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2
3 **ALABAMA UNIFORM TRUST CODE**
4

5 Chapter 3B. ALABAMA UNIFORM TRUST CODE

6 **ARTICLE 1**

7 **GENERAL**

8 **Section 19-3B-101. Short Title.**

9 This chapter may be cited as the Alabama Uniform
10 Trust Code.

11 *Alabama Comment*

12
13 An Alabama comment to the Alabama Uniform Trust Code follows each
14 section of the Code, and describes any changes made to the Uniform Code provision
15 and the reasoning for the change. The Uniform Code comment follows the Alabama
16 comment, and for the most part, is *verbatim*. In some instances, however, the
17 Uniform comment contains instructions on how to incorporate the Uniform Code to
18 a state's existing statutory law and these instructions have been deleted without a
19 signal. In other instances, the Uniform comment may be inconsistent with a change
20 to the Uniform Code language. In these cases, the Uniform comment is deleted and
21 the ellipsis mark indicates this deletion.
22

23 Style changes to the Uniform Trust Code and Uniform Comment include the
24 replacement of the unhyphenated "cotrustee" with the hyphenated "co-trustee" and
25 the replacement of the masculine "remainderman(men)" with the gender-neutral
26 "remainder beneficiary(ies)."
27

28 **Section 19-3B-102. Scope.**

29 This chapter applies to express trusts, charitable
30 or noncharitable, and trusts created pursuant to a statute,
31 judgment, or decree that requires the trust to be administered
32 in the manner of an express trust.
33

34 *Alabama Comment*

35
36 **Comparison to Uniform Code.** Section 102 is the same as Section 102 of the
37 Uniform Trust Code (2001).

1
2
3 *Uniform Comment*
4

5 **Purpose and scope.** The Uniform Trust Code, while comprehensive, applies
6 only to express trusts. Excluded from the Code's coverage are resulting and
7 constructive trusts, which are not express trusts but remedial devices imposed by
8 law. For the requirements for creating an express trust and the methods by which
9 express trusts are created, see Sections 401-402. The Code does not attempt to
10 distinguish express trusts from other legal relationships with respect to property,
11 such as agencies and contracts for the benefit of third parties. For the distinctions,
12 see RESTATEMENT (THIRD) OF TRUSTS §§ 2, 5 (Tentative Draft No. 1, approved 1996);
13 RESTATEMENT (SECOND) OF TRUSTS §§ 2, 5-16C (1959).
14

15 **Express trusts arising in other contexts.** The Uniform Trust Code is directed
16 primarily at trusts that arise in an estate planning or other donative context, but
17 express trusts can arise in other contexts. For example, a trust created pursuant to a
18 divorce action would be included, even though such a trust is not donative but is
19 created pursuant to a bargained-for exchange. Commercial trusts come in
20 numerous forms, including trusts created pursuant to a state business trust act and
21 trusts created to administer specified funds, such as to pay a pension or to manage
22 pooled investments. Commercial trusts are often subject to special-purpose
23 legislation and case law, which in some respects displace the usual rules stated in
24 this Code. See John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument*
25 *of Commerce*, 107 YALE L.J. 165 (1997).
26

27 **Express trusts created by judgment or decree.** Express trusts may be created
28 by means of court judgment or decree. Examples include trusts created to hold the
29 proceeds of personal injury recoveries and trusts created to hold the assets of a
30 protected person in a conservatorship proceeding. See, e.g., UNIFORM PROBATE CODE
31 § 5-411(a)(4).
32

33 **Section 19-3B-103. Definitions.**

34 In this chapter:

35 (1) ACTION, with respect to an act of a trustee,
36 includes a failure to act.

37 (2) ASCERTAINABLE STANDARD means a standard relating
38 to an individual's health, education, support, or maintenance
39 within the meaning of Section 2041(b)(1)(A) or 2514(c)(1) of
40 the Internal Revenue Code of 1986, as in effect on the
41 effective date of this Code or as later amended.

42 (3) BENEFICIARY means a person that:

1 (A) has a present or future beneficial interest in a
2 trust, vested or contingent; or

3 (B) in a capacity other than that of trustee, holds
4 a power of appointment over trust property.

5 (4) CHARITABLE TRUST means a trust, or portion of a
6 trust, created for a charitable purpose described in Section
7 19-3B-405(a).

8 (5) CONSERVATOR means a person appointed by the
9 court to administer the estate of a minor or adult individual.

10 (6) ENVIRONMENTAL LAW means a federal, state, or
11 local law, rule, regulation, or ordinance relating to
12 protection of the environment.

13 (7) GUARDIAN means a person who has qualified as a
14 guardian of a minor or incapacitated person pursuant to
15 parental or spousal nomination or court appointment and
16 includes a limited guardian as described in Section 26-2A-
17 78(e) and Section 26-2A-105(c), but excludes one who is merely
18 a guardian ad litem.

19 (8) INTERESTS OF THE BENEFICIARIES means the
20 beneficial interests provided in the terms of the trust.

21 (9) JURISDICTION, with respect to a geographic area,
22 includes a state or country.

23 (10) PERSON means an individual, corporation,
24 business trust, estate, trust, partnership, limited liability
25 company, association, joint venture, government; governmental
26 subdivision, agency, or instrumentality; public corporation,
27 or any other legal or commercial entity.

28 (11) POWER OF WITHDRAWAL means a presently
29 exercisable general power of appointment other than a power

1 exercisable by a trustee which is limited by an ascertainable
2 standard, or which is exercisable by another person only upon
3 consent of the trustee or a person holding an adverse
4 interest.

5 (12) PRESUMPTIVE REMAINDER BENEFICIARY means a
6 person who would be entitled to the principal of a trust if
7 the income interest were immediately terminated, and if a
8 trust contains a power of appointment, then the holder of such
9 power of appointment shall also be a presumptive remainder
10 beneficiary.

11 (13) PROPERTY means anything that may be the subject
12 of ownership, whether real or personal, legal or equitable, or
13 any interest therein. Property includes choses in action,
14 claims, and interests created by beneficiary designation under
15 policies of insurance, financial instruments and deferred
16 compensation and other retirement arrangements, whether
17 revocable or irrevocable.

18 (14) QUALIFIED BENEFICIARY means a living
19 beneficiary who, on the date the beneficiary's qualification
20 is determined:

21 (A) is a distributee or permissible distributee of
22 trust income or principal;

23 (B) would be a distributee or permissible
24 distributee of trust income or principal if the interests of
25 the distributees described in paragraph (A) terminated on that
26 date, but the termination of those interests would not cause
27 the trust to terminate; or

1 (C) would be a distributee or permissible
2 distributee of trust income or principal if the trust
3 terminated on that date.

4 (15) REVOCABLE, as applied to a trust, means
5 revocable by the settlor without the consent of the trustee or
6 a person holding an adverse interest.

7 (16) SETTLOR means a person, including a testator,
8 who creates, or contributes property to, a trust. If more than
9 one person creates or contributes property to a trust, then
10 each person is a settlor of the portion of the trust property
11 attributable to that person's contribution except to the
12 extent another person has the power to revoke or withdraw that
13 portion.

14 (17) SPENDTHRIFT PROVISION means a term of a trust
15 which restrains both voluntary and involuntary transfer of a
16 beneficiary's interest.

17 (18) STATE means a state of the United States, the
18 District of Columbia, Puerto Rico, the United States Virgin
19 Islands, or any territory or insular possession subject to the
20 jurisdiction of the United States. The term includes an Indian
21 tribe or band recognized by federal law or formally
22 acknowledged by a state.

23 (19) TERMS OF A TRUST means the manifestation of the
24 settlor's intent regarding a trust's provisions as expressed
25 in the trust instrument or as may be established by other
26 evidence that would be admissible in a judicial proceeding.

27 (20) TRUST INSTRUMENT means an instrument executed
28 by the settlor that contains terms of the trust, including any
29 amendments thereto.

1 (21) TRUSTEE includes an original, additional, and
2 successor trustee, and a co-trustee.

3
4 *Alabama Comment*

5
6 **Comparison to Uniform Code.** Section 103 is the same as Section 103 of the
7 Uniform Trust Code (2001), with the following exceptions: In paragraph (7),
8 Alabama uses the same definition for guardian as is used in Section 26-2A-20(7) of
9 the Alabama Uniform Guardianship Act. In paragraph (13), Alabama adds a second
10 sentence, which comes from the Uniform Comment. This definition may expand
11 current Alabama law concerning the definition of “property,” and will allow a trust
12 to be created under Section 401 by naming a trust as the beneficiary of an insurance
13 policy, thereby “creating an interest by beneficiary designation under a policy of
14 insurance.” Finally, in subsection (12), Alabama adds the definition of “presumptive
15 remainder beneficiary,” which is taken from the Alabama Principal and Income Act
16 (see Ala. Code § 19-3A-102(11)). Subsections (12) through (20) are renumbered as
17 subsections (13) through (21), respectively.

18
19 *Uniform Comment*

20
21 **“Action” also includes failure to act.** A definition of “action” (paragraph (1))
22 is included for drafting convenience, to avoid having to clarify in the numerous
23 places in the Uniform Trust Code where reference is made to an “action” by the
24 trustee that the term includes a failure to act.

25
26 **Ascertainable standard.** The definition of “ascertainable standard”
27 (paragraph (2)) was added to the Code by a 2004 amendment. The term was
28 previously used only in and defined in Section 814. Other 2004 amendments add
29 the term to Sections 103(11) and 504, necessitating the need to move the definition to
30 the list of defined terms in Section 103 and make it applicable to the entire Code.

31
32 **Scope of definition of beneficiary.** “Beneficiary” (paragraph (3)) refers only
33 to a beneficiary of a trust as defined in the Uniform Trust Code. In addition to living
34 and ascertained individuals, beneficiaries may be unborn or unascertained.
35 Pursuant to Section 402(b), a trust is valid only if a beneficiary can be ascertained
36 now or in the future. The term “beneficiary” includes not only beneficiaries who
37 received their interests under the terms of the trust but also beneficiaries who
38 received their interests by other means, including by assignment, exercise of a power
39 of appointment, resulting trust upon the failure of an interest, gap in a disposition,
40 operation of an antilapse statute upon the predecease of a named beneficiary, or
41 upon termination of the trust. The fact that a person incidentally benefits from the
42 trust does not mean that the person is a beneficiary. For example, neither a trustee
43 nor persons hired by the trustee become beneficiaries merely because they receive
44 compensation from the trust. See RESTATEMENT (THIRD) OF TRUSTS § 48 cmt. c
45 (Tentative Draft No. 2, approved 1999); RESTATEMENT (SECOND) OF TRUSTS § 126 cmt.
46 c (1959).

1
2 **Holders of powers of appointment.** While the holder of a power of
3 appointment is not considered a trust beneficiary under the common law of trusts,
4 holders of powers are classified as beneficiaries under the Uniform Trust Code.
5 Holders of powers are included on the assumption that their interests are significant
6 enough that they should be afforded the rights of beneficiaries. A power of
7 appointment as used in state trust law and this Code is as defined in state property
8 law and not federal tax law although there is considerable overlap between the two
9 definitions.

10
11 **Types of powers.** A power of appointment is authority to designate the
12 recipients of beneficial interests in property. *See* RESTATEMENT (SECOND) OF
13 PROPERTY: DONATIVE TRANSFERS §11.1 (1986). A power is either general or
14 nongeneral and either presently exercisable or not presently exercisable. A general
15 power of appointment is a power exercisable in favor of the holder of the power, the
16 power holder's creditors, the power holder's estate, or the creditors of the power
17 holder's estate. *See* RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS §11.4
18 (1986). All other powers are nongeneral. A power is presently exercisable if the
19 power holder can currently create an interest, present or future, in an object of the
20 power. A power of appointment is not presently exercisable if exercisable only by
21 the power holder's will or if its exercise is not effective for a specified period of time
22 or until occurrence of some event. *See* RESTATEMENT (SECOND) OF PROPERTY:
23 DONATIVE TRANSFERS §11.5 (1986). Powers of appointment may be held in either a
24 fiduciary or nonfiduciary capacity. The definition of "beneficiary" excludes powers
25 held by a trustee but not powers held by others in a fiduciary capacity.

26
27 **Categories of general powers.** While all categories of powers of appointment
28 are included within the definition of "beneficiary," the Uniform Trust Code
29 elsewhere makes distinctions among types of powers. A "power of withdrawal"
30 (paragraph (11)) is defined as a presently exercisable general power of appointment
31 other than a power exercisable by a trustee and limited by an ascertainable standard,
32 or a power which is exercisable by another person only upon consent of the trustee
33 or a person holding an adverse interest. Under Section 302, the holder of a
34 testamentary general power of appointment may represent and bind persons whose
35 interests are subject to the power.

36
37 The definition of "beneficiary" includes only those who hold beneficial
38 interests in the trust. Because a charitable trust is not created to benefit ascertainable
39 beneficiaries but to benefit the community at large (*see* Section 405(a)), persons
40 receiving distributions from a charitable trust are not beneficiaries as that term is
41 defined in this Code. However, pursuant to Section 110(b), charitable organizations
42 expressly designated to receive distributions under the terms of a charitable trust
43 and whose beneficial interests are otherwise sufficient to satisfy the definition of
44 qualified beneficiary were the trust noncharitable, are granted the rights of a
45 qualified beneficiary under the Code.

