removal under a variety of circumstances where the trustee is not acting in the best interests of the beneficiaries or in conformity with the expectations of the settlor.

Because of its importance to the long-term value of the beneficiaries' interests, subsection (b)(3) allows a trustee to be removed if the investment decisions of the trustee, although not constituting a breach of trust, have resulted in investment performance persistently and substantially below that of comparable trusts.

To honor the settlor's reasonable expectations, subsection (b)(4) allows a trustee to be removed because of changed circumstances. Changed circumstances justifying removal of a trustee might include a substantial change in the character of the trustee which has occurred between the date of the trust's creation and the date the removal petition is filed.

Friction between cotrustees, inability of the trustee and beneficiaries to get along through fault of the trustee, indifference on the part of the trustee, and mediocre service may all justify removal if in the best interests of the beneficiaries and not inconsistent with the purposes of the trust.

A particularly appropriate circumstance justifying removal of the trustee is a serious breach of the trustee's duty to keep the beneficiaries reasonably informed of the administration of the trust or to comply with a beneficiary's request for information as required by Section 813. Failure to comply with this duty may make it impossible for the beneficiaries to protect their interests. It may also mask more serious violations by the trustee.

While the failure of a trustee to act in the beneficiaries' best interest is an important factor in determining whether removal is appropriate, the settlor's purposes in creating the trust should not be compromised. Complying with the beneficiaries' wishes to the detriment of the settlor's purposes may justify replacement with a trustee who will comply with the fundamental responsibility to administer a trust in accordance with its terms.

SECTION 707. DELIVERY OF PROPERTY BY FORMER TRUSTEE. Unless a cotrustee remains in office or the court otherwise orders, and until the trust property is delivered to a successor trustee or to a person appointed by the court to receive the property:

(1) a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the trust property; and

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

Comment

This section addresses the continuing authority of a former trustee. Subject to the power of the court to make other arrangements, a former trustee has continuing authority until the property is delivered to a successor. However, if a cotrustee remains in office, there is no reason to grant such continuing authority, and none is granted. If the trustee has resigned or been removed, the continuing authority is granted to the former trustee; if the former trustee has died, to the former trustee's personal representative; if the former trustee has been adjudicated incapacitated, to the former trustee's guardian or conservator. Whether or not a former trustee remains in office, the former trustee remains liable for actions or omissions during the trustee's term of office until liability is barred.

Unless a cotrustee remains in office, Section 813 requires a trustee's report whenever there is a change of trustees. Section 1012(d) protects third persons who deal in good faith with a former trustee without knowledge that the person is no longer a trustee. There is also ample authority in the Act for the appointment of a special fiduciary prior to the assumption of duties by a successor trustee so that it will not be necessary for a resigning or removed trustee to continue with the powers and duties of office until the successor is in place. See Sections 704(d) (court may appoint additional trustee or special fiduciary whenever court considers appointment necessary for administration of trust), 705(d) (in approving resignation, court may impose conditions necessary for protection of trust property, including appointment of special fiduciary), 706(c) (pending decision on petition for removal, court may order appropriate relief, including appointment of special fiduciary), 1002(b)(5) (court may appoint special fiduciary upon breach of trust).

SECTION 708. COMPENSATION OF TRUSTEE.

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

(b) If the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified, but the court may allow more or less compensation if:

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

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

Comment

Subsection (a) establishes a standard of reasonable compensation. For a list of factors relevant in determining reasonable compensation, see Restatement (Second) of Trusts § 242 cmt. b (1959); Restatement (Third) of Trusts § 38 cmt. c (Tentative Draft No. 2, 1999). Because "trustee" as defined in Section 102(19) includes not only an individual trustee but also cotrustees, each trustee, including a cotrustee, is entitled to reasonable compensation under the circumstances. In setting compensation, the services actually performed and responsibilities assumed by the trustee should be closely examined. For example, an adjustment in compensation may be appropriate if the trustee has delegated significant duties, such as the delegation of investment authority, to outside managers. See Section 807 (delegation by trustee). On the other hand, a trustee with special skills, such as those of a real estate agent, may be entitled to extra compensation for performing services that would ordinarily be delegated. See Restatement (Second) of Trusts § 242 cmt. d (1959); Restatement (Third) of Trusts § 38 cmt. d (Tentative Draft No. 2, 1999).

Subsection (b) permits the reasonable compensation standard to be overridden or clarified by the terms of the trust, subject to the court's inherent equity power to make adjustments downward or upward in appropriate circumstances. Whether a provision in the terms of the trust setting the amount of the trustee's compensation is binding on a successor trustee is a matter for interpretation. Also a question for interpretation is whether a beneficial provision for the trustee in the terms of the trust is in addition to or in lieu of the trustee's regular compensation. Another possible uncertainty is whether the discharge of the beneficial provision is conditional on the person performing services as trustee. See Restatement (Second) of Trusts § 242 cmt. f (1959); Restatement (Third) of Trusts § 38 cmt. e (Tentative Draft No.2, 1999).

Compensation may be set by agreement. A trustee may enter into an agreement with the beneficiaries for lesser or increased compensation, although an agreement increasing compensation is not binding on a nonconsenting beneficiary. A trustee may agree to waive compensation and should do so prior to rendering significant services if concerned about possible gift and income tax liability on the compensation accrued prior to the waiver. See Rev. Rul. 66-167, 1966-1 C.B. 20. See also Restatement (Second) of Trusts § 242 cmt. i, j (1959); Restatement (Third) of Trusts § 38 cmt. f, g (Tentative Draft No. 2, 1999).

The fact that a trust has more than one trustee does not mean that the trustees together are entitled to more compensation than had either acted alone. Nor does the appointment of multiple trustees mean that the trustees are eligible to receive the compensation in equal shares. The total amount of the compensation to be paid and how it will be divided depend on the totality of the circumstances. Factors to be considered include the settlor's reasons for naming multiple trustees and the level of responsibility assumed and exact services performed by each trustee. Often the fees of cotrustees will be in the aggregate higher than that for a single trustee because of the duty of each trustee to participate in administration and not delegate to a cotrustee duties the settlor expected the trustee to perform. See Restatement (Third) of Trusts § 38 cmt. i (Tentative Draft No. 2, 1999).

Section 816(16) grants the trustee authority to fix and pay its compensation without the necessity of prior court review, but without precluding the right of a beneficiary to object to the compensation in a later judicial proceeding. Allowing the trustee to pay its compensation without prior court approval promotes efficient trust administration but does place a significant burden on a beneficiary who believes the compensation is unreasonable. To provide a beneficiary with time to take action, if the beneficiary believes that action is appropriate, and because of the importance of trustee's fees to the beneficiaries' interests, Section 813(b)(4) requires a trustee to provide the qualified beneficiaries with advance notice of any change in the method or rate of the trustee's compensation. Failure to provide such advance notice constitutes a breach of trust, possibly justifying removal under Section 706.

SECTION 709. REPAYMENT OF EXPENDITURES. A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for:

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

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

Comment

A trustee has the authority to expend trust funds as necessary in the administration of the trust, including expenses incurred in the hiring of agents. See Sections 807 (delegation by trustee) and 816(16) (trustee to pay expenses of administration from trust).

Paragraph (1) clarifies that a trustee is entitled to reimbursement from the trust for incurring expenses within the trustee's authority. The trustee may also withhold appropriate reimbursement for expenses before making distributions to the beneficiaries. Restatement (Second) of Trusts § 244 cmt. b (1959); Restatement (Third) of Trusts § 38 cmt. b (Tentative Draft No. 2, 1999). But a trustee is ordinarily not entitled to reimbursement for incurring unauthorized expenses. Such expenses are normally the personal responsibility of the trustee.

As provided in paragraph (2), a trustee is entitled to reimbursement for unauthorized expenses only if the unauthorized expenditures benefitted the trust The purpose of paragraph (2), which is derived from Restatement (Second) of Trusts § 245, is not to ratify the unauthorized conduct of the trustee, but to prevent the unjust enrichment of the trust. Given this purpose, a court, on appropriate grounds, may delay or even deny reimbursement for expenses which benefitted the trust. For a list of factors which the court may wish to consider in making this determination, see Restatement (Second) of Trusts § 245 cmt. g (1959).

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

ARTICLE 8

FIDUCIARY ADMINISTRATION

General Comment

This article states the fundamental duties of a trustee and lists the trustee's powers. The duties listed are not new, but how the particular duties are formulated and applied has changed over the years. This part was drafted where possible to conform with the 1994 Uniform Prudent Investor Act, which has been enacted in over half the States. The Uniform Prudent Investor Act prescribes a trustee's responsibilities with respect to the management and investment of trust property. The Uniform Trust Act, however, also addresses a trustee's duties with respect to distribution to beneficiaries.

Because of the widespread adoption of the Uniform Prudent Investor Act, no effort has been made to disassemble and fully integrate the Prudent Investor Act into the Trust Act. Instead, states enacting the Trust Act are encouraged to recodify their version of the Prudent Investor Act by reenacting it as Article 9 of this Act rather than leaving it elsewhere in their codes. Where the Trust Act and Uniform Prudent Investor Act overlap, States should enact the provisions of this article and not enact the duplicative provisions of the Prudent Investor Act. Sections of this article which overlap with the Prudent Investor Act are Sections 802 (duty of loyalty), 803 (impartiality), 805 (costs of administration), trustee's skills (806), and delegation (807). For a list of the sections of the Prudent Investor Act which should not be enacted as part of this Act, see the General Comment to Article 9.