46
47 **Extent of beneficiary's interest.** The Uniform Trust Code leaves certain
48 issues concerning beneficiaries to the common law. Any person with capacity to

1 take and hold legal title to intended trust property has capacity to be a beneficiary.
2 See RESTATEMENT (THIRD) OF TRUSTS § 43 (Tentative Draft No. 2, approved 1999);
3 RESTATEMENT (SECOND) OF TRUSTS §§ 116-119 (1959). Except as limited by public
4 policy, the extent of a beneficiary's interest is determined solely by the settlor's
5 intent. See RESTATEMENT (THIRD) OF TRUSTS § 49 (Tentative Draft No. 2, approved
6 1999); RESTATEMENT (SECOND) OF TRUSTS §§ 127-128 (1959). While most beneficial
7 interests terminate upon a beneficiary's death, the interest of a beneficiary may
8 devolve by will or intestate succession the same as a corresponding legal interest.
9 See RESTATEMENT (THIRD) OF TRUSTS § 55(1) (Tentative Draft No. 2, approved 1999);
10 RESTATEMENT (SECOND) OF TRUSTS §§ 140, 142 (1959).

11
12 **Trusts with charitable and noncharitable beneficiaries.** Under the Uniform
13 Trust Code, when a trust has both charitable and noncharitable beneficiaries only
14 the charitable portion qualifies as a "charitable trust" (paragraph (4)). The great
15 majority of the Code's provisions apply to both charitable and noncharitable trusts
16 without distinction. The distinctions between the two types of trusts are found in
17 the requirements relating to trust creation and modification. Pursuant to Sections
18 405 and 413, a charitable trust must have a charitable purpose and charitable trusts
19 may be modified or terminated under the doctrine of *cy pres*. Also, Section 411
20 allows a noncharitable trust to in certain instances be terminated by its beneficiaries
21 while noncharitable trusts do not have beneficiaries in the usual sense. To the extent
22 of these distinctions, a split-interest trust is subject to two sets of provisions, one
23 applicable to the charitable interests, the other the noncharitable.

24
25 **Conservator.** For discussion of the definition of "conservator" (paragraph
26 (5)), see the definition of "guardian" (paragraph (7)).

27
28 **Environmental law.** To encourage trustees to accept and administer trusts
29 containing real property, the Uniform Trust Code contains several provisions
30 designed to limit exposure to possible liability for violation of "environmental law"
31 (paragraph (6)). Section 701(c)(2) authorizes a nominated trustee to investigate trust
32 property to determine potential liability for violation of environmental law or other
33 law without accepting the trusteeship. Section 816(13) grants a trustee
34 comprehensive and detailed powers to deal with property involving environmental
35 risks. Section 1010(b) immunizes a trustee from personal liability for violation of
36 environmental law arising from the ownership and control of trust property.

37
38 **Guardian.** Under the Uniform Trust Code, a "guardian" (paragraph (7))
39 makes decisions with respect to personal care; a "conservator" (paragraph (5))
40 manages property. The terminology used is that employed in Article V of the
41 Uniform Probate Code, and in its free-standing Uniform Guardianship and
42 Protective Proceedings Act.

43
44 **Interests of the beneficiaries.** The phrase "interests of the beneficiaries"
45 (paragraph (8)) is used with some frequency in the Uniform Trust Code. The
46 definition clarifies that the interests are as provided in the terms of the trust and not
47 as determined by the beneficiaries. Absent authority to do so in the terms of the
48 trust, Section 108 prohibits a trustee from changing a trust's principal place of

1 administration if the transfer would violate the trustee’s duty to administer the trust
2 at a place appropriate to the interests of the beneficiaries. Section 706(b) conditions
3 certain of the grounds for removing a trustee on the court’s finding that removal of
4 the trustee will best serve the interests of the beneficiaries. Section 801 requires the
5 trustee to administer the trust in the interests of the beneficiaries, and Section 802
6 makes clear that a trustee may not place its own interests above those of the
7 beneficiaries. Section 808(d) requires the holder of a power to direct who is subject
8 to a fiduciary obligation to act with regard to the interests of the beneficiaries.
9 Section 1002(b) may impose greater liability on a co-trustee who commits a breach of
10 trust with reckless indifference to the interests of the beneficiaries. Section 1008
11 invalidates an exculpatory term to the extent it relieves a trustee of liability for
12 breach of trust committed with reckless indifference to the interests of the
13 beneficiaries.

14
15 **Jurisdiction.** “Jurisdiction” (paragraph (9)), when used with reference to a
16 geographic area, includes a state or country but is not necessarily so limited. Its
17 precise scope will depend on the context in which it is used. “Jurisdiction” is used
18 in Sections 107 and 403 to refer to the place whose law will govern the trust. The
19 term is used in Section 108 to refer to the trust’s principal place of administration.
20 The term is used in Section 816 to refer to the place where the trustee may appoint
21 an ancillary trustee and to the place in whose courts the trustee can bring and
22 defend legal proceedings.

23
24 **Property.** The definition of “property” (paragraph (12)) is intended to be as
25 expansive as possible and to encompass anything that may be the subject of
26 ownership. Included are choses in action, claims, and interests created by
27 beneficiary designations under policies of insurance, financial instruments, and
28 deferred compensation and other retirement arrangements, whether revocable or
29 irrevocable. Any such property interest is sufficient to support creation of a trust.
30 *See* Section 401 Comment.

31
32 **Qualified beneficiary.** Due to the difficulty of identifying beneficiaries
33 whose interests are remote and contingent, and because such beneficiaries are not
34 likely to have much interest in the day-to-day affairs of the trust, the Uniform Trust
35 Code uses the concept of “qualified beneficiary” (paragraph (13)) to limit the class of
36 beneficiaries to whom certain notices must be given or consents received. The
37 definition of qualified beneficiaries is used in Section 705 to define the class to whom
38 notice must be given of a trustee resignation. The term is used in Section 813 to
39 define the class to be kept informed of the trust’s administration. Section 417
40 requires that notice be given to the qualified beneficiaries before a trust may be
41 combined or divided. Actions which may be accomplished by the consent of the
42 qualified beneficiaries include the appointment of a successor trustee as provided in
43 Section 704. Prior to transferring a trust’s principal place of administration, Section
44 108(d) requires that the trustee give at least 60 days notice to the qualified
45 beneficiaries.

46
47 The qualified beneficiaries consist of the beneficiaries currently eligible to
48 receive a distribution from the trust together with those who might be termed the

1 first-line remainder beneficiaries. These are the beneficiaries who would become
2 eligible to receive distributions were the event triggering the termination of a
3 beneficiary's interest or of the trust itself to occur on the date in question. Such a
4 terminating event will typically be the death or deaths of the beneficiaries currently
5 eligible to receive the income. Should a qualified beneficiary be a minor,
6 incapacitated, or unknown, or a beneficiary whose identity or location is not
7 reasonably ascertainable, the representation and virtual representation principles of
8 Article 3 may be employed, including the possible appointment by the court of a
9 representative to represent the beneficiary's interest.

10
11 The qualified beneficiaries who take upon termination of the beneficiary's
12 interest or of the trust can include takers in default of the exercise of a power of
13 appointment. The term can also include the persons entitled to receive the trust
14 property pursuant to the exercise of a power of appointment. Because the exercise
15 of a testamentary power of appointment is not effective until the testator's death and
16 probate of the will, the qualified beneficiaries do not include appointees under the
17 will of a living person.

18 Charitable trusts and trusts for a valid noncharitable purpose do not have
19 beneficiaries in the usual sense. However, certain persons, while not technically
20 beneficiaries, do have an interest in seeing that the trust is enforced. Section 110
21 expands the definition of qualified beneficiaries to encompass this wider group.
22 Section 110(b) grants the rights of qualified beneficiaries to charitable organizations
23 expressly designated under the terms of a charitable trust and whose interests
24 would have been sufficient to satisfy the definition of qualified beneficiary were the
25 trust noncharitable. Section 110(c) grants the rights of qualified beneficiaries to a
26 person appointed by the terms of the trust or by the court to enforce a trust created
27 for an animal or other noncharitable purpose. Section 110(d) is an optional
28 provision granting the rights of a qualified beneficiary with respect to a charitable
29 trust to the attorney general of the enacting jurisdiction.

30
31 **Revocable.** The definition of "revocable" (paragraph (14)) clarifies that
32 revocable trusts include only trusts whose revocation is substantially within the
33 settlor's control. The consequences of classifying a trust as revocable are many. The
34 Uniform Trust Code contains provisions relating to liability of a revocable trust for
35 payment of the settlor's debts (Section 505), the standard of capacity for creating a
36 revocable trust (Section 601), the procedure for revocation (Section 602), the
37 subjecting of the beneficiaries' rights to the settlor's control (Section 603), the period
38 for contesting a revocable trust (Section 604), the power of the settlor of a revocable
39 trust to direct the actions of a trustee (Section 808(a)), notice to the qualified
40 beneficiaries upon the settlor's death (Section 813(b)), and the liability of a trustee of
41 a revocable trust for the obligations of a partnership of which the trustee is a general
42 partner (Section 1011(d)).

43
44 Because under Section 603(d) the holder of a power of withdrawal has the
45 rights of a settlor of a revocable trust, the definition of "power of withdrawal"
46 (paragraph (11)), and "revocable" (paragraph (14)) are similar. Both exclude
47 individuals who can exercise their power only with the consent of the trustee or
48 person having an adverse interest although the definition of "power of withdrawal"

1 excludes powers subject to an ascertainable standard, a limitation which is not
2 present in the definition of “revocable.”
3

4 **Settlor.** The definition of “settlor” (paragraph (15)) refers to the person who
5 creates, or contributes property to, a trust, whether by will, self-declaration, transfer
6 of property to another person as trustee, or exercise of a power of appointment. For
7 the requirements for creating a trust, see Section 401. Determining the identity of
8 the “settlor” is usually not an issue. The same person will both sign the trust
9 instrument and fund the trust. Ascertaining the identity of the settlor becomes more
10 difficult when more than one person signs the trust instrument or funds the trust.
11 The fact that a person is designated as the “settlor” by the terms of the trust is not
12 necessarily determinative. For example, the person who executes the trust
13 instrument may be acting as the agent for the person who will be funding the trust.
14 In that case, the person funding the trust, and not the person signing the trust
15 instrument, will be the settlor. Should more than one person contribute to a trust, all
16 of the contributors will ordinarily be treated as settlors in proportion to their
17 respective contributions, regardless of which one signed the trust instrument. *See*
18 Section 602(b).
19

20 In the case of a revocable trust employed as a will substitute, gifts to the
21 trust’s creator are sometimes made by placing the gifted property directly into the
22 trust. To recognize that such a donor is not intended to be treated as a settlor, the
23 definition of “settlor” excludes a contributor to a trust that is revocable by another
24 person or over which another person has a power of withdrawal. Thus, a parent
25 who contributes to a child’s revocable trust would not be treated as one of the trust’s
26 settlors. The definition of settlor would treat the child as the sole settlor of the trust
27 to the extent of the child’s proportionate contribution. Pursuant to Section 603(d),
28 the child’s power of withdrawal over the trust would also result in the child being
29 treated as the settlor with respect to the portion of the trust attributable to the
30 parent’s contribution.
31

32 Ascertaining the identity of the settlor is important for a variety of reasons. It
33 is important for determining rights in revocable trusts. *See* Sections 505(a)(1), (3)
34 (creditor claims against settlor of revocable trust), 602 (revocation or modification of
35 revocable trust), and 604 (limitation on contest of revocable trust). It is also
36 important for determining rights of creditors in irrevocable trusts. *See* Section
37 505(a)(2) (creditors of settlor can reach maximum amount trustee can distribute to
38 settlor). While the settlor of an irrevocable trust traditionally has no continuing
39 rights over the trust except for the right under Section 411 to terminate the trust with
40 the beneficiaries’ consent, the Uniform Trust Code also authorizes the settlor of an
41 irrevocable trust to petition for removal of the trustee and to enforce or modify a
42 charitable trust. *See* Sections 405(c) (standing to enforce charitable trust), 413
43 (doctrine of *cy pres*), and 706 (removal of trustee).
44

45 **Spendthrift provisions.** “Spendthrift provision” (paragraph (16)) means a
46 term of a trust which restrains the transfer of a beneficiary’s interest, whether by a
47 voluntary act of the beneficiary or by an action of a beneficiary’s creditor or
48 assignee, which at least as far as the beneficiary is concerned, would be involuntary.

1 A spendthrift provision is valid under the Uniform Trust Code only if it restrains
2 both voluntary and involuntary transfer. For a discussion of this requirement and
3 the effect of a spendthrift provision in general, see Section 502. The insertion of a
4 spendthrift provision in the terms of the trust may also constitute a material purpose
5 sufficient to prevent termination of the trust by agreement of the beneficiaries under
6 Section 411, although the Code does not presume this result.