All of the provisions of this article are subject to modification by the terms of the trust except that the terms of the trust may not negate a trustee's fundamental obligation to act as a fiduciary, in good faith, and with regard to the purposes of the trust and the interests of the beneficiaries. See Section 103(b)(2).

SECTION 801. DUTY TO ADMINISTER TRUST. Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in conformity with this [Act].

Comment

This section confirms that the primary duty of a trustee, above all others, is to follow the terms and purposes of the trust. Only if the terms of a trust are silent or for some reason invalid on a particular issue are the trustee's duties derived exclusively from this Act. This section also confirms that a trustee does not have a duty to act until the trustee has accepted the trusteeship. See Section 701 and Comment (acceptance or declination of trusteeship).

While a trustee generally must administer a trust in accordance with its terms and purposes, the purposes and particular terms of the trust will on occasion conflict. Should such a conflict occur because of circumstances not anticipated by the settlor, it may be appropriate for the trustee to petition under Section 411 to modify or terminate the trust. The trustee is not required to perform a duty prescribed by the terms of the trust if performance would be impossible, invalid, illegal or contrary to public policy. See Section 403 (purposes for which trust can be created).

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

SECTION 802. DUTY OF LOYALTY.

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

(b) Subject to the rights of persons dealing with or assisting the trustee as provided in Section 1012, a transaction involving trust property which is affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:

(1) the transaction was approved by the court;

(2) the beneficiary failed to initiate a judicial proceeding within the time allowed by Section 1006;

(3) the beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with Section 1010; or

(4) the transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.

(c) A transaction is presumed to be affected by a conflict between personal and fiduciary interests if it involves a sale, encumbrance, or other transaction concerning the trust property entered into by the trustee with:

(1) the spouse of the trustee, or the trustee's descendants, siblings, parents, or their spouses;

(2) an agent or attorney of the trustee;

(3) a corporation or other enterprise, or its affiliate, in which the trustee has an interest that might affect the trustee's best judgment.

(d) A transaction between a trustee and a beneficiary that does not concern trust property but which occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary and from which the trustee obtains an advantage is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.

(e) A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.

(f) An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not a prohibited act of self-dealing but must otherwise comply with this section and with the prudent investor rule of [Article 9]. The trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust if the trustee discloses at least annually to the persons entitled under Section 813 to receive a copy of the trustee's annual report the rate and method by which the compensation was determined.

(g) This section does not preclude the following transactions, if fair to the beneficiaries:

(1) an agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee; or

(2) a transaction between a trust and another trust, decedent's estate, or [conservatorship] of which the trustee is a fiduciary or in which a beneficiary has an interest.

(h) Upon petition by a trustee or beneficiary, the court may appoint a special fiduciary to make a decision with respect to any proposed transaction that, if entered into by the trustee, might violate this section.

Comment

This section addresses the duty of loyalty, perhaps the most fundamental duty of the trustee. Subsection (a) states the general principle, which is copied from Restatement (Second) of Trusts § 170(1) (1959). A trustee owes a duty of loyalty to the beneficiaries, a principle which is sometimes expressed as the obligation by the trustee not to place the trustee's own interests over those of the beneficiaries. Most but not all violations of the duty of loyalty concern transactions involving the trust property, but breaches of the duty can take a myriad of other forms. For a discussion of the different types of violations, see 2A Austin W. Scott & William F. Fratcher, The Law of Trusts §§ 170-170.24 (4th ed. 1987).

Subsection (b) states the general rule with respect to transactions involving trust property which are affected by a conflict of interest. A transaction involving the trust property which is affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction. Transactions involving trust property entered into by a trustee for the trustee's own account are voidable without further proof under the "no further inquiry" rule. Such transactions are irrebuttably presumed to be affected by a conflict between personal and fiduciary interests. It is immaterial whether the trustee acts in good faith or pays a fair consideration. See Restatement (Second) of Trusts § 170 cmt. b (1959).

The appropriate result is less clear with respect to transactions involving trust property entered into with persons who have close business or personal ties to the trustee. Subsection (c) resolves the issue by requiring the trustee to prove the propriety of such transactions. Transactions between a trustee and certain relatives, business associates, or enterprises in which the trustee has a beneficial interest are presumptively voidable. Transactions involving trust property with parties not on the list are not necessarily valid, however. While a presumption does not apply, a transaction may still be voided if the beneficiary proves that a conflict between personal and fiduciary interests exists and that the transaction was affected by the conflict.

The right of a beneficiary to void a transaction affected by a conflict of interest is elective. If the transaction proves profitable to the trust, the beneficiary will likely allow the transaction to stand. Also, as provided in subsection (b), no breach of the duty of loyalty occurs if the transaction was expressly authorized by the terms of the trust or approved by the court. In addition, a beneficiary may be precluded from acting by a statute of limitations or laches, or by choosing to ratify the transaction, either prior to or subsequent to its occurrence. See Sections 1006, 1010. In determining whether a beneficiary has consented to a transaction, the principles of representation from Article 3 may be applied.

Subsection (b)(4), derived from Section 3-713(1) of the Uniform Probate Code, allows a trustee to implement a contract or pursue a claim which the trustee entered into or acquired before the person became or contemplated becoming trustee. While this subsection allows the transaction to proceed without automatically being voidable by a beneficiary, the transaction is not necessarily free from scrutiny. In implementing the contract or pursuing the claim, the trustee must still complete the transaction in a way that will avoid a conflict between the trustee's fiduciary and personal interests. Because avoiding such a conflict will frequently be difficult, the trustee should consider petitioning the court to appoint a special trustee, as authorized by subsection (h), to work out the details and complete the transaction.

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

Subsection (e), which allows a beneficiary to void a transaction entered into by the trustee which involved an opportunity belonging to the trust, is based on Restatement (Second) of Trusts § 170 cmt. k (1959).

Subsection (f) creates an exception to the no further inquiry rule for trustee investments in so called "proprietary funds." Proprietary funds are mutual fund investments which are typically sponsored by an affiliate of a financial-service institution trustee. Under a typical proprietary fund arrangement, the mutual fund company will pay to the financial-service institution trustee an annual fee based on a percentage of the fund's value for providing investment advice, custody, transfer agent, distribution, or shareholder services that would otherwise be provided by agents of the fund. Subsection (f) provides that such dual investment-fee arrangements are not per se prohibited acts of self dealing. Subsection (f) does not otherwise waive or lessen a trustee's fiduciary obligations. The trustee, in deciding whether to invest in a proprietary fund, continues to have an obligation not to place its interests above those of the beneficiaries. The investment decision must also comply with the enacting jurisdiction's prudent investor rule. To obtain the protection afforded by this subsection, the trustee must disclose at least annually to the beneficiaries entitled to receive a copy of the trustee's annual report the rate and method by which the additional compensation was determined. Furthermore, the selection of a mutual fund, and the resulting delegation of certain of the trustee's functions, may be taken into account in setting the trustee's regular compensation. See Section 708 (trustee's compensation).

Subsection (g) contains several exceptions to the general duty of loyalty, which apply if the transaction was fair to the beneficiaries. A trustee is allowed to negotiate in freedom about the terms of appointment and rate of compensation. Consistent with Restatement (Second) of Trusts § 170 cmt. r (1959), a trustee may also engage in a transaction involving another trust of which the trustee is also trustee, a transaction with a decedent's or conservatorship estate of which the trustee is personal representative or conservator, or a transaction with another trust or other fiduciary relationship in which a beneficiary of the trust has an interest. With respect to a transaction involving another fiduciary role, the trustee need not give advance notice of the transaction to the beneficiaries unless required by some other provision. See, e.g., Section 813(c).

SECTION 803. IMPARTIALITY. If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing and distributing the trust property, giving due regard to the beneficiaries' respective interests.

Comment

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

SECTION 804. PRUDENT ADMINISTRATION. A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

Comment

The duty to administer a trust with prudence is a fundamental duty of the trustee. This duty is not affected by whether the trustee receives compensation but may be altered by the terms of the trust. See Section 103 (effect of the terms of the trust; nonwaivable provisions). For a more detailed statement of the duty of prudence with respect to trustee investment, including a list of factors to be taken into account in determining whether the standard has been met, see Section 2 of the Uniform Prudent Investor Act.

SECTION 805. COSTS OF ADMINISTRATION. In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.

Comment

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 compensation and reimbursement of trustees, see Sections 708 and 709. The duty not to incur unreasonable costs applies to delegation to agents as well as to other aspects of trust administration. In deciding whether and how to delegate, the trustee must be alert to balancing projected benefits against the likely costs. The trustee must also be alert to adjusting compensation for functions which the trustee has delegated to others in order to protect the beneficiary against "double dipping." The obligation to incur only necessary or appropriate costs of administration has long been part of the common law and of the Restatement. See Restatement (Second) of Trusts § 188 (1959).

This section is similar to Section 7 of the Uniform Prudent Investor Act.

SECTION 806. TRUSTEE'S SKILLS. A trustee shall apply the full extent of the trustee's skills. A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise.