7
8 **Terms of a trust.** “Terms of a trust” (paragraph (18)) is a defined term used
9 frequently in the Uniform Trust Code. While the wording of a written trust
10 instrument is almost always the most important determinant of a trust’s terms, the
11 definition is not so limited. Oral statements, the situation of the beneficiaries, the
12 purposes of the trust, the circumstances under which the trust is to be administered,
13 and, to the extent the settlor was otherwise silent, rules of construction, all may have
14 a bearing on determining a trust’s meaning. *See* RESTATEMENT (THIRD) OF TRUSTS § 4
15 cmt. a (Tentative Draft No. 1, approved 1996); RESTATEMENT (SECOND) OF TRUSTS § 4
16 cmt. a (1959). If a trust established by order of court is to be administered as an
17 express trust, then the terms of the trust are determined from the court order as
18 interpreted in light of the general rules governing interpretation of judgments. *See*
19 RESTATEMENT (THIRD) OF TRUSTS § 4 cmt. f (Tentative Draft No. 1, approved 1996).

20
21 A manifestation of a settlor’s intention does not constitute evidence of a
22 trust’s terms if it would be inadmissible in a judicial proceeding in which the trust’s
23 terms are in question. *See* RESTATEMENT (THIRD) OF TRUSTS § 4 cmt. b (Tentative
24 Draft No. 1, approved 1996); RESTATEMENT (SECOND) OF TRUSTS § 4 cmt. b (1959). *See*
25 *also* RESTATEMENT (THIRD) PROPERTY: DONATIVE TRANSFERS §§ 10.2, 11.1-11.3
26 (Tentative Draft No. 1, approved 1995). For example, in many states a trust of real
27 property is unenforceable unless evidenced by a writing, although Section 407 of
28 this Code does not so require. Evidence otherwise relevant to determining the terms
29 of a trust may also be excluded under other principles of law, such as the parol
30 evidence rule.

31
32 **Trust instrument.** “Trust instrument” (paragraph (19)) is a subset of the
33 definition of “terms of a trust” (paragraph (18)), referring to only such terms as are
34 found in an instrument executed by the settlor. Section 403 provides that a trust is
35 validly created if created in compliance with the law of the place where the trust
36 instrument was executed. Pursuant to Section 604(a)(2), the contest period for a
37 revocable trust can be shortened by providing the potential contestant with a copy
38 of the trust instrument plus other information. Section 813(b)(1) requires that the
39 trustee upon request furnish a beneficiary with a copy of the trust instrument. To
40 allow a trustee to administer a trust with some dispatch without concern about
41 liability if the terms of a trust instrument are contradicted by evidence outside of the
42 instrument, Section 1006 protects a trustee from liability to the extent a breach of
43 trust resulted from reasonable reliance on those terms. Section 1013 allows a trustee
44 to substitute a certification of trust in lieu of providing a third person with a copy of
45 the trust instrument. Section 1106(a)(4) provides that unless there is a clear
46 indication of a contrary intent, rules of construction and presumptions provided in
47 the Uniform Trust Code apply to trust instruments executed before the effective date
48 of the Code.

1
2 **Trustee.** The definition of “trustee” (paragraph (20)) includes not only the
3 original trustee but also an additional and successor trustee as well as a co-trustee.
4 Because the definition of trustee includes trustees of all types, any trustee, whether
5 original or succeeding, single or co-trustee, has the powers of a trustee and is subject
6 to the duties imposed on trustees under the Uniform Trust Code. Any natural
7 person, including a settlor or beneficiary, has capacity to act as trustee if the person
8 has capacity to hold title to property free of trust. *See* RESTATEMENT (THIRD) OF
9 TRUSTS § 32 (Tentative Draft No. 2, approved 1999); RESTATEMENT (SECOND) OF
10 TRUSTS § 89 (1959). State banking statutes normally impose additional requirements
11 before a corporation can act as trustee.
12

13 **Section 19-3B-104. Knowledge.**

14 (a) Subject to subsection (b), a person has
15 knowledge of a fact if the person:

16 (1) has actual knowledge of it;

17 (2) has received a notice or notification of it; or

18 (3) from all the facts and circumstances known to
19 the person at the time in question, has reason to know it.

20 (b) An organization that conducts activities through
21 employees has notice or knowledge of a fact involving a trust
22 only from the time the information was received by an employee
23 having responsibility to act for the trust, or would have been
24 brought to the employee's attention if the organization had
25 exercised reasonable diligence. An organization exercises
26 reasonable diligence if it maintains reasonable routines for
27 communicating significant information to the employee having
28 responsibility to act for the trust and there is reasonable
29 compliance with the routines. Reasonable diligence does not
30 require an employee of the organization to communicate
31 information unless the communication is part of the
32 individual's regular duties or the individual knows a matter
33 involving the trust would be materially affected by the
34 information.

Comparison to Uniform Code. Section 104 is the same as Section 104 of the Uniform Trust Code (2001).

Uniform Comment

Purpose and scope. This section specifies when a person is deemed to know a fact. Subsection (a) states the general rule. Subsection (b) provides a special rule dealing with notice to organizations. Pursuant to subsection (a), a fact is known to a person if the person had actual knowledge of the fact, received notification of it, or had reason to know of the fact's existence based on all of the circumstances and other facts known to the person at the time. Under subsection (b), notice to an organization is not necessarily achieved by giving notice to a branch office. Nor does the organization necessarily acquire knowledge at the moment the notice arrives in the organization's mailroom. Rather, the organization has notice or knowledge of a fact only when the information is received by an employee having responsibility to act for the trust, or would have been brought to the employee's attention had the organization exercised reasonable diligence.

"Know" is used in its defined sense in Sections 109 (methods and waiver of notice), 305 (appointment of representative), 604(b) (limitation on contest of revocable trust), 812 (collecting trust property), 1009 (nonliability of trustee upon beneficiary's consent, release, or ratification), 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 Section 1005 (limitation of action against trustee following report of trustee).

This section is based on Uniform Commercial Code § 1-202 (2000 Annual Meeting Draft).

Section 19-3B-105. Default and Mandatory Rules.

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

(b) The terms of a trust prevail over any provision of this chapter except:

- (1) the requirements for creating a trust;

1 (2) the duty of a trustee to act in good faith and
2 in accordance with the terms and purposes of the trust and the
3 interest of the beneficiaries;

4 (3) the requirement that a trust and its terms be
5 for the benefit of its beneficiaries, and that the trust have
6 a purpose that is lawful, not contrary to public policy, and
7 possible to achieve;

8 (4) the power of the court to modify or terminate a
9 trust under Sections 19-3B-410 through 19-3B-416;

10 (5) the effect of a spendthrift provision and the
11 rights of certain creditors and assignees to reach a trust as
12 provided in Article 5;

13 (6) the power of the court under Section 19-3B-702
14 to require, dispense with, or modify or terminate a bond;

15 (7) the power of the court under Section 19-3B-
16 708(b) to adjust a trustee's compensation, as specified in the
17 terms of the trust or by written agreement, which is
18 unreasonably low or high;

19 (8) the duty under Section 19-3B-813(a)(2) to
20 respond to the request of a qualified beneficiary of an
21 irrevocable trust for trustee's reports and other information
22 reasonably related to the administration of a trust;

23 (9) the effect of an exculpatory term under Section
24 19-3B-1008;

25 (10) the rights under Sections 19-3B-1010 through
26 19-3B-1013 of a person other than a trustee or beneficiary;

27 (11) periods of limitation for commencing a judicial
28 proceeding;

1 (12) the power of the court to take such action and
2 exercise such jurisdiction as may be necessary in the
3 interests of justice; and

4 (13) a proceeding as provided in Sections 19-3B-203
5 through 19-3B-205.

6 *Alabama Comment*

7
8 **Comparison to Uniform Code.** Alabama modifies the language in Section
9 105(b)(7) of the Uniform Trust Code (2001), to include compensation as specified by
10 written agreement. This change is made to provide consistency with the Alabama
11 changes to Section 708(b). Alabama deleted Section 105(b)(8) of the UTC (2001),
12 which read as follows: “with respect to the qualified beneficiaries of an irrevocable
13 trust who have attained 25 years of age, the duty under Section 813(b)(2) – (3) to
14 notify them of the existence of the trust, of the identity of the trustee, and of their
15 right to request trustee’s reports.” Subsections (b)(9) through (b)(14) of the Uniform
16 Code are renumbered as subsections (b)(8) through (b)(13), respectively. The
17 reference to Section 813(a) in subsection (b)(9) of the UTC (renumbered as subsection
18 (b)(8) in the Alabama Uniform Trust Code) is changed to Section 813(a)(2), in order
19 to conform to the Alabama changes to Section 813 of the Uniform Code.

20 *Uniform Comment*

21
22
23 **Default rules.** Subsection (a) emphasizes that the Uniform Trust Code is
24 primarily a default statute. While this Code provides numerous procedural rules on
25 which a settlor may wish to rely, the settlor is generally free to override these rules
26 and to prescribe the conditions under which the trust is to be administered. With
27 only limited exceptions, the duties and powers of a trustee, relations among trustees,
28 and the rights and interests of a beneficiary are as specified in the terms of the trust.

29
30 **Mandatory rules.** Subsection (b) lists the items not subject to override in the
31 terms of the trust.

32
33 Subsection (b)(1) confirms that the requirements for a trust’s creation, such as
34 the necessary level of capacity and the requirement that a trust have a legal purpose,
35 are controlled by statute and common law, not by the settlor. For the requirements
36 for creating a trust, see Sections 401 – 409. Subsection (b)(11) makes clear that the
37 settlor may not reduce any otherwise applicable period of limitations for
38 commencing a judicial proceeding. See Sections 604 (period of limitations for
39 contesting validity of revocable trust) and 1005 (period of limitation on action for
40 breach of trust). Similarly, a settlor may not so negate the responsibilities of a
41 trustee that the trustee would no longer be acting in a fiduciary capacity. Subsection
42 (b)(2) provides that the terms may not eliminate a trustee’s duty to act in good faith
43 and in accordance with the purposes of the trust and the interests of the
44 beneficiaries. Subsection (b)(3) provides that the terms may not eliminate the
45 requirement that a trust and its terms must be for the benefit of the beneficiaries and

1 that a settlor cannot override the requirement that a trust must have a legal and
2 valid purpose. Subsections (b)(2) - (3) are echoed in Sections 404 (trust and its terms
3 must be for benefit of beneficiaries), 801 (trustee must administer trust in good faith,
4 in accordance with its terms and purposes and the interests of the beneficiaries), 814
5 (trustee must exercise discretionary power in good faith and in accordance with its
6 terms and purposes and the interests of the beneficiaries), and 1008 (exculpatory
7 term unenforceable to extent it relieves trustee of liability for breach of trust
8 committed in bad faith or with reckless indifference to the purposes of the trust and
9 the interests of the beneficiaries).

10
11 The terms of a trust may not deny a court authority to take such action as
12 necessary in the interests of justice, including requiring that a trustee furnish bond.
13 Subsections (b)(6) and (b)(12). Additionally, should the jurisdiction adopting this
14 Code enact the optional provisions on subject-matter jurisdiction and venue,
15 subsection (b)(13) similarly provides that such provisions cannot be altered in the
16 terms of the trust. The power of the court to modify or terminate a trust under
17 Sections 410 through 416 is not subject to variation in the terms of the trust.
18 Subsection (b)(4). However, all of these Code sections involve situations which the
19 settlor could have addressed had the settlor had sufficient foresight. These include
20 situations where the purpose of the trust has been achieved, a mistake was made in
21 the trust's creation, or circumstances have arisen that were not anticipated by the
22 settlor.

23
24 Section 813 imposes a general obligation to keep the beneficiaries informed as
25 well as several specific notice requirements. Subsection (b)(8) specifies limits on the
26 settlor's ability to waive the information requirements imposed by Section 813. ... A
27 settlor may dispense with all of the requirements of Section 813 except for the duty
28 ... to respond to a qualified beneficiary's request for other information reasonably
29 related to the trust's administration. Among the specific requirements that a settlor
30 may waive include the duty to provide a beneficiary upon request with a copy of the
31 trust instrument (Section 813(b)(1)), the duty to notify qualified beneficiaries of the
32 acceptance of and of trustee's name and address and telephone number (Section
33 813(b)(2)) within 90 days of acceptance of a trusteeship, the duty to notify qualified
34 beneficiaries that a revocable trust has become irrevocable (Section 813(b)(3)) and
35 the requirement that the trustee provide annual reports to the qualified beneficiaries
36 (Section 813(c)). The furnishing of a copy of the entire trust instrument and
37 preparation of annual reports may be required in a particular case, however, if such
38 information is requested by a beneficiary and is reasonably related to the trust's
39 administration. ...

40
41 Waiver by a settlor of the trustee's duty to keep the beneficiaries informed of
42 the trust's administration does not otherwise affect the trustee's duties. The trustee
43 remains accountable to the beneficiaries for the trustee's actions.

44
45 Subsection (b)(8) does not apply to revocable trusts. The settlor of a revocable
46 trust may waive all reporting to the beneficiaries, even in the event the settlor loses
47 capacity. If the settlor is silent about the subject, then reporting to the beneficiaries
48 will be required upon the settlor's loss of capacity. *See* Section 603.

1
2 In conformity with traditional doctrine, the Uniform Trust Code limits the
3 ability of a settlor to exculpate a trustee from liability for breach of trust. The limits
4 are specified in Section 1008. Subsection (b)(9) of this section provides a cross-
5 reference. Similarly, subsection (b)(7) provides a cross-reference to Section 708(b),
6 which limits the binding effect of a provision specifying the trustee's compensation.
7

8 Finally, subsection (b)(10) clarifies that a settlor is not free to limit the rights
9 of third persons, such as purchasers of trust property. Subsection (b)(5) clarifies that
10 a settlor may not restrict the rights of a beneficiary's creditors except to the extent a
11 spendthrift restriction is allowed as provided in Article 5.
12

13 **Section 19-3B-106. Common Law of Trusts; Principles of Equity.**

14 The common law of trusts and principles of equity
15 supplement this chapter, except to the extent modified by this
16 chapter or another statute of this state.

17 *Alabama Comment*

18
19 **Comparison to Uniform Code.** Section 106 is the same as
20 Section 106 of the Uniform Trust Code (2001).

21
22 *Uniform Comment*

23
24 The Uniform Trust Code codifies those portions of the law of express trusts
25 that are most amenable to codification. The Code is supplemented by the common
26 law of trusts, including principles of equity, particularly as articulated in the
27 Restatement of Trusts, Restatement (Third) of Property: Wills and Other Donative
28 Transfers, and the Restatement of Restitution. The common law of trusts is not static
29 but includes the contemporary and evolving rules of decision developed by the
30 courts in exercise of their power to adapt the law to new situations and changing
31 conditions. It also includes the traditional and broad equitable jurisdiction of the
32 court, which the Code in no way restricts.
33

34 The statutory text of the Uniform Trust Code is also supplemented by these
35 Comments, which, like the Comments to any Uniform Act, may be relied on as a
36 guide for interpretation. *See Acierno v. Worthy Bros. Pipeline Corp.*, 656 A.2d 1085,
37 1090 (Del. 1995) (interpreting Uniform Commercial Code); *Yale University v.*
38 *Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting Uniform Management of
39 Institutional Funds Act); 2 NORMAN SINGER, STATUTORY CONSTRUCTION § 52.05 (6th
40 ed. 2000); JACK DAVIES, LEGISLATIVE LAW AND PROCESS IN A NUTSHELL § 55-4 (2d ed.
41 1986).
42

1 **Section 19-3B-107. Governing Law.**

2 The meaning and effect of the terms of a trust are
3 determined by:

4 (1) the law of the jurisdiction designated in the
5 terms unless the designation of that jurisdiction's law is
6 contrary to a strong public policy of the jurisdiction having
7 the most significant relationship to the matter at issue; or

8 (2) in the absence of a controlling designation in
9 the terms of the trust, the law of the jurisdiction having the
10 most significant relationship to the matter at issue.

11
12 *Alabama Comment*

13
14 **Comparison to Uniform Code.** Section 107 is the same as Section 107 of the
15 Uniform Trust Code (2001). This provision purports to establish a choice of
16 law rule only with respect to the meaning and effect of the terms of a trust. Except
17 in this regard, there is no intent to alter the case law principles of *lex loci contractus*
18 and *lex loci delicti*, as applied by the Supreme Court of Alabama in *American*
19 *Nonwovens, Inc. v. Non Wovens Engineering, S.R.L.*, 648 So.2d 565 (Ala.1994), and *Fitts*
20 *v. Minnesota Mining & Manufacturing Co.*, 581 So.2d 819 (Ala.1991).

21
22 *Uniform Comment*

23
24 **Purpose and scope.** This section provides rules for determining the law that
25 will govern the meaning and effect of particular trust terms. The law to apply to
26 determine whether a trust has been validly created is determined under Section 403.

27
28 Paragraph (1) allows a settlor to select the law that will govern the meaning
29 and effect of the terms of the trust. The jurisdiction selected need not have any other
30 connection to the trust. The settlor is free to select the governing law regardless of
31 where the trust property may be physically located, whether it consists of real or
32 personal property, and whether the trust was created by will or during the settlor's
33 lifetime. This section does not attempt to specify the strong public policies sufficient
34 to invalidate a settlor's choice of governing law. These public policies will vary
35 depending upon the locale and may change over time.

36
37 Paragraph (2) provides a rule for trusts without governing law provisions –
38 the meaning and effect of the trust's terms are to be determined by the law of the
39 jurisdiction having the most significant relationship to the matter at issue. Factors to
40 consider in determining the governing law include the place of the trust's creation,

1 the location of the trust property, and the domicile of the settlor, the trustee, and the
2 beneficiaries. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 270 cmt. c and 272
3 cmt. d (1971). Other more general factors that may be pertinent in particular cases
4 include the relevant policies of the forum, the relevant policies of other interested
5 jurisdictions and degree of their interest, the protection of justified expectations and
6 certainty, and predictability and uniformity of result. See RESTATEMENT (SECOND) OF
7 CONFLICT OF LAWS § 6 (1971). Usually, the law of the trust's principal place of
8 administration will govern administrative matters and the law of the place having
9 the most significant relationship to the trust's creation will govern the dispositive
10 provisions.

11
12 This section is consistent with and was partially patterned on the Hague
13 Convention on the Law Applicable to Trusts and on their Recognition, signed on
14 July 1, 1985. Like this section, the Hague Convention allows the settlor to designate
15 the governing law. Hague Convention art. 6. Absent a designation, the Convention
16 provides that the trust is to be governed by the law of the place having the closest
17 connection to the trust. Hague Convention art. 7. The Convention also lists
18 particular public policies for which the forum may decide to override the choice of
19 law that would otherwise apply. These policies are protection of minors and
20 incapable parties, personal and proprietary effects of marriage, succession rights,
21 transfer of title and security interests in property, protection of creditors in matters
22 of insolvency, and, more generally, protection of third parties acting in good faith.
23 Hague Convention art. 15.

24
25 For the authority of a settlor to designate a trust's principal place of
26 administration, see Section 108(a).

27
28 **Section 19-3B-108. Principal Place of Administration.**

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

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

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

38 (b) A trustee shall administer the trust at a place
39 appropriate to its purposes, its administration, and the

1 interests of the beneficiaries; provided, however, a trustee
2 shall not be required to transfer the trust's principal place
3 of administration to another state or to a jurisdiction
4 outside of the United States.

5 (c) Without precluding the right of the court to
6 order, approve, or disapprove a transfer, the trustee may
7 transfer the trust's principal place of administration to
8 another state or to a jurisdiction outside of the United
9 States, provided that the transfer is to a place appropriate
10 to the trust's purposes, its administration and the interests
11 of the beneficiaries.

12 (d) The trustee shall notify the qualified
13 beneficiaries of a proposed transfer of a trust's principal
14 place of administration to another state or to a jurisdiction
15 outside of the United States not less than 30 days before
16 initiating the transfer. The notice of proposed transfer must
17 include:

18 (1) the name of the jurisdiction to which the
19 principal place of administration is to be transferred;

20 (2) the address and telephone number at the new
21 location at which the trustee can be contacted;

22 (3) an explanation of the reasons for the proposed
23 transfer;

24 (4) the date on which the proposed transfer is
25 anticipated to occur; and

26 (5) the date, not less than 30 days after the giving
27 of the notice, by which the qualified beneficiary must notify
28 the trustee of an objection to the proposed transfer.

1 (e) The authority of a trustee under this section to
2 transfer a trust's principal place of administration to
3 another state or to a jurisdiction outside of the United
4 States terminates if a qualified beneficiary notifies the
5 trustee of an objection to the proposed transfer on or before
6 the date specified in the notice.

7 (f) In connection with a transfer of the trust's
8 principal place of administration, the trustee may transfer
9 some or all of the trust property to a successor trustee
10 designated in the terms of the trust or appointed pursuant to
11 Section 19-3B-704.

12 (g) Unless otherwise designated in the trust
13 instrument, the principal place of administration of a trust
14 is the usual place where the day-to-day activity of the trust
15 is carried on by the trustee or its representative who is
16 primarily responsible for the administration of the trust. If
17 the principal place of administration of the trust cannot be
18 determined pursuant to the foregoing sentence, then it shall
19 be determined as follows:

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

23 (2) If the trust has more than one trustee, then the
24 principal place of administration of the trust is (i) the
25 usual place of business of the corporate trustee if there is
26 but one corporate co-trustee, or (ii) the usual place of
27 business or residence of the individual trustee who is a
28 professional fiduciary if there is but one such person and no
29 corporate co-trustee. If neither (i) nor (ii) apply, then the

1 principal place of administration shall be the usual place of
2 business or residence of any of the co-trustees.

3
4 *Alabama Comment*

5
6 **Comparison to Uniform Code.** Section 108 is substantially the same as
7 Section 108 of the Uniform Trust Code (2001). Alabama adds subsection 108(g),
8 which is patterned after CAL. PROB. CODE § 17002 and S.C. CODE § 62-7-202.

9
10 **Transfer of a trust's principal place of administration by the trustee.**
11 Subsections (c) through (f) prescribe the rules to be followed by the trustee when
12 transferring the trust's principal place of administration to another state or to a
13 jurisdiction outside of the United States. Alabama amends the language of
14 subsections (b) and (c) in the UTC by giving the trustee the authority, but without
15 imposing an affirmative duty, to transfer the trust's principal place of administration
16 where appropriate. The original UTC language seemed to impose an affirmative
17 duty upon the trustee to seek best place of administration for the trust. The original
18 language could be interpreted to require the trustee to continually "forum shop" for,
19 among other things, the best tax situs for the trust and the best tax situs for the
20 beneficiaries. Transferring the trust's principal place of administration is costly and
21 time consuming, and should not be undertaken lightly and without considering all
22 of the relevant factors: the trust's purposes, the trust's interests and the interests of
23 the beneficiaries.

24
25 This section is not intended to provide for a beneficiary to object to the
26 transfer of a trust's principal place of administration within the state of Alabama.
27 For example, if a corporate trustee decides to consolidate its trust operations within
28 the state of Alabama, and closes a branch office of its trust department in
29 furtherance of consolidation, then subsection (e) would not be applicable. Alabama
30 adds the clause "to another state or to a jurisdiction outside of the United States" to
31 subsection (d) and (e) to make explicit what is implicit in subsections (c) through (f).

32
33 Note, however, that Subsection 108(b) is not intended to preclude the court
34 from transferring a trust's principal place of administration to another jurisdiction
35 pursuant to its authority under Section 201(d)(12).

36
37 **Waiver of notice by persons to be notified.** To facilitate administration,
38 Section 109(c) allows waiver of the Section 108(d) notice requirement.

39
40 *Uniform Comment*

41
42 **Purpose and scope.** This section prescribes rules relating to a trust's principal
43 place of administration. Locating a trust's principal place of administration will
44 ordinarily determine which court has primary if not exclusive jurisdiction over the
45 trust. It may also be important for other matters, such as payment of state income

1 tax or determining the jurisdiction whose laws will govern the trust. *See* Section 107
2 Comment.

3
4 Because of the difficult and variable situations sometimes involved, the
5 Uniform Trust Code does not attempt to further define principal place of
6 administration. A trust's principal place of administration ordinarily will be the
7 place where the trustee is located. Determining the principal place of administration
8 becomes more difficult, however, when co-trustees are located in different states or
9 when a single institutional trustee has trust operations in more than one state. In
10 such cases, other factors may become relevant, including the place where the trust
11 records are kept or trust assets held, or in the case of an institutional trustee, the
12 place where the trust officer responsible for supervising the account is located.

13
14 A concept akin to principal place of administration is used by the Office of the
15 Comptroller of the Currency. Reserves that national banks are required to deposit
16 with state authorities is based on the location of the office where trust assets are
17 primarily administered. *See* 12 C.F.R. § 9.14(b).

18
19 Under the Uniform Trust Code, the fixing of a trust's principal place of
20 administration will determine where the trustee and beneficiaries have consented to
21 suit (Section 202), and the rules for locating venue within a particular state (Section
22 204). It may also be considered by a court in another jurisdiction in determining
23 whether it has jurisdiction, and if so, whether it is a convenient forum.

24
25 **Terms of the trust with respect to jurisdiction are controlling.** A settlor
26 expecting to name a trustee or co-trustees with significant contacts in more than one
27 state may eliminate possible uncertainty about the location of the trust's principal
28 place of administration by specifying the jurisdiction in the terms of the trust.
29 Under subsection (a), a designation in the terms of the trust is controlling if (1) a
30 trustee is a resident of or has its principal place of business in the designated
31 jurisdiction, or (2) all or part of the administration occurs in the designated
32 jurisdiction. Designating the principal place of administration should be
33 distinguished from designating the law to determine the meaning and effect of the
34 trust's terms, as authorized by Section 107. A settlor is free to designate one
35 jurisdiction as the principal place of administration and another to govern the
36 meaning and effect of the trust's provisions.