Comment

This section requires a trustee to apply the full extent of the trustee's skills, whether the trustee actually possesses those skills or incorrectly represents such competence. In other words, a skilled trustee who makes representation of minimal competence is subject to the standard of a skilled trustee as is a trustee of modest abilities who makes representations of great competence. This section is similar to Section 7-302 of the Uniform Probate Code, Restatement (Second) of Trusts § 174 (1959), and Section 2(f) of the Uniform Prudent Investor Act.

SECTION 807. DELEGATION BY TRUSTEE.

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

(1) selecting an agent;

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

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

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

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

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

Comment

This section permits trustees to delegate various aspects of trust administration to agents, subject to the standards of the section. The language is derived from Section 9 of the Uniform Prudent Investor Act. See also John H. Langbein, Reversing the Nondelegation Rule of Trust-Investment Law, 59 Mo. L. Rev. 105 (1994) (discussing prior law).

This section encourages and protects the trustee in making delegations appropriate to the facts and circumstances of the particular trust. Whether particular functions of the trustee are delegable is based on whether it is a function that a prudent trustee might delegate under similar circumstances. For example, delegation of trust administration and reporting duties might be prudent for a family trustee but unnecessary for a corporate trustee.

This section applies only to delegation to agents and not to delegation to a cotrustee. For the provision authorizing delegation to a cotrustee, see Section 703(d)(2).

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

SECTION 808. POWERS TO DIRECT.

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

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

Comment

This section is derived from Restatement (Second) of Trusts § 185 (1959). Powers to direct in the terms of a trust usually relate either to choice of investment or management of closely-held business interests. A power to direct must be distinguished from a veto power. A power to direct involves action initiated and within the control of a third party. The trustee usually has no responsibility other than to carry out the direction when made. But if a third party holds a veto power, the trustee is responsible for initiating the decision, subject to the third party's approval. A trustee who administers a trust subject to a veto power occupies a position akin to that of a cotrustee and is responsible for taking appropriate action if the third party's refusal to consent would result in a breach of trust. See Restatement (Second) of Trusts § 185 cmt. g (1959); Section 703(d)(1)(duties of cotrustees).

Powers to direct take a variety of forms. Frequently, the person holding the power is directing the investment of the holder's own beneficial interest. Such self-directed accounts are particularly prevalent among trusts holding interests in employee benefit plans or individual retirement accounts. See ERISA § 404(c). But for the type of donative trust which is the primary focus of this Act, the holder of the power to direct is frequently acting on behalf of others. In that event, the holder, as provided in subsection (b), is presumptively acting in a fiduciary capacity and can be held liable should the power holder's conduct constitute a breach of trust.

Powers to direct are most effective when the trustee is not deterred from honoring the exercise of the power due to concerns about possible liability. On the other hand, the trustee does bear overall responsibility for seeing that the terms of the trust are honored. For this reason, subsection (a) provides that the trustee need not honor an attempted exercise of a power to direct if the attempted exercise is manifestly contrary to the terms of the trust or the trustee has reason to believe that the attempted exercise violates a fiduciary duty that the holder of the power owes to the beneficiaries of the trust.

SECTION 809. CONTROL AND PROTECTION OF TRUST PROPERTY. A trustee shall take steps reasonable under the circumstances to take control of and protect the trust property.

Comment

This section codifies the substance of Sections 175 and 176 of the Restatement (Second) of Trusts (1959). The duty to take control of and safeguard trust property is an aspect of the trustee's duty to act with prudence. See Section 804. See also Sections 816(1) (power to collect trust property), 816(12) (power to insure trust property), and 816(13) (power to abandon trust property). This section, like the other sections in this part, is subject to limitation in the terms of the trust. For example, the settlor may provide that the spouse or other beneficiary may occupy the settlor's former residence rent free, in which event the trustee will be specifically precluded by the terms of the trust from taking complete control.

SECTION 810. SEPARATION AND IDENTIFICATION OF TRUST PROPERTY.

(a) A trustee shall keep trust property separate from the trustee's own property.

(b) Except as otherwise provided in subsection (c), a trustee other than a regulated financial-service institution shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.

(c) As long as the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of two or more separate trusts.

Comment

The duty to earmark trust assets and the duty of a trustee not to mingle the assets of the trust with the trustee's own are closely related. Subsection (a), which addresses the duty not to mingle, is derived from Section 179 of the Restatement (Second) of Trusts (1959). However, subsection (b), which addresses earmarking, broadens the standard of Restatement Second by attempting to make more precise what is meant by the phrase "the interest of the trust clearly appears." Except for a regulated financial-service institution, whose trust records are subject to regular state or federal audit, the interest of the trust must appear in the records of a third party, such as a bank or brokerage firm. Because of the serious risk of mistake or misappropriation even if disclosure is made to the beneficiaries, a noninstitutional trustee is not allowed to show the interest of the trust solely in the trustee's own internal records. Section 816(8), which allows a trustee to hold securities in nominee form, is not inconsistent with this requirement. While securities held in nominee form are not specifically registered in the name of the trustee, they are properly earmarked because the trustee's holdings are indicated in the records maintained by an independent party, such as in an account at a brokerage firm.

Earmarking is not practical for all types of assets. With respect to assets not subject to registration, such as tangible personal property and bearer bonds, arranging for the trust's ownership interest to be reflected on the records of a third-party custodian would be impracticable. For this reason, subsection (b) waives separate recordkeeping for these types of assets. Under subsection (a), however, the duty of the trustee not to mingle these or any other trust assets with the trustee's own remains absolute.

Subsection (c), following the lead of a number of state statutes, allows a trustee to make joint investments of the property of two or more trusts even though such joint investments, under traditional principles, would violate the duty to earmark. Such joint investments are often more economical than attempting to invest the funds of each trust separately. Also, because the trustee owes fiduciary duties to each trust, the risk of misappropriation or mistake is less than if the trust funds are invested jointly with those of the trustee or some other person.

SECTION 811. ENFORCEMENT AND DEFENSE OF CLAIMS. A trustee shall take reasonable steps to enforce claims of the trust and to defend against claims against the trust.

Comment

This section codifies the substance of Sections 177 and 178 of the Restatement (Second) of Trusts (1959). Under this section, it may not be reasonable to enforce a claim depending upon the likelihood of recovery and the cost of suit and enforcement. It might also be reasonable to settle an action or suffer a default rather than to defend an action. See also Section 816(15) (power to pay, contest, settle or release claims).

SECTION 812. FORMER FIDUCIARIES. A trustee shall take reasonable steps to compel a former trustee or other fiduciary to deliver trust property to the trustee, and to redress a breach of trust known to the trustee to have been committed by a former trustee or other fiduciary.

Comment

This section is based on Restatement (Second) of Trusts § 223 (1959), but extends the duty to include not only former trustees but also personal representatives and conservators from whom the trustee receives trust property.

This section is a specific application of Section 811 on the duty to enforce claims, which could include a claim against a predecessor trustee for breach of trust. In certain circumstances it may not be reasonable to enforce a claim against a predecessor trustee or other fiduciary, depending upon the likelihood of recovery and the cost of suit and enforcement.

As authorized by Section 1010, the beneficiaries may relieve the trustee from potential liability for acts of a predecessor trustee or other fiduciary.

The trustee's duty to redress a breach of trust committed by a predecessor applies only if the trustee had knowledge of the breach. For the definition of "know," see Section 102(7).

SECTION 813. DUTY TO INFORM AND REPORT.

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

(b) A trustee shall:

(1) upon request of a beneficiary, promptly provide the beneficiary with a copy of the trust instrument;

(2) within 30 days after accepting a trusteeship, inform the qualified beneficiaries of the acceptance and of the trustee's name and address;

(3) within 30 days after the death of the settlor of a revocable trust, inform the qualified beneficiaries of the trust's existence; and

(4) inform the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation.

(c) Except as otherwise provided in the terms of the trust and unless disclosure is forbidden by law or would be seriously detrimental to the interests of the beneficiaries, the trustee shall notify the qualified beneficiaries before entering into a binding agreement with respect to the sale or other disposition of real estate, tangible personal property, closely-held business interest or other asset not normally sold on a public market and whose value comprises a significant portion of the total value of the trust property.

(d) A trustee shall send to the qualified beneficiaries at least annually and at the termination of the trust a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation. Upon a vacancy in a trusteeship, unless a cotrustee remains in office a report must be sent to the qualified beneficiaries by the former trustee or, if the trusteeship terminated by reason of death or incapacity, by the former trustee's personal representative, [conservator], or [guardian].

(e) A beneficiary, by a consent made in writing or by other record, may waive the right to a trustee's report or other information otherwise required to be provided under this section. A beneficiary may revoke a consent previously given.

(f) The terms of a trust may dispense with the requirements of this section only as to a beneficiary who is a settlor or has not attained 25 years of age. With respect to a beneficiary for whom the requirements of this section have been dispensed with, the terms of the trust may designate a person to receive reports and other information on the beneficiary's behalf and to protect and represent the beneficiary's interests.

(g) Except as otherwise provided by the terms of a trust, while the trust is revocable and the settlor has capacity to revoke the trust, the duties of the trustee under this section are owed exclusively to the settlor. If a trust has more than one settlor, the duties under this section are owed to all settlors.

Comment

The duty to keep the beneficiaries reasonably informed of the administration of the trust is one of the fundamental duties of a trustee. This section is more specific than the common law. For the common law duty to keep the beneficiaries informed, see Restatement (Second) of Trusts § 173 (1959). This section makes the duty to keep the beneficiaries informed more precise by limiting it to the qualified beneficiaries. For the definition of qualified beneficiary, see Section 102(12). The result of this limitation is that the information need not be furnished to beneficiaries with remote remainder interests unless they have filed a specific request with the trustee.