37
38 **Duty to administer trust at an appropriate place.** Subsection (b) provides
39 that a trustee is under a continuing duty to administer the trust at a place
40 appropriate to its purposes, its administration, and the interests of the beneficiaries.
41 "Interests of the beneficiaries," defined in Section 103(7), means the beneficial
42 interests provided in the terms of the trust. Ordinarily, absent a substantial change
43 or circumstances, the trustee may assume that the original place of administration is
44 also the appropriate place of administration. The duty to administer the trust at an
45 appropriate place may also dictate that the trustee not move the trust.

46
47 **Procedure for changing principal place of administration.** Subsections (c) -
48 (f) provide a procedure for changing the principal place of administration to another

1 state or country. Such changes are often beneficial. A change may be desirable to
2 secure a lower state income tax rate, or because of relocation of the trustee or
3 beneficiaries, the appointment of a new trustee, or a change in the location of the
4 trust investments. The procedure for transfer specified in this section applies only in
5 the absence of a contrary provision in the terms of the trust. *See* Section 105. To
6 facilitate transfer in the typical case, where all concur that a transfer is either
7 desirable or is at least not harmful, a transfer can be accomplished without court
8 approval unless a qualified beneficiary objects. To allow the qualified beneficiaries
9 sufficient time to review a proposed transfer, the trustee must give the qualified
10 beneficiaries at least 60 days prior notice of the transfer. Notice must be given not
11 only to qualified beneficiaries as defined in Section 103(12) but also to those granted
12 the rights of qualified beneficiaries under Section 110. To assure that those receiving
13 notice have sufficient information upon which to make a decision, minimum
14 contents of the notice are specified. If a qualified beneficiary objects, then a trustee
15 wishing to proceed with the transfer must seek court approval.
16

17 **Transfer of principal place of administration.** In connection with a transfer
18 of the principal place of administration, the trustee may transfer some or all of the
19 trust property to a new trustee located outside of the state. The appointment of a
20 new trustee may also be essential if the current trustee is ineligible to administer the
21 trust in the new place. Subsection (f) clarifies that the appointment of the new
22 trustee must comply with the provisions on appointment of successor trustees as
23 provided in the terms of the trust or under Section 704. Absent an order of
24 succession in the terms of the trust, Section 704(c) provides for an appointment if
25 approved by all of the qualified beneficiaries or by the court.
26

27 While transfer of the principal place of administration will normally change
28 the governing law with respect to administrative matters, a transfer does not
29 normally alter the controlling law with respect to the validity of the trust and the
30 construction of its dispositive provisions. *See* 5A AUSTIN W. SCOTT & WILLIAM F.
31 FRATCHER, THE LAW OF TRUSTS § 615 (4th ed. 1989).
32
33

34 **Section 19-3B-109. Methods and Waiver of Notice.**

35 (a) Notice to a person under this chapter or the
36 transmission of information to a person under this chapter
37 must be accomplished in a manner reasonably suitable under the
38 circumstances and likely to result in receipt of the notice or
39 information. Permissible methods of notice or for transmitting
40 information include first-class mail, personal delivery,
41 delivery to the person's last known place of residence or
42 place of business, a properly directed electronic message, or

1 any method otherwise provided by the Alabama Rules of Civil
2 Procedure.

3 (b) Notice otherwise required under this chapter or
4 information otherwise required to be sent under this chapter
5 need not be provided to a person whose identity or location is
6 unknown to and not reasonably ascertainable by the trustee.

7 (c) Notice under this chapter or the transmission of
8 information under this chapter may be waived by the person to
9 be notified or sent the document.

10 (d) Notice of a judicial proceeding must be given as
11 provided in the applicable rules of civil procedure.

12 *Alabama Comment*

13 **Comparison to Uniform Code.** Section 109 is substantially the same as
14 Section 109 of the Uniform Trust Code (2001). Alabama substitutes the wording
15 “transmission of information” for “sending a document” throughout Section 109 in
16 order to provide a broader context for the methods of notice and waiver of notice
17 provisions in this section. Alabama adds the phrase “or any method otherwise
18 provided by the Alabama Rules of Civil Procedure” to subsection (a) in order to
19 allow for additional appropriate methods for notice or for transmitting information.
20
21
22

23 *Uniform Comment*

24 **Purpose and scope.** Subsection (a) clarifies that notices and other
25 information required to be given under the Uniform Trust Code may be given by
26 any method likely to result in its receipt by the person to be notified. The specific
27 methods listed in the subsection are illustrative, not exhaustive. Subsection (b)
28 relieves a trustee of responsibility for what would otherwise be an impossible task,
29 the giving of notice to a person whose identity or location is unknown and not
30 reasonably ascertainable by the trustee. The section does not define when a notice is
31 deemed to have been sent or delivered or person deemed to be unknown or not
32 reasonably ascertainable.
33
34

35 **Actions taken upon unanimous consent of beneficiaries.** Under the
36 Uniform Trust Code, certain actions can be taken upon unanimous consent of the
37 beneficiaries or qualified beneficiaries. *See* Sections 411 (termination of
38 noncharitable irrevocable trust) and 704 (appointment of successor trustee).
39 Subsection (b) of this section only authorizes waiver of notice. A consent required
40 from a beneficiary in order to achieve unanimity is not waived because the

1 beneficiary is missing. But the fact a beneficiary cannot be located may be a
2 sufficient basis for a substitute consent to be given by another person on the
3 beneficiary's behalf under the representation principles of Article 3.
4

5 **Waiver of notice by persons to be notified.** To facilitate administration,
6 subsection (c) allows waiver of notice by the person to be notified or sent the
7 document. Among the notices and documents to which this subsection can be
8 applied are notice of a proposed transfer of principal place of administration
9 (Section 108(d)) or of a trustee's report (Section 813(c)). This subsection also applies
10 to notice to qualified beneficiaries of a proposed trust combination or division
11 (Section 417), of a temporary assumption of duties without accepting trusteeship
12 (Section 701(c)(1)), and of a trustee's resignation (Section 705(a)(1)).
13

14 **Notices are nonjudicial.** Notices under the Uniform Trust Code are
15 nonjudicial. Pursuant to subsection (d), notice of a judicial proceeding must be
16 given as provided in the applicable rules of civil procedure.
17

18 **Section 19-3B-110. Others Treated as Qualified Beneficiaries.**

19 (a) Whenever notice to qualified beneficiaries of a
20 trust is required under this chapter, the trustee must also
21 give notice to any other beneficiary who has sent the trustee
22 a request for notice.

23 (b) A charitable organization expressly designated
24 to receive distributions under the terms of a charitable trust
25 has the rights of a qualified beneficiary under this Code if
26 the charitable organization, on the date of the charitable
27 organization's qualification is being determined:

28 (1) is a distributee or a permissible distributee of
29 trust income or principal;

30 (2) would be a distributee or permissible
31 distributee of trust income or principal upon the termination
32 of the interests of other distributees or permissible
33 distributees then receiving or eligible to receive
34 distributions; or

1 (3) would be a distributee or permissible
2 distributee of trust income or principal if the trust
3 terminated on that date.

4 (c) A person appointed to enforce a trust created
5 for the care of an animal or another noncharitable purpose as
6 provided in Section 19-3B-408 or 19-3B-409 has the rights of a
7 qualified beneficiary under this chapter.

8 (d) The attorney general of this state has the
9 rights of a qualified beneficiary when the charitable interest
10 to be represented would qualify under subsection (b) but no
11 charitable organization has been expressly designated to
12 receive distribution under the terms of a charitable trust.

13
14 *Alabama Comment*

15
16 **Comparison to Uniform Code.** Section 110 is the same as Section 110 of the
17 Uniform Trust Code (2001), except for subsection (d), which is re-written for
18 clarification.

19
20 *Uniform Comment*

21
22 **Purpose and scope.** Under the Uniform Trust Code, certain notices need be
23 given only to the “qualified” beneficiaries. For the definition of “qualified
24 beneficiary,” see Section 103(13). Among these notices are notice of a transfer of the
25 trust’s principal place of administration (Section 108(d)), notice of a trust division or
26 combination (Section 417), notice of a trustee resignation (Section 705(a)(1)), and
27 notice of a trustee’s annual report (Section 813(c)). Subsection (a) of this section
28 authorizes other beneficiaries to receive one or more of these notices by filing a
29 request for notice with the trustee.

30
31 Under the Code, certain actions, such as the appointment of a successor
32 trustee, can be accomplished by the consent of the qualified beneficiaries. *See, e.g.,*
33 Section 704 (filling vacancy in trusteeship). Subsection (a) only addresses notice, not
34 required consent. A person who requests notice under subsection (a) does not
35 thereby acquire a right to participate in actions that can be taken only upon consent
36 of the qualified beneficiaries.

37
38 **Charitable organizations.** Charitable trusts do not have beneficiaries in the
39 usual sense. However, certain persons, while not technically beneficiaries, do have
40 an interest in seeing that the trust is enforced. In the case of a charitable trust, this

1 includes the state's attorney general and charitable organizations expressly
2 designated to receive distributions under the terms of the trust. Under subsection
3 (b), charitable organizations expressly designated in the terms of the trust to receive
4 distributions and who would qualify as a qualified beneficiary were the trust
5 noncharitable, are granted the rights of qualified beneficiaries under the Code.
6 Because the charitable organization must be named in the terms of the trust and
7 must be designated to receive distributions, excluded are organizations who may
8 receive distributions only in the trustee's discretion. Requiring that the organization
9 have an interest similar to that of a beneficiary of a private trust excludes in addition
10 organizations holding remainder interests subject to a contingency.

11
12 **Trusts with a valid purpose but no ascertainable beneficiary.** Subsection (c)
13 similarly grants the rights of qualified beneficiaries to persons appointed by the
14 terms of the trust or by the court to enforce a trust created for an animal or other
15 trust with a valid purpose but no ascertainable beneficiary. For the requirements for
16 creating such trusts, see Sections 408 and 409.

17
18 **Enforcement authority of attorney general.** Subsection (d) does not limit
19 other means by which the attorney general can enforce a charitable trust.

20
21 **Section 19-3B-111. Nonjudicial Settlement Agreements.**

22 (a) For purposes of this section, "interested
23 persons" means persons whose consent would be required in
24 order to achieve a binding settlement were the settlement to
25 be approved by the court.

26 (b) Except as otherwise provided in subsection (c),
27 interested persons may enter into a binding nonjudicial
28 settlement agreement with respect to any matter involving a
29 trust.

30 (c) A nonjudicial settlement agreement is valid only
31 to the extent it does not violate a material purpose of the
32 trust and includes terms and conditions that could be properly
33 approved by the court under this chapter or other applicable
34 law.

35 (d) Matters that may be resolved by a nonjudicial
36 settlement agreement include:

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

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

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

8 (4) the resignation or appointment of a trustee and
9 the determination of a trustee's compensation;

10 (5) transfer of a trust's principal place of
11 administration;

12 (6) liability of a trustee for an action relating to
13 the trust; and

14 (7) partial or final settlements.

15 (e) Any interested person may request the court to
16 approve a nonjudicial settlement agreement, to determine
17 whether the representation as provided in Article 3 was
18 adequate, and to determine whether the agreement contains
19 terms and conditions the court could have properly approved.

20
21 *Alabama Comment*
22

23 **Comparison to Uniform Code.** Section 111 is substantially the same as
24 Section 111 of the Uniform Trust Code (2001). While it may be inferred that Section
25 111(d)(2) includes partial or final settlements, Alabama adds paragraph (d)(7) to
26 make it expressly clear. The limitation on actions against a trustee is addressed in
27 Section 1005, and a nonjudicial settlement agreement under this section may
28 contemplate the potential impact of the requirements of Section 1005.