The trustee is under a duty to communicate to a qualified beneficiary information about the administration of the trust that is reasonably necessary to enable the beneficiary to enforce the beneficiary's rights and to prevent or redress a breach of trust. See Restatement (Second) of Trusts § 173 cmt. c (1959). Ordinarily, the trustee is not under a duty to furnish information to a beneficiary in the absence of a specific request for the information. See *id.* cmt. d. Thus, the general duty provided in subsection (a) is ordinarily satisfied by complying with the annual report mandated by subsection (c) unless there are special circumstances requiring particular information to be reported to the qualified beneficiaries. However, if the trustee is dealing with the beneficiary on the trustee's own account, the trustee has a duty to communicate material facts relating to the transaction that the trustee knows or should know. See *id.*

The standard is different if a beneficiary, whether qualified or not, makes a specific request for information. In that event, subsection (a) requires the trustee to promptly comply with the beneficiary's request unless unreasonable under the circumstances. Further supporting the principle that a beneficiary should be allowed to make an independent assessment of what information is relevant to protecting the beneficiary's interest, subsection (b)(1) requires the trustee to on request furnish a beneficiary with a complete copy of the trust instrument and not merely with those portions the trustee concludes are relevant to the beneficiary's interest.

This section has only limited application to revocable trusts. Subsection (g) provides that during the time that a trust is revocable and the settlor has capacity, the right to request information or a copy of the trust instrument pursuant to this section belongs exclusively to the settlor. In the case of a trust with multiple settlors, subsection (g) clarifies that the beneficiaries' right to information extends to all of the settlors. Should fewer than all of the settlors revoke or modify the trust, the trustee must notify the other settlor or settlors of this fact. See Section 602 Comment.

To enable beneficiaries to effectively protect their interests, it is essential that they know the identity of the trustee. Subsection (b)(2) requires that a trustee inform the qualified beneficiaries of the trustee's acceptance of office and of the trustee's name and address within 30 days of acceptance. Similar to the obligation imposed on a personal representative following admission of the will to probate, subsection (b)(3) requires the trustee of a revocable trust to inform the qualified beneficiaries, within 30 days after the settlor's death, of the trust's existence. These two duties can overlap. If the death of the settlor happens also to be the occasion for the appointment of a successor trustee, the new trustee of the now formerly revocable trust would need to inform the qualified beneficiaries both of the trustee's acceptance and of the trust's existence.

Subsection (b)(4) deals with the sensitive issue of changes, usually increases, in trustee compensation. Consistent with the requirement in subsection (b)(5) that the qualified beneficiaries receive advance notice of certain major transactions affecting their interests, subsection (b)(4) requires that the beneficiaries be told in advance of changes in the method or rate of the trustee's compensation. This might include a change in a periodic base fee, rate of percentage compensation, hourly rate, termination fee or transaction charge. For the standard for setting trustee compensation, see Section 708 and Comment.

Subsection (c) requires that the beneficiaries be given advance notice of certain proposed transactions. This subsection is designed to codify but at the same time make more precise the fiduciary duty delineated in such cases as *Allard v. Pacific National Bank*, 663 P.2d 104 (Wash. 1983). In *Allard*, the court surcharged a trustee for failing to give the beneficiaries advance notice of the proposed sale of a parcel of real estate that was the sole asset of the trust. Cases subsequent to *Allard* have extended this duty to the sale of an interest in a closely-held business, and this subsection extends the duty to sales of tangible personal property. Under subsection (c), *Allard* disclosure is not required if forbidden by law, as can on occasion occur under federal securities laws, or if disclosure would be seriously detrimental to the interests of the beneficiaries, for example, if disclosure would cause the loss of the only serious buyer. The settlor can also waive disclosure in the terms of the trust.

Subsection (d) requires the trustee to furnish the beneficiaries with a copy of a trustee's report at least annually and at the termination of the trust. Unless a cotrustee remains in office, a report must also be furnished upon a resignation or removal of a trustee or other vacancy in a trusteeship. See Section 704. The term "report" instead of "accounting" is used to negate the inference that the report must be prepared in any particular format. The key factor is not the format chosen but whether the report provides the beneficiaries with the information necessary to protect their interests.

Subsection (d) also addresses the responsibility for the preparation of the report upon a trustee's death or incapacity. If a cotrustee remains in office, the report need not be prepared by the cotrustee until the end of the regular reporting period. However, if no cotrustee remains in office, consistent with Section 707, the report must be prepared by the trustee's personal representative, in the event of the trustee's death, or the trustee's conservator or guardian, in the event of the trustee's incapacity.

Subsection (e) allows trustee reports and other required information to be waived by a beneficiary upon written consent. A beneficiary may also revoke a consent. However, a waiver of a trustee's report or other information is not a waiver of the trustee's accountability and potential liability for items that the report or other information would have disclosed.

The requirements of this section are not subject to waiver in the terms of the trust. Subsection (f) creates two exceptions. First, the creation of a "blind" trust is recognized. Second, in response to the desire of certain settlors that younger beneficiaries not know of another person's generosity until they have reached an age of maturity and self-sufficiency, subsection (f) allows the terms of the trust to waive the requirements of this section with respect to beneficiaries under 25 years of age. However, to assure trustee accountability in such cases, the settlor is encouraged to make use of the ability under subsection (d) to appoint someone to receive information on behalf of and otherwise protect and represent the interests of the beneficiary for whom the requirements of this section have been waived.

SECTION 814. DUTY WITH REGARD TO DISCRETIONARY POWER.

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

Comment

Despite the breadth of discretion purportedly granted by the wording of a trust, a grant of discretion to a trustee, whether with respect to management of distribution, is never absolute. A grant of discretion establishes a range within which the trustee may act. The greater the grant of discretion, the broader the range. A trustee's action must always be in good faith, with regard to the purposes of the trust and the interest of the beneficiaries, and in accordance with the trustee's other duties, including the obligation to exercise reasonable skill, care and caution. See Sections 801 (duty to administer trust), and 804 (duty to act with prudence). See also Edward C. Halbach, Jr., Problems of Discretion in Discretionary Trusts, 61 Colum. L. Rev. 1425 (1961); Restatement (Second) of Trusts § 187 (1959).

The standard of this section applies only to powers which are to be exercised in a fiduciary capacity. A power held in a nonfiduciary capacity is not subject to this section even though the power holder may coincidentally be acting as trustee.

SECTION 815. GENERAL POWERS OF TRUSTEE.

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

(1) powers conferred by the terms of the trust;

(2) except as limited by the terms of the trust:

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

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

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

(b) Except as modified by the terms of a trust, the exercise of a power is subject to the fiduciary duties prescribed by this [article].

Comment

This section is intended to grant trustees the broadest possible powers, but to be exercised always in accordance with the duties of the trustee and any limitations stated in the terms of the trust. The powers conferred elsewhere in this Act which are subsumed under this section include all of the specific powers listed in Section 816 as well as others listed in the Comment to that section. The powers conferred by this Act may be exercised without court approval. Should court approval of the exercise of a power be desired, a petition for court approval may be filed.

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

SECTION 816. SPECIFIC POWERS OF TRUSTEE. Without limiting the authority conferred by Section 815, a trustee may:

(1) collect trust property and accept or decline additions to the trust property from a settlor or any other person;

(2) acquire or sell property, for cash or on credit, at public or private sale;

(3) exchange, partition, or otherwise change the character of trust property; (4) deposit trust funds in an account in a regulated financial-service institution, including an institution operated by the trustee;

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

(6) advance money for the protection of the trust, and the trustee has a lien on the trust property as against a beneficiary for reimbursement of those advances, with reasonable interest;

(7) with respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation or other form of business or enterprise, continue the business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving or otherwise changing the form of business organization or contributing additional capital;

(8) with respect to stocks or other securities, to exercise the rights of an absolute owner, including the right to:

(A) vote, or give proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement;

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

(C) pay calls, assessments, and other sums chargeable or accruing against the securities, and sell or exercise stock subscription or conversion rights; and

(D) deposit the securities with a securities depository or other regulated financial-services institution;

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

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

(11) grant an option involving a sale, lease, or other disposition of trust property or take an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;

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

(13) abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration;

(14) with respect to possible liability for environmental conditions:

(A) inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an entity in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;

(B) 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, whether taken before or after the initiation of a claim or governmental enforcement action;

(C) decline to accept property into trust or to disclaim any power with respect to property that has or may have environmental liability attached;

(D) compromise claims against the trust which may be asserted for an alleged violation of environmental law; and

(E) pay the expense of any inspection, review, abatement, or remedial action to comply with environmental law;

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

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

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

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

(19) make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans;

(20) guarantee loans made by others to the beneficiary by pledging trust property;

(21) appoint a trustee to act in another State or country as to trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, require that the appointed trustee furnish security, and remove any trustee so appointed;

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

(A) paying it to the beneficiary's [conservator] or, if the beneficiary does not have a [conservator], the beneficiary's [guardian];

(B) paying it to the beneficiary's custodian under [the Uniform Transfers to Minors Act] or custodial trustee under [the Uniform Custodial Trust Act], and, for such purpose, to create a custodianship or custodial trust;

(C) if there is no [conservator], [guardian], custodian, or custodial trustee, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf,

(D) depositing it in a regulated financial services institution in an interest bearing account or certificate in the sole name of the beneficiary and by giving notice of the deposit to the beneficiary; or

(E) the trustee managing it as a separate fund on the beneficiary's behalf,

subject to the beneficiary's continuing right to withdraw the distribution.