29
30 *Uniform Comment*
31

32 **Purpose and scope.** While the Uniform Trust Code recognizes that a court
33 may intervene in the administration of a trust to the extent its jurisdiction is invoked
34 by interested persons or otherwise provided by law (*see* Section 201(a)), resolution of
35 disputes by nonjudicial means is encouraged. This section facilitates the making of

1 such agreements by giving them the same effect as if approved by the court. To
2 achieve such certainty, however, subsection (c) requires that the nonjudicial
3 settlement must contain terms and conditions that a court could properly approve.
4 Under this section, a nonjudicial settlement cannot be used to produce a result not
5 authorized by law, such as to terminate a trust in an impermissible manner.
6

7 **Beneficiaries who are minors, incapacitated, unborn or unascertained.**

8 Trusts ordinarily have beneficiaries who are minors, incapacitated, unborn or
9 unascertained. Because such beneficiaries cannot signify their consent to an
10 agreement, binding settlements can ordinarily be achieved only through the
11 application of doctrines such as virtual representation or appointment of a guardian
12 *ad litem*, doctrines traditionally available only in the case of judicial settlements. The
13 effect of this section and the Uniform Trust Code more generally is to allow for such
14 binding representation even if the agreement is not submitted for approval to a
15 court. For the rules on representation, including appointments of representatives by
16 the court to approve particular settlements, see Article 3.
17

18 **Matters that maybe resolved by settlement agreement.** Subsection (d) is a

19 nonexclusive list of matters to which a nonjudicial settlement may pertain. Other
20 matters which may be made the subject of a nonjudicial settlement are listed in the
21 Article 3 General Comment. The fact that the trustee and beneficiaries may resolve a
22 matter nonjudicially does not mean that beneficiary approval is required. For
23 example, a trustee may resign pursuant to Section 705 solely by giving notice to the
24 qualified beneficiaries and any co-trustees. But a nonjudicial settlement between the
25 trustee and beneficiaries will frequently prove helpful in working out the terms of
26 the resignation.
27

28 **Interested persons whose consent is required.** Because of the great variety

29 of matters to which a nonjudicial settlement may be applied, this section does not
30 attempt to precisely define the “interested persons” whose consent is required to
31 obtain a binding settlement as provided in subsection (a). However, the consent of
32 the trustee would ordinarily be required to obtain a binding settlement with respect
33 to matters involving a trustee’s administration, such as approval of a trustee’s report
34 or resignation.
35

36 **Section 19-3B-112. Rules of Construction.**

37 Except as otherwise provided in this chapter, the
38 rules of construction under Title 43, Chapter 8, Article 8,
39 and the miscellaneous provisions of Article 9 that apply in
40 this state to the interpretation of and disposition of
41 property by will also apply as appropriate to the

1 interpretation of the terms of a trust and the disposition of
2 the trust property.

3 *Alabama Comment*

4
5 **Comparison to Uniform Code.** Alabama changes Section 112
6 by adding the introductory clause “[e]xcept as otherwise provided in this Act” and
7 the descriptive phrase “under Title 43, Chapter 8, Article 8, and the miscellaneous
8 provisions of Article 9.” This section is meant to include, among other things, the
9 rules of construction of Articles 8 of the Alabama Probate Code and the rules of
10 operation in Article 9 of the Alabama Probate Code (as applicable).

11 12 *Uniform Comment*

13
14 **Purpose and scope.** This section is patterned after Restatement (Third) of
15 Trusts § 25(2) and comment e (Tentative Draft No. 1, approved 1996), although this
16 section, unlike the Restatement, also applies to irrevocable trusts. The revocable
17 trust is used primarily as a will substitute, with its key provision being the
18 determination of the persons to receive the trust property upon the settlor’s death.
19 Given this functional equivalence between the revocable trust and a will, the rules
20 for interpreting the disposition of property at death should be the same whether the
21 individual has chosen a will or revocable trust as the individual’s primary estate
22 planning instrument. Over the years, the legislatures of the states and the courts
23 have developed a series of rules of construction reflecting the legislative or judicial
24 understanding of how the average testator would wish to dispose of property in
25 cases where the will is silent or insufficiently clear. Few legislatures have yet to
26 extend these rules of construction to revocable trusts, and even fewer to irrevocable
27 trusts, although a number of courts have done so as a matter of judicial construction.
28 See RESTATEMENT (THIRD) OF TRUSTS § 25, Reporter’s Notes to cmt. d and e (Tentative
29 Draft No. 1, approved 1996).

30
31 Because of the wide variation among the states on the rules of construction
32 applicable to wills, this Code does not attempt to prescribe the exact rules to be
33 applied to trusts but instead adopts the philosophy of the Restatement that the rules
34 applicable to trusts ought to be the same, whatever those rules might be.

35
36 Rules of construction are not the same as constructional preferences. A
37 constructional preference is general in nature, providing general guidance for
38 resolving a wide variety of ambiguities. An example is a preference for a
39 construction that results in a complete disposition and avoid illegality. Rules of
40 construction, on the other hand, are specific in nature, providing guidance for
41 resolving specific situations or construing specific terms. Unlike a constructional
42 preference, a rule of construction, when applicable, can lead to only one result.
43 See RESTATEMENT (THIRD) OF PROPERTY: DONATIVE TRANSFERS § 11.3 and cmt. b
44 (Tentative Draft No. 1, approved 1995).

1 Rules of construction attribute intention to individual donors based on
2 assumptions of common intention. Rules of construction are found both in enacted
3 statutes and in judicial decisions. Rules of construction can involve the meaning to
4 be given to particular language in the document, such as the meaning to be given to
5 "heirs" or "issue." Rules of construction also address situations the donor failed to
6 anticipate. These include the failure to anticipate the predecease of a beneficiary or
7 to specify the source from which expenses are to be paid. Rules of construction can
8 also concern assumptions as to how a donor would have revised donative
9 documents in light of certain events occurring after execution. These include rules
10 dealing with the effect of a divorce and whether a specific devisee will receive a
11 substitute gift if the subject matter of the devise is disposed of during the testator's
12 lifetime.

13 14 ARTICLE 2

15 JUDICIAL PROCEEDINGS

16 Section 19-3B-201. Role of Court in Administration of Trust.

17 (a) The court may intervene in the administration of
18 a trust to the extent its jurisdiction is invoked by an
19 interested person or as provided by law.

20 (b) A trust is not subject to continuing judicial
21 supervision unless ordered by the court.

22 (c) A judicial proceeding involving a trust may
23 relate to any matter involving the trust's administration,
24 including a request for instructions and an action to declare
25 rights.

26 (d) A judicial proceeding involving a trust may
27 relate to any matter involving the trust's administration,
28 including, but not being limited to a proceeding to:

29 (1) request instructions;

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

32 (3) approve a nonjudicial settlement;

33 (4) interpret or construe the terms of the trust;

34 (5) determine the validity of a trust or of any of
35 its terms;

- 1 (6) approve a trustee's report or accounting or
2 compel a trustee to report or account;
- 3 (7) direct a trustee to refrain from performing a
4 particular act or grant to a trustee any necessary or
5 desirable power;
- 6 (8) review the actions or approve the proposed
7 actions of a trustee, including the exercise of a
8 discretionary power;
- 9 (9) accept the resignation of a trustee;
- 10 (10) appoint or remove a trustee;
- 11 (11) determine a trustee's compensation;
- 12 (12) transfer a trust's principal place of
13 administration or a trust's property to another jurisdiction;
- 14 (13) determine the liability of a trustee for an
15 action relating to the trust and compel redress of a breach of
16 trust by any available remedy;
- 17 (14) modify or terminate a trust;
- 18 (15) combine trusts or divide a trust;
- 19 (16) determine liability of a trust for debts of a
20 beneficiary and living settlor;
- 21 (17) determine liability of a trust for debts,
22 expenses of administration, and statutory allowances
23 chargeable against the estate of a deceased settlor;
- 24 (18) determine the liability of a trust for claims,
25 expenses and taxes in connection with the settlement of a
26 trust that was revocable at the settlor's death; and
- 27 (19) ascertain beneficiaries and determine to whom
28 property will pass upon final or partial termination of a
29 trust.
30

Comparison to Uniform Code. Sections 201(a) – 201(c) are the same as Sections 201(a) – 201(c) of the Uniform Trust Code (2001). Alabama adds subsections (d)(1) – d(17), which are derived from the Connecticut Uniform Trust Code, in order to list the types of matters that may be brought within the jurisdiction of the courts. Subsection (d)(18) is added to provide for the adjudication of claims, expenses and taxes provided for in Section 505(b) of the Alabama Trust Code. Subsection (d)(19) is taken from California Probate Code § 17200.

Uniform Comment

Purpose and scope. While the Uniform Trust Code encourages the resolution of disputes without resort to the courts by providing such options as the nonjudicial settlement authorized by Section 111, 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 also 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 an actual dispute.

Contrary to the trust statutes in some states, the Uniform Trust Code does not create a system of routine or mandatory court supervision. While subsection (b) authorizes a court to direct that a particular trust be subject to continuing court supervision, the court’s intervention will normally be confined to the particular matter brought before it.

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 if there is a reasonable doubt as to the extent of the trustee’s powers or duties. The court will not ordinarily instruct trustees on how to exercise discretion, however. *See* RESTATEMENT (SECOND) OF TRUSTS §§ 187, 259 (1959). This section does not limit the court’s equity 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. Such an effort is made in CALIFORNIA PROBATE CODE § 17200. Excluding matters not germane to the Uniform Trust Code, the California statute lists the following as items relating to the “internal affairs” of a trust:

- determining questions of construction;
- determining the existence or nonexistence of any immunity, power, privilege, duty, or right;
- determining the validity of a trust provision;
- ascertaining beneficiaries and determining to whom property will

- 1 pass upon final or partial
2 termination of the trust;
- 3 • settling accounts and passing upon
4 the acts of a trustee, including the
5 exercise of discretionary powers;
 - 6 • instructing the trustee; compelling
7 the trustee to report information
8 about the trust or account to the
9 beneficiary;
 - 10 • granting powers to the trustee;
 - 11 • fixing or allowing payment of the
12 trustee's compensation or reviewing
13 the reasonableness of the
14 compensation;
 - 15 • appointing or removing a trustee;
16 accepting the resignation of a trustee;
17 compelling redress of a breach of
18 trust by any available remedy;
 - 19 • approving or directing the
20 modification or termination of a
21 trust;
 - 22 • approving or directing the
23 combination or division of trusts;
24 and
 - 25 • authorizing or directing transfer of a
26 trust or trust property to or from
27 another jurisdiction.

28

29 **Section 19-3B-202. Jurisdiction Over Trustee and Beneficiary.**

30 (a) A trustee submits personally to the jurisdiction
31 of the courts of this state regarding any matter involving a
32 trust:

33 (1) by accepting the trusteeship of a trust whose
34 settlor was a resident of this state at the time of the
35 trust's creation, or in the case of testamentary trusts, the
36 settlor was a resident of this state at death;

37 (2) by accepting the trusteeship of a trust having
38 its principal place of administration in this state; or

39 (3) by moving the principal place of administration
40 of the trust to this state.

1 It also seems reasonable to require
2 beneficiaries to go to the seat of the trust
3 when litigation has been instituted there
4 concerning a trust in which they claim
5 beneficial interests, much as the rights of
6 shareholders of a corporation can be
7 determined at a corporate seat. The settlor
8 has indicated a principal place of
9 administration by its selection of a trustee
10 or otherwise, and it is reasonable to subject
11 rights under the trust to the jurisdiction of
12 the Court where the trust is properly
13 administered.
14

15 The jurisdiction conferred over the trustee and beneficiaries by this section
16 does not preclude jurisdiction by courts elsewhere on some other basis.
17 Furthermore, the fact that the courts in a new state acquire jurisdiction under this
18 section following a change in a trust's principal place of administration does not
19 necessarily mean that the courts of the former principal place of administration lose
20 jurisdiction, particularly as to matters involving events occurring prior to the
21 transfer.
22

23 The jurisdiction conferred by this section is limited. Pursuant to subsection
24 (b), until a distribution is made, jurisdiction over a beneficiary is limited to the
25 beneficiary's interests in the trust. Personal jurisdiction over a beneficiary is
26 conferred only upon the making of a distribution. Subsection (b) also gives the court
27 jurisdiction over other recipients of distributions. This would include individuals
28 who receive distributions in the mistaken belief they are beneficiaries.
29

30 For a discussion of jurisdictional issues concerning trusts, *see* 5A AUSTIN W.
31 SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS §§ 556-573 (4th ed. 1989).
32

33 **Section 19-3B-203. Subject Matter Jurisdiction.**

34 (a) Except as provided in subsection (b), the
35 circuit court has exclusive jurisdiction of proceedings in
36 this state brought by a trustee or beneficiary concerning the
37 administration of a trust.

38 (b) A probate court granted statutory equitable
39 jurisdiction has concurrent jurisdiction with the circuit
40 court in any proceeding involving a testamentary or inter
41 vivos trust.

1
2 *Alabama Comment*
3

4 **Comparison to Uniform Code.** Section 203 is completely rewritten to
5 accommodate Alabama law.
6

7 **Purpose and scope.** Subsection (a) is not intended to alter or limit the
8 jurisdiction currently possessed by Alabama probate courts. For example, a probate
9 court may continue to exercise jurisdiction over a testamentary trust, because the
10 filing of a will for probate is not a proceeding “brought by a trustee or beneficiary
11 concerning the administration of a trust.”
12

13 **Equity jurisdiction of probate courts of Jefferson and Mobile Counties.**
14 Subsection (b) recognizes that by local acts, the probate courts of Jefferson and
15 Mobile Counties have been granted equity jurisdiction. *See Jett v. Carter*, 758 So.2d
16 526 (Ala.1999), discussing Act No. 1144, Ala. Acts 1971 (Reg. Session) (Jefferson),
17 and Act No. 91-131, Ala. Acts 1991 (amending Act No. 974, § 5, Ala. Acts 1961 (Reg.
18 Session)) (Mobile). Presently, no other probate courts have been granted statutory
19 equitable jurisdiction. The effect of subsection (b) is to give original jurisdiction over
20 both testamentary and *inter vivos* trusts to those probate courts granted equity
21 powers.
22

23 **Section 19-3B-204. Venue.**

24 (a) Except as otherwise provided in subsection (b),
25 venue for actions and proceedings involving a trust is proper
26 (i) in any county where venue is proper for civil actions
27 generally, pursuant to Title 6, Chapter 3; (ii) in the county
28 of this state where the trust has its principal place of
29 administration; or (iii) in the case of a trust whose
30 principal place of administration is in a jurisdiction other
31 than this state, in the county where the settlor resided at
32 the creation of the trust, or in the case of a testamentary
33 trust, where the settlor's estate was administered.