(23) on distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation;

(24) decide, in accordance with rules of law, how and in what proportions any receipts or disbursements are credited, charged, or apportioned as between principal and income, including the ability to create reserves out of income for depreciation, depletion, amortization, or obsolescence;

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

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

(27) sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's powers; and

(28) on termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it.

Comment

This section lists the type of specific powers typically included in trust instruments. All of the powers listed here are subject to alteration in the terms of the trust. See Section 103. All of the powers listed here are also subsumed under the general authority granted in Section 815(a)(2) to exercise all powers over the trust property which an unmarried competent owner has over individually owned property, and any other powers appropriate to achieve the proper management, investment, and distribution of the trust property. As provided in Section 815(b), the exercise of a power is subject to fiduciary duties except as modified in the terms of the trust. The fact that the trustee has a power does not imply a duty that the power must be exercised.

Most of the powers listed in this section are similar to the powers listed in Section 3 of the Uniform Trustees' Powers Act (1964). Several of the paragraphs are new, however, and other powers drawn from the Trustees' Powers Act have been modified.

The powers listed here add little of substance not already granted by Section 815 and powers conferred elsewhere in the Act. While the Committee drafting this Act discussed excluding a list of specific powers, it concluded that the demand of third parties to see language expressly authorizing specific transactions required that a detailed list be retained.

Certain specific powers of a trustee which may be exercised without court approval are contained in other sections of the Act. See Sections 107(b) (transfer of principal place of administration), 408(d) and 412(a) (termination of uneconomic trust with value less than $50,000), 415 (combination and division of trusts), 703(d)(2) (delegation to cotrustee), 807 (delegation to agent of powers and duties), 810(c) (joint investments), and Article 9 (Uniform Prudent Investor Act).

Paragraph (1) authorizes a trustee to collect trust property and collect or decline additions to the trust property. The power to collect trust property is an aspect of the trustee's duty to administer the trust. See Section 801. The trustee also has a duty to enforce claims (see Section 811), the successful prosecution of which can result in trust property. The trustee also has a duty to prosecute claims against and collect trust property from a former trustee or other fiduciary. See Section 812. For a specific application of the power to reject additions to the trust property, see Section 816(14) (power to decline property with possible environmental liability).

Paragraph (2) authorizes a trustee to sell trust property, for cash or on credit, at public or private sale. Under the Restatement, a power of sale is implied unless limited in the terms of the trust. Restatement (Third) of Trusts: Prudent Investor Rule § 170 (1992). Despite authority to sell without security, such a sale may be imprudent. Before selling trust property, the trustee should determine that it is not the type of asset sale requiring advance notice to the qualified beneficiaries. See Section 813(c).

Paragraph (4) authorizes a trustee to deposit funds in an account in a regulated financial-service institution, including an institution operated by the trustee. This power to invest in the trustee's own institution is an exception to the prohibition against self-dealing stated in Section 802. See also Restatement (Second) of Trusts § 170 cmt. m (1959). The power to deposit funds in its own institution does not negate the trustee's responsibility to invest prudently, including the obligation to earn a reasonable rate of interest on deposits.

Paragraph (5) authorizes a trustee to borrow money. Under the Restatement, the sole limitation on such borrowing is the general obligation to invest prudently. See Restatement (Third) of Trusts: Prudent Investor Rule § 191 (1992). Language clarifying that the loan may extend beyond the duration of the trust was added to negate an older view that the trustee only had power to encumber the trust property while the trust was in existence.

Paragraph (6), which authorizes a trustee to advance money for the protection of the trust, is an exception to the prohibition against self-dealing specified in Section 802. Such advances by the trustee should not be made as a matter of routine and are usually of small amounts and made in emergencies or as a matter of convenience. The trustee has a lien against the trust property for any advances made but may not charge more than reasonable interest without violating the duty of loyalty.

Paragraph (7) authorizes the trustee to continue, incorporate or otherwise change the form of a business. Any such decision by the trustee must be made in light of the standards of prudent investment stated in Article 9. The authority under this paragraph is broader than that granted under Section 3(c)(3) of the Uniform Trustees' Powers Act. Under the Trustees' Powers Act, a trustee could continue a business only if authorized by the terms of the trust or court order.

Paragraph (8) on powers with respect to securities, codifies and adds further details to the principles of Restatement (Second) of Trusts § 193 (1959).

Paragraph (10), authorizing the leasing of property, negates the older view, reflected in Restatement § 189 cmt. c, that a trustee could not lease property beyond the duration of the trust. Whether a longer term lease is appropriate is judged by the standards of prudence applicable to all investments.

Paragraph (11), authorizing a trustee to grant options with respect to sales, leases or other dispositions of property, negates the older view, reflected in Restatement (Second) of Trusts § 190 cmt. k, that a trustee could not grant another person an option to purchase trust property. Whether the granting of an option is appropriate is, like all other investment decisions, judged by whether it is a prudent investment decision as judged by the standards of Article 9.

Paragraph (12), authorizing a trustee to purchase insurance, empowers a trustee to implement the duty to protect trust property. See Section 809. The trustee may also insure beneficiaries, agents, and the trustee against liability, including liability for breach of trust.

Paragraph (14) is one of several provisions in the Act designed to address trustee concerns about possible liability for environmental hazards. This paragraph collects all the powers relating to environmental concerns in one place even though some of the powers, such as the powers to pay expenses, compromise claims, and decline property, overlap with other paragraphs of this section (decline property, paragraph (1); compromise claims, paragraph (15); pay expenses, paragraph (16)). Numerous states have legislated on the subject of environmental liability of fiduciaries. For a representative state statute, see Tex. Prop. Code Ann. § 113.025. See also Sections 701(c)(2) (designated trustee may inspect property to determine potential environmental liability without having accepted trusteeship), 1011(c) (trustee not personally liable for environmental liability arising from ownership or control of trust property).

Paragraph (15), among other things, authorizes a trustee to release claims. Section 811 requires that a trustee need take only "reasonable" steps to enforce claims, meaning that a trustee may release a claim not only when it is uncollectible, but also when collection would be uneconomical. See also Restatement (Second) of Trusts § 192 (1959) (power to compromise, arbitrate and abandon claims).

Paragraph (16), among other things, authorizes a trustee to pay compensation to the trustee and agents without prior court approval. For the standard for setting trustee compensation, see Section 708. See also Section 709 (repayment of trustee expenditures). While prior court approval is not required, Section 813(b)(4) requires that the trustee inform the qualified beneficiaries in advance of a change in the method or rate of compensation.

Paragraph (17) authorizes a trustee to make elections with respect to taxes. The Act leaves to other law the issue of whether the trustee, in making such elections, must make compensating adjustments in the beneficiaries' interests.

Paragraph (18) authorizes a trustee to take action with respect to employee benefit or retirement plans, or annuities or life insurance payable to the trustee. Typically these will be beneficiary designations which the settlor has made payable to the trustee, but the Act does not prohibit the trustee from acquiring ownership of annuities and life insurance.

Paragraphs (19) and (20) allow a trustee to make loans to a beneficiary 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. Frequently, a trustee will make loans to a beneficiary which might be considered less than prudent in an ordinary commercial sense but which are of great benefit to the beneficiary and in carrying out the trustee's purposes. 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 § 255 (1959). The interest of a beneficiary that is subject to a spendthrift restraint may not be used for security for a loan under this paragraph. See Article 5 (spendthrift protection and claims of creditors).

Paragraph (21) allows for the appointment of ancillary trustees in jurisdictions in which the regularly appointed trustee is unable or unwilling to act. Normally, such an appointment will relate to the management of real estate located in another jurisdiction. This paragraph allows the regularly appointed trustee to select the ancillary trustee and to confer on the ancillary trustee such powers and duties as necessary. This is also a topic which the settlor may wish to address in the terms of the trust.

Paragraph (22) allows a trustee to make payments to another person for the use or benefit of a beneficiary whom the trustee reasonably believes is incapacitated. The paragraph establishes the following priority list for the making of distributions: (1) conservator; (2) guardian, custodian under the Uniform Transfers to Minors Act or custodial trustee under the Uniform Custodial Trust Act; and (3) an adult relative or other person having the beneficiary's legal or physical care or custody. While an adult relative or other person receiving funds is required to spend it on the beneficiary's behalf, it is preferable that the trustee make the distribution to a person with more formal fiduciary responsibilities. For this reason, the trustee is authorized to create a custodianship or custodial trust.

Paragraph (23) allows a trustee to make non-pro-rata distributions and allocate particular assets in proportionate or disproportionate shares. This power provides needed flexibility and lessens the risk that the non-pro-rata distribution will be treated as a taxable sale.

Paragraph (24) provides that a trustee may allocate receipts and disbursements in accordance with the state's applicable principal and income law. This other law should be consulted for the particular rules to be applied.

Paragraph (25) authorizes a trustee to resolve disputes through mediation or arbitration. The drafters of this Act strongly encourage the use of such alternate methods for resolving disputes. Arbitration is a form of nonjudicial settlement agreement authorized by Section 109. In representing beneficiaries and others in connection with arbitration or mediation, the representation principles of Article 3 may be applied. Settlors wishing to encourage use of alternate dispute resolution may wish to specifically draft for such possibility.