34 (b) If a trust has no trustee, then venue for a
35 judicial proceeding for the appointment of a trustee is in a
36 county of this state in which a beneficiary resides, in a
37 county in which any trust property is located, and if the

1 trust is created by will, in the county in which the
2 decedent's estate was or is being administered.

3
4 *Alabama Comment*

5
6 **Comparison to Uniform Code.** Section 204 is substantially rewritten and is
7 patterned after FLA. STAT. § 737.202 and MONT. CODE ANN. § 72-35-106. Subsection
8 (a) is not intended to be a priority, but to provide a choice for venue. This section is
9 not intended to eliminate *forum non conveniens*. See also the Alabama comment to
10 Section 202.

11
12 **Section 19-3B-205. Judicial Accountings and Settlements.**

13 (a) A trustee may file an accounting of the
14 trustee's administration of a trust in court at any time and
15 seek a partial or final settlement thereof or, upon petition
16 of an interested party, a court may order a trustee to render
17 an accounting of the trustee's administration of a trust and
18 require a partial or final settlement thereof. Notice of such
19 judicial proceeding shall be provided to the trustee and each
20 beneficiary, or representative thereof pursuant to Article 3,
21 as provided by the applicable rules of civil procedure.

22 (b) A trust accounting must be a reasonably
23 understandable report from the date of the last accounting or,
24 if none, from the date upon which the trustee became
25 accountable, or other such date the court may set, which
26 provides reasonable detail of the transactions affecting the
27 administration of the trust, and which adequately discloses
28 the following information:

29 (1) The accounting must identify the trust, the
30 trustee furnishing the accounting, and the time period covered
31 by the accounting.

1 trust accounting statute enacted in Florida, which was effective January 1, 2003.
2 (FLORIDA STAT. 737.3035.)
3

4 The terms "receipts" and "disbursements" as used in Section 205(b)(2) and
5 205(b)(5) are the same terms used in the Alabama Principal and Income Act, §§ 19-
6 3A-1 *et seq.*, and it is intended that they will be interpreted in the same manner
7 under both Acts.
8

9 In Section 205(b)(3), the terms "asset acquisition value" and "carrying value"
10 are used. These are fiduciary accounting concepts. *See* Robert Whitman, FIDUCIARY
11 ACCOUNTING GUIDE (2d ed. 1998). Other comparable terms used in financial
12 accounting are "original book value" or "adjusted book value." The intent is to
13 show the original value of each asset at the time it comes into the possession of the
14 trustee, and then to show adjustments in that original value due to depreciation, etc.
15

16 Section 205(b)(5) imposes upon the trustee an obligation to allocate receipts
17 and disbursements between income and principal of the trust whenever it affects the
18 rights of the beneficiaries of the trust. For example, whenever different beneficiaries
19 of a trust have different rights in the income and the principal of the trust, it would
20 be necessary to allocate receipts and disbursements between income and principal.
21 This typically occurs when one person is the income beneficiary and another person
22 is the remainder beneficiary of a trust.
23

24 ARTICLE 3

25 REPRESENTATION

26 Section 19-3B-301. Representation: Basic Effect.

27 (a) Notice to a person who may represent and bind
28 another person under this article has the same effect as if
29 notice were given directly to the other person.

30 (b) The consent of a person who may represent and
31 bind another person under this article is binding on the
32 person represented unless the person represented objects to
33 the representation before the consent would otherwise have
34 become effective.

35 (c) Except as otherwise provided in Sections 19-3B-
36 411 and 19-3B-602, a person who under this article may
37 represent a settlor who lacks capacity may receive notice and
38 give a binding consent on the settlor's behalf.

1 (d) A settlor may not represent and bind a
2 beneficiary under this article with respect to the termination
3 or modification of a trust under Section 19-3B-411(a).

4
5 *Alabama Comment*

6
7 **Comparison to Uniform Code.** Section 301 is the same as Section 301 of the
8 Uniform Trust Code (2001).

9
10 *Uniform Comment*

11
12 **Purpose and scope.** This section is general and introductory, laying out the
13 scope of the article.

14
15 **Substitute notice to persons who may represent and bind others.**
16 Subsection (a) validates substitute notice to a person who may represent and bind
17 another person as provided in the succeeding sections of this article. Notice to the
18 substitute has the same effect as if given directly to the other person. Subsection (a)
19 does not apply to notice of a judicial proceeding. Pursuant to Section 109(d), notice
20 of a judicial proceeding must be given as provided in the applicable rules of civil
21 procedure, which may require that notice not only be given to the representative but
22 also to the person represented. For a model statute for the giving of notice in such
23 cases, *see* UNIFORM PROBATE CODE § 1-403(3). Subsection (a) may be used to facilitate
24 the giving of notice to the qualified beneficiaries of a proposed transfer of principal
25 place of administration (Section 108(d)), of a proposed trust combination or division
26 (Section 417), of a temporary assumption of duties without accepting trusteeship
27 (Section 701(c)(1)), of a trustee's resignation (Section 705(a)(1)), and of a trustee's
28 report (Section 813(c)).
29

30 **Effect of a consent.** Subsection (b) deals with the effect of a consent, whether
31 by actual or virtual representation. Subsection (b) may be used to facilitate consent
32 of the beneficiaries to modification or termination of a trust, with or without the
33 consent of the settlor (Section 411), agreement of the qualified beneficiaries on
34 appointment of a successor trustee (Section 704(c)(2)), and consent, release, or
35 affirmance of a beneficiary's to actions of trustee (Section 1009).
36

37 **Consent by representative.** A consent by a representative bars a later
38 objection by the person represented, but a consent is not binding if the person
39 represented raises an objection prior to the date the consent would otherwise
40 become effective. The possibility that a beneficiary might object to a consent given
41 on the beneficiary's behalf will not be germane in many cases because the person
42 represented will be unborn or unascertained. However, the representation
43 principles of this article will sometimes apply to adult and competent beneficiaries.
44 For example, while the trustee of a revocable trust entitled to a pourover devise has
45 authority under Section 303 to approve the personal representative's account on

1 behalf of the trust beneficiaries, such consent would not be binding on a trust
2 beneficiary who registers an objection. Subsection (b) implements cases such as
3 *Barber v. Barber*, 837 P.2d 714 (Alaska 1992), which held that the a refusal to allow an
4 objection by an adult competent remainder beneficiary violated due process.
5

6 **Representation by conservator or guardian.** Subsection (c) implements the
7 policy of Sections 411 and 602 that a conservator or guardian may represent a settlor
8 with respect to the revocation or termination of a trust only with the approval of the
9 court supervising the conservatorship or guardianship.

10
11 **Section 19-3B-302. Representation by Holder of Power of**
12 **Appointment.**

13 (a) The holder of a lifetime power to appoint to
14 oneself may represent and bind all persons whose interests are
15 subject to the power, including but without limitation,
16 permissible appointees and takers in default.

17
18 (b) To the extent that there is no conflict of
19 interest between the holder of a power of appointment, other
20 than a power enumerated in subsection (a), and the persons
21 represented with respect to the particular question or
22 dispute, the holder may represent and bind persons whose
23 interests, as permissible appointees, takers in default, or
24 otherwise, are subject to the power.

25
26 *Alabama Comment*
27

28 **Comparison to Uniform Code.** Alabama adds subsection (a) in order to
29 create a class of holders of a power of appointment who can bind any person by
30 virtue of the fact that this particular class of holders has immediate access to the
31 property that is subject to the power of appointment. This class of holders has a
32 broader power of representation in that the condition that there be no conflict of
33 interest is not applicable.

34
35 Subsection (b) is substantially the same as Section 302 of the Uniform Trust
36 Code (2001).
37
38

1
2
3 **Purpose and scope.** This section specifies the circumstances under which a
4 holder of a general testamentary power of appointment may receive notices on
5 behalf of and otherwise represent and bind persons whose interests are subject to
6 the power, whether as permissible appointees, takers in default, or otherwise. Such
7 representation is allowed except to the extent there is a conflict of interest with
8 respect to the particular matter or dispute. Typically, the holder of a general
9 testamentary power of appointment is also a life income beneficiary of the trust,
10 oftentimes of a trust intended to qualify for the federal estate tax marital deduction.
11 See I.R.C. § 2056(b)(5). Without the exception for conflict of interest, the holder of
12 the power could act in a way that could enhance the holder's income interests to the
13 detriment of the appointees or takers in default, whoever they may be.

14
15 **Section 19-3B-303. Representation by Fiduciaries and**
16 **Ancestors.**

17 To the extent there is no conflict of interest
18 between the representative and the person represented or among
19 those being represented with respect to a particular question
20 or dispute:

21 (1) a conservator may represent and bind the estate
22 that the conservator controls;

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

25 (3) an agent having authority to act with respect to
26 the particular question or dispute may represent and bind the
27 principal;

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

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

32 (6) a parent or other direct ancestor may represent
33 and bind the minor or unborn issue if a conservator or
34 guardian for the issue has not been appointed.

1
2 *Alabama Comment*
3

4 **Comparison to Uniform Code.** Section 303 is the same as Section 303 of the
5 Uniform Trust Code (2001), except for paragraph 6, which is rewritten to allow a
6 grandparent (or other direct ancestor) to represent a grandchild (or other remote
7 direct descendant) in those instances where there is a conflict of interest between a
8 parent and a child. Paragraph (6) originally read as follows: “a parent may represent
9 and bind the parent’s minor or unborn child if a conservator or guardian for the
10 child has not been appointed.” Alabama also changes the heading of this section
11 from “Representation by fiduciaries and parents” to
12 “Representation by fiduciaries and ancestors,” consistent with the changes in
13 paragraph 6.
14

15 *Uniform Comment*
16

17 **Purpose and scope.** This section allows for representation of persons by their
18 fiduciaries (conservators, guardians, agents, trustees, and personal representatives),
19 a principle that has long been part of the law. Paragraph (6), which allows parents
20 to represent their children, is more recent, having originated in 1969 upon approval
21 of the Uniform Probate Code. This section is not limited to representation of
22 beneficiaries. It also applies to representation of the settlor. Representation is not
23 available if the fiduciary or parent is in a conflict position with respect to the
24 particular matter or dispute, however. A typical conflict would be where the
25 fiduciary or parent seeking to represent the beneficiary is either the trustee or holds
26 an adverse beneficial interest.
27

28 **Authority of guardian to represent a ward.** Paragraph (2) authorizes a
29 guardian to bind and represent a ward if a conservator of the ward’s estate has not
30 been appointed. Granting a guardian authority to represent the ward with respect
31 to interests in the trust can avoid the need to seek appointment of a conservator.
32 This grant of authority to act with respect to the ward’s trust interest may broaden
33 the authority of a guardian in some states although not in states that have adopted
34 the Section 1-403 of the Uniform Probate Code, from which this section was derived.
35 Under the Uniform Trust Code, a “conservator” is appointed by the court to manage
36 the ward’s property, a “guardian” to make decisions with respect to the ward’s
37 personal affairs. *See* Section 103.
38

39 **Authority of agent to represent a principal.** Paragraph (3) authorizes an
40 agent to represent a principal only to the extent the agent has authority to act with
41 respect to the particular question or dispute. Pursuant to Sections 411 and 602, an
42 agent may represent a settlor with respect to the amendment, revocation or
43 termination of the trust only to the extent this authority is expressly granted either in
44 the trust or the power. Otherwise, depending on the particular question or dispute,
45 a general grant of authority in the power may be sufficient to confer the necessary
46 authority.

1
2 **Section 19-3B-304. Representation by Person Having**
3 **Substantially Identical Interest.**

4 (a) Unless otherwise represented, a minor,
5 incapacitated, or unborn individual, or a person whose
6 identity or location is unknown and not reasonably
7 ascertainable, may be represented by and bound by another
8 having a substantially identical interest with respect to the
9 particular question or dispute, but only to the extent there
10 is no conflict of interest between the representative and the
11 person represented.

12 (b) A presumptive remainder beneficiary may
13 represent contingent successor remainder beneficiaries with
14 respect to matters in which there is no conflict of interest.

15
16 *Alabama Comment*
17

18 **Comparison to Uniform Code.** Subsection 304(a) is the same as Section 304
19 of the Uniform Trust Code (2001). Alabama adds subsection (b), which codifies the
20 principle in the Uniform Comment regarding the ability of a presumptive remainder
21 beneficiary to represent contingent successor remainder beneficiaries with respect to
22 matters in which there is no conflict of interest.