Paragraph (26) authorizes a trustee to prosecute or defend an action. As to the propriety of reimbursement for attorney's fees and other expenses of an action or judicial proceeding, see Section 709 and Comment. See also Section 811 (duty to defend actions).

Paragraph (28), which is similar to Section 344 of the Restatement (Second) of Trusts (1959), clarifies that even though the trust has terminated, the trustee retains the powers needed to wind up the administration of the trust and distribute the remaining trust property. While such terminations should not be delayed, neither should they be hasty or ill-considered. By anticipating the termination prior to the terminating event, many of the problems that typically arise can be avoided.

SECTION 817. PROPOSAL FOR DISTRIBUTION. Upon termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. The right of any beneficiary to object to the proposed distribution on the basis of the kind or value of asset to be received terminates if the beneficiary fails to object to the trustee within thirty days after the report was sent but only if the proposal informed the beneficiary of the right to object and of the applicable time limit.

ARTICLE 9

UNIFORM PRUDENT INVESTOR ACT

General Comment

Because of the widespread adoption of the Uniform Prudent Investor Act, no effort has been made to disassemble and fully integrate the Uniform Prudent Investor Act into the Trust Act. States adopting the Trust Act which have previously enacted the Prudent Investor Act are encouraged to recodify their version of the Prudent Investor Act as a unit in this article of the Trust Act. Codifying the Prudent Investor Act as a unit will preserve uniformity with States which have enacted the Prudent Investor Act in free-standing form.

The Uniform Prudent Investor Act prescribes a series of duties relevant to the *investment* and *management* of trust property. The Uniform Trust Act, Article 8 lists duties and powers of a trustee relevant to the *investment*, *management*, and *distribution* of trust property. There is therefore some overlap between Article 8 and the Prudent Investor Act. Where the two Acts overlap, enacting jurisdictions are encouraged to codify the Uniform Prudent Investor Act in this article but *without* the overlapping provisions. The overlapping provisions of the Uniform Prudent Investor Act and Article 8 of this Act are as follows:

	Prudent Investor Act	**Article 8**
Special skills	2(f)	806
Loyalty	5	802
Impartiality	6	803
Investment costs	7	805
Delegation	9	807

ARTICLE 10

LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH TRUSTEE

General Comment

Sections 1002 through 1010 list the remedies for breach of trust, describe how money damages are to be determined, and specify some potential defenses. The equitable remedies for breach of trust are listed in Section 1002. The remedies provided are both broad and flexible. The method for determining money damages provided in Section 1003 is based on two principles: (1) the trust should be restored to the position it would have been in had the harm not occurred; and (2) the trustee should not be permitted to profit from the trustee's own wrong. Section 1006 through 1010 specify potential defenses. Section 1006 provides a statute of limitations on actions against a trustee, Section 1007 protects a trustee who reasonably relies on the terms of a written trust instrument, Section 1009 describes the effect of and potential limits on use of an exculpatory clause, and Section 1010 deals with the requirements for beneficiary approval of acts of the trustee that might otherwise constitute a breach of trust.

Sections 1011 through 1013 address trustee relations with persons other than beneficiaries. The emphasis is on encouraging trustees and third parties to engage in commercial transactions to the same extent as if the property was not held in trust. Section 1011 negates personal liability on contracts entered into by the trustee if the fiduciary relationship or identity of the trust was properly disclosed. The trustee is also relieved from liability for torts committed in the course of administration unless the trustee was personally at fault. Section 1012 protects persons other than beneficiaries who deal with a trustee in good faith and without knowledge that the trustee is exceeding a power. Section 1013 permits a third party to rely on a certification of trust, thereby reducing requests by third parties for copies of the complete trust instrument.

The settlor, in the terms of the trust, may not reduce the rights of persons other than beneficiaries as provided in Sections 1011 through 1013, nor interfere with the court's ability to remedy a breach of trust as provided in Sections 1002 through 1006.

SECTION 1001. DEFINITION. In this [article], "good faith" means honesty in fact and the observance of reasonable standards of fair dealing.

Comment

Under the Act, more is required than honesty of intent before a trustee, in dealing with persons other than beneficiaries, can be said to have been acting in "good faith." The person must also have exhibited honesty in conduct. For the person with whom the trustee deals, this requires that the person observe reasonable standards of fair dealing, a requirement based on comparable provisions of the Uniform Commercial Code. See Uniform Commercial Code § 3-103(4). With respect to a person with whom the trustee deals, good faith, and the associated requirement of observance of reasonable standards of fair dealing, is required before the person may be protected in dealings with the trustee (see Section 1012), or for rejecting a certification of trust. See Section 1013.

SECTION 1002. BREACH OF TRUST; EQUITABLE REMEDIES.

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

(b) To remedy a breach of trust that has occurred or may occur, the court may order any equitable remedy, including:

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

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

(3) compelling the trustee to redress a breach of trust by paying money, restoring property, or other means;

(4) ordering a trustee to account;

(5) appointing a special fiduciary to take possession of the trust property and administer the trust;

(6) suspending or removing the trustee;

(7) reducing or denying compensation to the trustee;

(8) subject to Section 1012, voiding an act of the trustee, imposing a lien or a constructive trust on trust property, or tracing trust property wrongfully disposed of and recover the property or its proceeds; or

(9) granting any other appropriate relief.

Comment

This section codifies in general terms the equitable remedies available if a trustee has committed a breach of trust or threatens to do so. This section provides brief statements of the available remedies and does not attempt to cover the refinements and exceptions developed in case law. The availability of a remedy in a particular circumstance is governed by the common law of trusts and principles of equity. See Section 105. The petitioner may seek any of the remedies that are appropriate to the particular case.

Beneficiaries and cotrustees have standing to bring a petition for breach of trust. Following a successor trustee's acceptance of office, a successor trustee has standing to sue a predecessor for breach of trust. See Restatement (Second) of Trusts § 200 (1959). In the case of a charitable trust, standing to sue for a breach is also in the State Attorney General and persons with a special interest. See Restatement (Second) of Trusts § 391 (1959). Under this Act, a person appointed to enforce a trust for an animal or a trust for a noncharitable purpose would have standing to sue for a breach of trust. See Sections 406, 407. A person appointed in the terms of a trust to represent a beneficiary's interest as provided in Section 813(f) would have standing, as would a person who may represent a beneficiary's interest under Article 3. This comment is illustrative and not necessarily exhaustive of those who have standing. As to standing generally, see Restatement (Second) of Trusts § 200 (1959).

Traditionally, legal remedies for breach of trust were limited to suits to enforce unconditional obligations to pay money or deliver chattels. See Restatement (Second) of Trusts § 198 (1959). Otherwise, remedies for breach of trust were exclusively equitable, and as such, neither jury trial or punitive damages were available. See Restatement (Second) of Trusts § 197 (1959). This Act does not preclude the possibility that a particular enacting jurisdiction might allow jury trials or punitive damages in an action for breach of trust, or even classify punitive damages as an equitable remedy. Nor does this Act preclude the possibility that jury trial or punitive damages might be available in an enacting jurisdiction for actions against a trustee not arising under this Act but under other law.

The list of equitable remedies listed in this section are derived from Restatement (Second) of Trusts § 199 (1959). The reference to payment of money in subsection (b)(3) includes liability that might be characterized as damages, restitution, or surcharge. For the measure of liability, see Section 1003. Subsection (b)(5) makes explicit the court's authority to appoint a special fiduciary, also sometimes referred to as a receiver. See Restatement (Second) of Trusts § 199(d) (1959). The authority of the court to appoint a special fiduciary is not limited to actions alleging breach of trust but is available whenever the court, exercising its equitable jurisdiction, concludes such appointment would promote administration of the trust. See Sections 704(d) (special fiduciary may be appointed whenever court considers such appointment necessary for administration), 705(d) (in approving resignation, court may impose conditions to protect trust property, including appointment of special fiduciary), and 706(c) (pending final decision on petition to remove, or in lieu of removing trustee, court may order any relief available for breach of trust).

Subsection (b)(6) authorizes the court to suspend or remove the trustee. For the complete statement of grounds for trustee removal, see Section 706.

Subsection (b)(7), which allows the court to reduce or deny compensation, follows Section 243 of the Restatement (Second) of Trusts (1959). For the factors to consider in setting a trustee's compensation absent breach of trust, see Section 708. In deciding whether to reduce or deny a trustee compensation, the court may wish to consider (1) whether the trustee acted in good faith; (2) whether the breach of trust was intentional; (3) the nature of the breach and the extent of the loss; (4) whether the trustee has restored the loss; and (5) the value of the trustee's services to the trust. See Restatement (Second) of Trusts § 243 cmt. c (1959).

The authority under subsection (b)(8) to set aside wrongful acts of the trustee is a corollary of the power to enjoin a threatened breach as provided in paragraph (2). However, in setting aside the wrongful acts of the trustee the court may not impair the rights of bona fide purchasers protected by Section 1012. See Restatement (Second) of Trusts § 202 (1959). See also G. Bogert, The Law of Trusts and Trustees § 861, at 16-17 (rev. 2d ed. 1982).

SECTION 1003. DAMAGES AGAINST TRUSTEE FOR BREACH OF TRUST. A beneficiary may charge a trustee who commits a breach of trust with the greater of:

(1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or

(2) the profit that the trustee made by reason of the breach.

Comment

This section is based on Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992). If a trustee commits a breach of trust, the beneficiaries may either affirm the transaction or, if a loss has occurred, hold the trustee liable for the amount necessary to fully compensate for the consequences of the breach. This may include lost income, capital gain, or appreciation that would have resulted from proper administration. Even if a loss has not occurred, the trustee may not be allowed to benefit by reason of the trustee's improper action, and is thus accountable for any profit that the trustee may have made by reason of the breach.

For extensive commentary on the determination of damages, with numerous specific applications, see Restatement (Third) of Trusts: Prudent Investor Rule §§ 204-213 (1992). On the authority of a court of equity to reduce or excuse damages for breach of trust, see Restatement (Second) of Trusts § 205 cmt. g (1959).

The remedies provided in this section do not preclude resort to other remedies provided by this Act or available under the common law of trusts. See Sections 105 (common law of trusts) and 1002 (equitable remedies for breach of trust). As to possible defenses of the trustee, see Sections 1006 through 1010.

SECTION 1004. LIABILITY OF TRUSTEE IN ABSENCE OF BREACH.

(a) A trustee is accountable to a beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust.

(b) Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for the failure to make a profit.

Comment

The principle on which a trustee's duty of loyalty is premised is that a trustee should not be allowed to use the trust as a means for personal profit other than for compensation earned. While most instances of personal profit involve situations where the trustee has breached the duty of loyalty, not all cases of personal profit involve a breach of trust. Subsection (a), which holds a trustee accountable for any profit made, even absent a breach of trust, is based on Restatement (Second) of Trusts § 203 (1959).

A trustee is not an insurer. As provided in subsection (b), absent a breach of trust, a trustee is not liable for a loss or depreciation in the value of the trust property or for failure to make a profit. Subsection (b) is based on Restatement (Second) of Trusts § 204 (1959).

SECTION 1005. ATTORNEY'S FEES AND COSTS. In a judicial proceeding involving a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

Comment

This section is based on Massachusetts General Laws chapter 215, § 45. The court, in its discretion, may award the costs and expenses of a party, including reasonable attorney's fees, against another party or the trust. This section broadens but also builds on the common law. This section overlaps with Section 709, which allows a trustee to recover expenditures properly incurred in the administration of the trust. Generally, litigation expenses were at common law chargeable against another party only in the case of egregious conduct such as bad faith or fraud. A beneficiary, however, could recover litigation costs from the trust if the litigation was deemed beneficial to the trust. Sometimes, this litigation by a beneficiary involves an allegation that the trustee had committed a breach of trust. On other occasions, the suit by the beneficiary is brought because of the trustee's failure to take action against a third party, such as to recover property properly belonging to the trust. For the authority of a beneficiary to bring an action when the trustee fails act against a third party, see Restatement (Second) of Trusts §§ 281-282 (1959).

SECTION 1006. LIMITATION OF ACTION AGAINST TRUSTEE FOLLOWING TRUSTEE'S REPORT.

(a) A beneficiary may initiate a proceeding against a trustee for breach of trust until the first to occur of:

(1) one year after the date the beneficiary was sent a report that adequately disclosed the facts constituting a claim and which informed the beneficiary of the time allowed; or

(2) the date the proceeding was precluded by adjudication, consent, or limitation.

(b) A report adequately discloses the facts constituting a claim if it provides sufficient information so that the beneficiary knows of the claim or reasonably should have inquired into its existence.

(c) For the purpose of subsection (a), a beneficiary is deemed to have been sent a report if:

(1) in the case of a beneficiary having capacity, it is sent to the beneficiary; or

(2) in the case of a beneficiary who under [Article] 3 may be represented and bound by another person, it is sent to the other person.

(d) This section does not preclude an action to recover for fraud or misrepresentation related to the report.

Comment

Subsection (a) is based in part on Section 7-307 of the Uniform Probate Code. For provisions governing consent, release, and ratification by beneficiaries to relieve the trustee of liability, see Section 1010. The reference in the introductory clause to claims previously barred also includes principles such as estoppel and laches that apply under the common law of trusts. See Section 105. During the time that a trust is revocable and someone other than the settlor is acting as trustee, the person holding the power to revoke is the one who must receive the report in order to commence the running of the limitations period provided in this section. See Section 604 (rights of settlor).

Subsection (c) specifies who must receive the report for it to have the effect of later barring claims based on the information disclosed. This subsection addresses only the issue of when the clock will start to run for purposes of the statute of limitations. Should the trustee wish immediately to foreclose possible claims based on the information disclosed, a consent to the report or other information may be obtained pursuant to Section 1010.

Subsection (d), providing that the statute of limitations does not begin to run if there was fraud or misrepresentation related to the report, is based on Missouri Revised Statutes § 456.220.

For the provisions relating to the duty to report information to beneficiaries, see Section 813.

SECTION 1007. RELIANCE ON TRUST INSTRUMENT. A trustee who acted in reasonable reliance on the terms of a written trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

Comment

On occasion, the terms of the trust will differ from the an apparent plain meaning of the written trust instrument. This can occur because the court, in determining the terms of the trust, is allowed to consider evidence extrinsic to the written trust instrument. See Section 102(17) (definition of "terms of a trust"). Furthermore, if a trust is reformed on account of mistake of fact or law, as provided in Section 413, provisions of a written trust instrument can be deleted or contradicted and provisions not in the written document may be added. "Terms of the trust," as defined in this Act and under the doctrine of reformation, reflect the guiding principle that a trust should be administered and distributed in accordance with the settlor's intent. However, a trustee should at the same time be permitted to administer a trust with some dispatch and without concern that a reasonable reliance on the terms of a written trust instrument is misplaced. This section protects a trustee who so relies on a written trust instrument but only to the extent the breach of trust resulted form such reliance. This section is similar to Section 2(b) of the Uniform Prudent Investor Act, which protects a trustee from liability to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

SECTION 1008. EVENTS AFFECTING ADMINISTRATION OR DISTRIBUTION. Whenever the happening of an event, including marriage, divorce, performance of education requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge.

SECTION 1009. EXCULPATION OF TRUSTEE.

(a) A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:

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

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

(b) An exculpatory term drafted by or on behalf of the trustee is presumed to have been inserted as a result of an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.

Comment

Subsection (a) is the same in substance as Section 222 of the Restatement (Second) of Trusts (1959). It is also consistent with the standards expressed in Sections 103 and 814 relating to the extent to which a settlor may negate a duty in the terms of the trust. There is a minimum standard of conduct to which a trustee must adhere, whether stated as a negation of a duty or in the form of an exculpatory provision. A trustee must always act in good faith and with regard to the purposes of the trust and the interest of the beneficiaries.

Subsection (b) disapproves of cases such as *Marsman v. Nasca*, 573 N.E.2d 1025 (Mass. App. Ct. 1991), which held that an exculpatory clause in a trust instrument drafted by the trustee was valid absent proof that it was inserted as a result of an abuse of a fiduciary relationship. For a later case where sufficient proof of abuse was present, see *Rutanan v. Ballard*, 678 N.E.2d 133 (Mass. 1997). Subsection (b) responds to the danger that the insertion of such a clause by the fiduciary or its agent may have been undisclosed or inadequately understood by the settlor. To overcome this presumption of abuse, the trustee must establish that the clause was fair and that its existence and contents were adequately communicated to the settlor. In determining whether the clause was fair, the court may wish to examine: (1) the extent of the prior relationship between the settlor and trustee; (2) whether the settlor received independent advice; (3) the sophistication of the settlor with respect to business and fiduciary matters; (4) the trustee's reasons for inserting the clause; and (5) the scope of the particular provision inserted. See Restatement (Second) of Trusts § 222 cmt. d (1959).

SECTION 1010. BENEFICIARY'S CONSENT, RELEASE, OR RATIFICATION. A beneficiary may not hold a trustee liable for a breach of trust if the beneficiary, while having capacity, consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:

(1) the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or

(2) at the time of the consent, release, or ratification, the beneficiary did not know of:

(A) the beneficiary's rights; or

(B) material facts the trustee knew or should have known with the exercise of reasonable inquiry.

Comment

This section is based on Sections 216 through 218 of the Restatement (Second) of Trusts (1959). When one beneficiary has consented but others have not, courts give a remedy to the nonconsenting beneficiaries. Restatement (Second) of Trusts § 216 cmt. h (1959). But consent by the settlor of a revocable trust or by the holder of a presently exercisable power of withdrawal binds all of the beneficiaries. See Section 604. A beneficiary is also bound to the extent a consent is given by a person authorized to represent the beneficiary as provided in Article 3.

Per Restatement (Second) of Trusts § 216(3) and Comment n, a consent of a beneficiary to a self-dealing transaction by a trustee is binding only if the transaction was fair and reasonable.

SECTION 1011. LIMITATION ON PERSONAL LIABILITY OF TRUSTEE.

(a) Except as otherwise provided in the contract, 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 if the trustee in the contract discloses the fiduciary capacity.

(b) Except as otherwise provided in the contract, a trustee who holds a general partnership interest is not personally liable for contracts entered into by the partnership if the ownership interest and fiduciary capacity is disclosed either in the contract or in a statement filed pursuant to the [Uniform Partnership Act].

(c) A trustee is personally liable for torts committed in the course of administering a trust, or for obligations arising from ownership or control of trust property, including liability for violation of environmental law, only if the trustee is personally at fault.

(d) A claim based on a contract entered into by a trustee in the trustee's fiduciary 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 in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable on the claim.

Comment

This section is based on Section 7-306 of the Uniform Probate Code. However, unlike the Uniform Probate Code, which requires that the contract disclose both the representative capacity and identify the trust, subsection (a) of this section protects a trustee who reveals the fiduciary relationship, whether by indicating a signature as trustee or by simply referring to the trust. Under this section, it is assumed that all that should be required is that the other contracting party be put on notice that a trust is involved. 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.

Subsection (c) addresses trustee liability arising from ownership or control of trust property and for torts occurring incident to the administration of the trust. Liability in such situations is imposed on the trustee personally only if the trustee was personally at fault, either intentionally or negligently. This is contrary to Restatement (Second) of Trusts § 264 (1959), which imposes liability on a trustee regardless of fault, including liability for acts of agents under respondeat superior. Responding to a particular concern of trustees, subsection (c) specifically protects a trustee from personal liability for violations of environmental law unless the trustee was personally at fault. See also Sections 701(c)(2) (nominated trustee may investigate trust property to determine environmental liability without having accepted trusteeship), and 816(14) (trustee powers with respect to possible liability for environmental conditions).

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

SECTION 1012. PROTECTION OF PERSON DEALING WITH TRUSTEE.

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

(b) A person other than a beneficiary who in good faith deals with another person knowing that the other person is a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise.

(c) A person who in good faith delivers assets to a trustee need not ensure their proper application.

(d) A person other than a beneficiary who in good faith assists a former trustee or who for value and in good faith deals with a former trustee without knowledge that the trusteeship has terminated is protected from liability as if the former trustee were still a trustee.

(e) The protection provided by this section to persons assisting or dealing with a trustee is superseded by comparable protective provisions of other laws relating to commercial transactions or to the transfer of securities by fiduciaries.

Comment

This section is originally derived from Section 7 of the Uniform Trustees' Powers Act, but with important changes. The most important change is to conform the standard of protection for third parties to that provided under the Uniform Commercial Code. This is accomplished through the addition of a definition of "good faith" at Section 1101, and the definition of "know" at Section 102(7). The effect of these definitions, as applied in this section, is to protect a third party who deals with a trustee while observing reasonable standards of fair dealing and without reason to inquire as to whether the trustee is committing a breach of trust. This is in contrast to the Uniform Trustees' Powers Act, which by failing to define good faith, left open the issue of whether its requirement that a trustee act in good faith was totally subjective or instead contained an objective element. For criticism of the Trustees' Powers Act on this point, see Jerome H. Curtis, Jr., *The Transmogrification of the American Trust*, 31 Real Prop. Prob. Tr. J. 251, 297-309 (1996); and Peter T. Wendel, *Examining the Mystery Behind the Unusually and*

Inexplicably Broad Provisions of Section Seven of the Uniform Trustee's Powers Act: A Call for Clarification, 56 Mo. L. Rev. 25 (1991).

The definition of "good faith" requires that a third party, to receive protection, must not only exhibit honesty of intention but also must observe reasonable standards of fair dealing. The definition of "know" refers to more than actual knowledge. While a person is not charged with knowledge of facts discoverable upon reasonable inquiry, the third party is charged with knowledge of facts the person had reason to know based on the facts and circumstances actually known to the person at the time in question. In other words, if the person should have been aware of a particular fact based on the circumstances and other facts of which the person was actually aware, the person is charged with knowledge of that fact.

Subsection (a) protects two different classes; persons who assist a trustee with a transaction, and persons who deal with the trustee for value. The third person is protected in the transaction despite the fact the trustee was exceeding or improperly exercising the power as long as the assistance was provided or transaction was entered into in "good faith" and without "knowledge" as defined in Sections 1101 and 102(7).

Subsection (b) confirms that a third party acting in good faith and with knowledge that the other person is a trustee is not charged with a duty to inquire into the extent of a trustee's powers or the propriety of their exercise.

Subsection (c) protects any person, including a beneficiary, who in good faith delivers property to a trustee. The standard of protection in the Restatement is in effect similar although more elaborate. Under the Restatement, the person delivering the property is liable only if the person, at the time of the delivery, had notice that the trustee was misapplying or intending to misapply the property delivered. See Restatement (Second) of Trusts § 321 (1959).

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

The purpose of subsection (e) is to allow a statute relating to commercial transactions to control whenever both it and this section could apply to a transaction. Consequently, the protections provided by this section are superseded by comparable protective provisions of these other laws. The principal statutes in question are the various articles of the Uniform Commercial Code, including Article 8 on the transfer of securities, as well as the Uniform Simplification of Transfer of Securities by Fiduciaries Act.

SECTION 1013. CERTIFICATION OF TRUST.

(a) Instead of providing a person other than a beneficiary with a copy of the trust instrument, a trustee may provide the person with a certification of trust containing statements concerning, but not limited to, the following matters:

(1) the existence of the trust and the date of execution of the trust instrument;

(2) the identity of the settlor or settlors and of the currently acting trustee or trustees of the trust;

(3) the powers of the trustee;

(4) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;

(5) the authority of cotrustees to sign and whether all or less than all are required to sign in order to exercise powers of the trustee;

(6) the trust's taxpayer identification number; and

(7) the manner in which title to trust property may be taken.

(b) A certification of trust must be in the form of an acknowledged writing and may be signed by any trustee.

(c) A certification of trust must contain a statement that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

(d) A certification of trust need not contain the dispositive terms of a trust.

(e) A recipient of a certification of trust may require the trustee to provide copies of those excerpts from the original trust instrument and later amendments which designate the trustee and confer upon the trustee the power to act in the pending transaction.

(f) 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 of the terms of the trust 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 certification.

(g) A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

(h) A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in requesting the trust instrument.

(i) This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

Comment

This section, based on California Probate Code § 18100.5, is designed to protect the privacy of a trust instrument by reducing requests by third parties for complete copies of the instrument when verifying a trustee's authority. Third parties frequently insist on receiving a copy of the complete trust instrument solely to verify a specific and narrow authority of the trustee to engage in a particular transaction. While a testamentary trust, because it is created under a will, is a matter of public record, an inter vivos trust instrument is private. Such privacy is compromised, however, if the trust instrument must be widely distributed among third parties. A certification of trust is a document signed by all currently acting trustees that may include excerpts from the trust instrument necessary to facilitate the particular transaction. The benefit of a certification is that it will enable the transaction to proceed without disclosure of the trust's beneficial provisions. Nor is there a need for third parties who may already have a copy of the instrument to pry into its provisions. Persons acting in reliance on a certification may assume the truth of the certification even if they have a complete copy of the trust instrument in their possession.

To encourage compliance with this section, persons demanding a trust instrument despite having already been offered a certification may be liable for damages if their refusal is determined not to have been made in good faith. This requires, based on the definition of "good faith" in Section 1101, that the refusal not have been made with honesty in intention or in accordance with reasonable standards of fair dealing. A person acting in good faith would include a person required to examine a complete copy of the trust instrument pursuant to due diligence standards or as required by other law. Specific examples of such due diligence and legal requirements would include (1) in connection with transactions to be executed in the capital market where documentary standards have been established in connection with underwriting concerns; (2) to satisfy documentary requirements established by state or local government or regulatory agency; (3) to satisfy documentary requirements established by a state or local government or regulatory agency; and (4) where the insurance rates or premiums or other expenses of the party would be higher absent the availability of the documentation.

ARTICLE 11

TRANSITIONAL AND MISCELLANEOUS PROVISIONS

SECTION 1101. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

SECTION 1102. SEVERABILITY CLAUSE. If any provision of this [Act] or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 1103. EFFECTIVE DATE.

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

SECTION 1104. REPEALS AND AMENDMENTS.

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

(1) Uniform Trustee Powers Act;

(2) Uniform Probate Code, Article VII;

(3) Uniform Trusts Act (1937);

(4)

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

(1) Uniform Prudent Investor Act;

(2)

(3)]

Comment

For the reasons why the above uniform acts should be repealed upon enactment of this Act, see the Prefatory Note. States which have not enacted one or more of the specified uniform acts should repeal their comparable legislation. Because of the comprehensive scope of this Act, many states will have trust provisions not based on any uniform act which will need to be repealed upon enactment of this Act. This section does not attempt to list the types of conforming amendments, whether in the enacting State's probate code or elsewhere, which will need to be made upon enactment of this Act. But blank spaces are included in subsection (b) in order to alert enacting jurisdictions to this fact.

SECTION 1105. APPLICATION TO EXISTING RELATIONSHIPS.

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

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

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

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

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

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

(b) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before [the effective date of the [Act]], that statute remains in force with respect to that right.

Comment

This section is similar to Section 8-101 of the Uniform Probate code. This section addresses the applicability of the Act, including application to pending judicial proceedings and the administration of existing trusts. The Act is intended to receive the widest possible application. The Act applies to all trusts subject to the jurisdiction of the enacting State, whether created before or after the date of enactment. But recognizing constitutional concerns, excluded from coverage are trusts created prior to the Act's effective date if such application would impair a vested right. For such an impairment to occur, however, the trust would have to be irrevocable as of the effective date and the particular provision of the Act would have to actually reduce or otherwise threaten a beneficial interest.