23
24 *Uniform Comment*
25

26 **Purpose and scope.** This section authorizes a person with a substantially
27 identically interest with respect to a particular question or dispute to represent and
28 bind an otherwise unrepresented minor, incapacitated or unborn individual, or
29 person whose location is unknown and not reasonably ascertainable. This section is
30 derived from Section 1-403(2)(iii) of the Uniform Probate Code, but with several
31 modifications. Unlike the UPC, this section does not expressly require that the
32 representation be adequate, the drafters preferring to leave this issue to the courts.
33 Furthermore, this section extends the doctrine of virtual representation to
34 representation of minors and incapacitated individuals. Finally, this section does
35 not apply to the extent there is a conflict of interest between the representative and
36 the person represented.

37
38 **Represented interest must be sufficiently protected.** Restatement (First) of
39 Property §§ 181 and 185 (1936) provide that virtual representation is inapplicable if

1 the interest represented was not sufficiently protected. Representation is deemed
2 sufficiently protective as long as it does not appear that the representative acted in
3 hostility to the interest of the person represented. RESTATEMENT (FIRST) OF PROPERTY
4 § 185 (1936). Evidence of inactivity or lack of skill is material only to the extent it
5 establishes such hostility. RESTATEMENT (FIRST) OF PROPERTY § 185 cmt. b (1936).
6

7 Typically, the interests of the representative and the person represented will
8 be identical. A common example would be a trust providing for distribution to the
9 settlor's children as a class, with an adult child being able to represent the interests
10 of children who are either minors or unborn. Exact identity of interests is not
11 required, only substantial identity with respect to the particular question or dispute.
12 Whether such identity is present may depend on the nature of the interest. For
13 example, a presumptive remainder beneficiary may be able to represent alternative
14 remainder beneficiaries with respect to approval of a trustee's report but not with
15 respect to interpretation of the remainder provision or termination of the trust. Even
16 if the beneficial interests of the representative and person represented are identical,
17 representation is not allowed in the event of conflict of interest. The representative
18 may have interests outside of the trust that are adverse to the interest of the person
19 represented, such as a prior relationship with the trustee or other beneficiaries. See
20 RESTATEMENT (FIRST) OF PROPERTY § 185 cmt. d (1936).
21

22 **Section 19-3B-305. Appointment of Representative.**

23 (a) If the court determines that an interest is not
24 represented under this article, or that the otherwise
25 available representation might be inadequate, then the court
26 may appoint a guardian ad litem or other representative to
27 receive notice, give consent, and otherwise represent, bind,
28 and act on behalf of a minor, incapacitated, or unborn
29 individual, or a person whose identity or location is unknown.

30 (b) A guardian ad litem or other representative may
31 act on behalf of the individual represented with respect to
32 any matter arising under this chapter, whether or not a
33 judicial proceeding concerning the trust is pending.

34 (c) In making decisions, a guardian ad litem or
35 other representative may consider general benefit accruing to
36 the living members of the individual's family.

1 (d) A guardian ad litem or other representative may
2 be appointed to represent several persons or interests.

3
4 *Alabama Comment*

5
6 **Comparison to Uniform Code.** In Section 305, Alabama provides that a
7 guardian ad litem or other representative may be appointed by the court to
8 represent a minor. A circuit court can make the appointment of a representative
9 without going to the probate court; that is the circuit court can resolve the
10 appointment of guardian *ad litem* or other representative without collateral
11 proceedings in probate court. The last sentence of subsection (a) of the Uniform
12 Code is renumbered as subsection (d) in the Alabama Trust Code, for ease of
13 statutory construction.

14
15 *Uniform Comment*

16
17 **Purpose and scope.** This section is derived from Section 1-
18 403(4) of the Uniform Probate Code. ... Under this section a representative can be
19 appointed to act with respect to a nonjudicial settlement or to receive a notice on a
20 beneficiary's behalf. Furthermore, in making decisions, a representative may
21 consider general benefit accruing to living members of the family. ... The court may
22 appoint a representative to act for a person even if the person could be represented
23 under another section of this article.
24

25 **ARTICLE 4**

26 **CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST**

27
28 **Section 19-3B-401. Methods of Creating Trust.**

29 A trust may be created by:

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

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

35 (3) exercise of a power of appointment in favor of a
36 trustee; or

37 (4) a court in the exercise of its equitable powers.

1
2 *Alabama Comment*
3

4 **Comparison to Uniform Code.** Section 401 is substantially the same as
5 Section 401 of the Uniform Trust Code (2001). Alabama adds paragraph (4).
6

7 This section addresses the issue of whether or not a trust exists. The efficacy
8 of transfers or attempted transfers of property to the trustee is not addressed here,
9 and Section 401(2) does not change the law as to what is necessary or effective to
10 transfer property to the trust. Alabama’s expanded definition of property under
11 Section 103(11) may allow a trust to be created under this section by naming a trust
12 as the beneficiary of an insurance policy, thereby “creating an interest by beneficiary
13 designation under a policy of insurance.”
14

15 Express trusts also may be created by means of court judgment or decree.
16 Examples include trusts created to hold the proceeds of personal injury recoveries
17 and trusts created to hold the assets of a protected person in a conservatorship
18 proceeding. *See, e.g.,* UNIFORM PROBATE CODE § 5-411(a)(4).
19

20 *Uniform Comment*
21

22 **Purpose and scope.** This section is based on Restatement (Third) of Trusts §
23 10 (Tentative Draft No. 1, approved 1996), and Restatement (Second) of Trusts § 17
24 (1959). Under the methods specified for creating a trust in this section, a trust is not
25 created until it receives property. For what constitutes an adequate property
26 interest, *see* RESTATEMENT (THIRD) OF TRUSTS §§ 40-41 (Tentative Draft No. 2,
27 approved 1999); RESTATEMENT (SECOND) OF TRUSTS §§ 74-86 (1959). The property
28 interest necessary to fund and create a trust need not be substantial. A revocable
29 designation of the trustee as beneficiary of a life insurance policy or employee
30 benefit plan has long been understood to be a property interest sufficient to create a
31 trust. *See* Section 103(11) (“property” defined). Furthermore, the property interest
32 need not be transferred contemporaneously with the signing of the trust instrument.
33 A trust instrument signed during the settlor’s lifetime is not rendered invalid simply
34 because the trust was not created until property was transferred to the trustee at a
35 much later date, including by contract after the settlor’s death. A pourover devise to
36 a previously unfunded trust is also valid and may constitute the property interest
37 creating the trust. *See* UNIFORM TESTAMENTARY ADDITIONS TO TRUSTS ACT § 1 (1991),
38 *codified at* UNIFORM PROBATE CODE § 2-511 (pourover devise to trust valid regardless
39 of existence, size, or character of trust corpus). *See also* RESTATEMENT (THIRD) OF
40 TRUSTS § 19 (Tentative Draft No. 1, approved 1996).
41

42 **Trust can be created even if no trustee is in office.** While this section refers
43 to transfer of property to a trustee, a trust can be created even though for a period of
44 time no trustee is in office. *See* RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. g (Tentative
45 Draft No. 1, approved 1996); RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. I (1959). A
46 trust can also be created without notice to or acceptance by a trustee or beneficiary.

1 See RESTATEMENT (THIRD) OF TRUSTS § 14 (Tentative Draft No. 1, approved 1996);
2 RESTATEMENT (SECOND) OF TRUSTS §§ 35-36 (1959).

3
4 **Methods of creation.** The methods specified in this section are not exclusive.
5 Section 102 recognizes that trusts can also be created by special statute or court
6 order. See also RESTATEMENT (THIRD) OF TRUSTS § 1 cmt. a (Tentative Draft No. 1,
7 approved 1996); UNIFORM PROBATE CODE § 2-212 (elective share of incapacitated
8 surviving spouse to be held in trust on terms specified in statute); UNIFORM PROBATE
9 CODE § 5-411(a)(4) (conservator may create trust with court approval); RESTATEMENT
10 (SECOND) OF TRUSTS § 17 cmt. I (1959) (trusts created by statutory right to bring
11 wrongful death action).

12
13 **Creation by promise.** A trust can also be created by a promise that creates
14 enforceable rights in a person who immediately or later holds these rights as trustee.
15 See RESTATEMENT (THIRD) OF TRUSTS §10(e) (Tentative Draft No. 1, approved 1996). A
16 trust thus created is valid notwithstanding that the trustee may resign or die before
17 the promise is fulfilled. Unless expressly made personal, the promise can be
18 enforced by a successor trustee. For examples of trusts created by means of
19 promises enforceable by the trustee, see RESTATEMENT (THIRD) OF TRUSTS § 10 cmt. g
20 (Tentative Draft No. 1, approved 1996); RESTATEMENT (SECOND) OF TRUSTS §§ 14 cmt.
21 h, 26 cmt. n (1959).

22
23 **Creation by self-declaration.** A trust created by self-declaration is best
24 created by reregistering each of the assets that comprise the trust into the settlor's
25 name as trustee. However, such reregistration is not necessary to create the trust.
26 See, e.g., *In re Estate of Heggstad*, 20 Cal. Rptr. 2d 433 (Ct. App. 1993); RESTATEMENT
27 (THIRD) OF TRUSTS § 10 cmt. e (Tentative Draft No. 1, approved 1996); RESTATEMENT
28 (SECOND) OF TRUSTS § 17 cmt. a (1959). A trust created by self declaration can be
29 funded merely by attaching a schedule listing the assets that are to be subject to the
30 trust without executing separate instruments of transfer. But such practice can make
31 it difficult to later confirm title with third party transferees and for this reason is not
32 recommended.

33
34 **Creation by will.** While a trust created by will may come into existence
35 immediately at the testator's death and not necessarily only upon the later transfer
36 of title from the personal representative, Section 701 makes clear that the nominated
37 trustee does not have a duty to act until there is an acceptance of the trusteeship,
38 express or implied. To avoid an implied acceptance, a nominated testamentary
39 trustee who is monitoring the actions of the personal representative but who has not
40 yet made a final decision on acceptance should inform the beneficiaries that the
41 nominated trustee has assumed only a limited role. The failure so to inform the
42 beneficiaries could result in liability if misleading conduct by the nominated trustee
43 causes harm to the trust beneficiaries. See RESTATEMENT (THIRD) OF TRUSTS § 35 cmt.
44 b (Tentative Draft No. 2, approved 1999).

45
46 **Creation by power of appointment.** While this section confirms the familiar
47 principle that a trust may be created by means of the exercise of a power of
48 appointment (paragraph (3)), this Code does not legislate comprehensively on the

1 subject of powers of appointment but addresses only selected issues. *See* Sections
2 302 (representation by holder of general testamentary power of appointment); 505(b)
3 (creditor claims against holder of power of withdrawal); and 603(d) (rights of holder
4 of power of withdrawal). For the law on powers of appointment generally, *see*
5 RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS §§ 11.1-24.4 (1986);
6 RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS (in
7 progress).
8

9 **Section 19-3B-402. Requirements for Creation.**

10 (a) A trust is created only if:

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

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

14 (3) the trust has a definite beneficiary or is:

15 (A) a charitable trust;

16 (B) a trust for the care of an animal, as provided
17 in Section 19-3B-408; or

18 (C) a trust for a noncharitable purpose, as provided
19 in Section 19-3B-409;

20 (4) the trustee has duties to perform; and

21 (5) the same person is not the sole trustee and sole
22 beneficiary.

23 (b) A beneficiary is definite if the beneficiary can
24 be ascertained now or in the future, subject to any applicable
25 rule against perpetuities.

26 (c) A power in a trustee to select a beneficiary
27 from an indefinite class is valid. If the power is not
28 exercised within a reasonable time, then the power fails and
29 the property subject to the power passes to the persons who
30 would have taken the property had the power not been
31 conferred.
32

1
2 *Alabama Comment*
3

4 **Comparison to Uniform Code.** Section 402 is the same as Section 402 of the
5 Uniform Trust Code (2001).
6

7 *Uniform Comment*
8

9 **Purpose and scope.** Subsection (a) codifies the basic requirements for the
10 creation of a trust. To create a valid trust, the settlor must indicate an intention to
11 create a trust. *See* RESTATEMENT (THIRD) OF TRUSTS § 13 (Tentative Draft No. 1,
12 approved 1996); RESTATEMENT (SECOND) OF TRUSTS § 23 (1959). But only such
13 manifestations of intent as are admissible as proof in a judicial proceeding may be
14 considered. *See* Section 103(17) (“terms of a trust” defined).
15

16 **Requisite mental capacity.** To create a trust, a settlor must have the requisite
17 mental capacity. To create a revocable or testamentary trust, the settlor must have
18 the capacity to make a will. To create an irrevocable trust, the settlor must have
19 capacity during lifetime to transfer the property free of trust. *See* Section 601
20 (capacity of settlor to create revocable trust), and *see generally* RESTATEMENT (THIRD)
21 OF TRUSTS § 11 (Tentative Draft No. 1, approved 1996); RESTATEMENT (SECOND) OF
22 TRUSTS §§ 18-22 (1959); and RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER
23 DONATIVE TRANSFERS § 8.1 (Tentative Draft No. 3, 2001).
24

25 **Noncharitable trust must have valid beneficiary.** Subsection (a)(3) requires
26 that a trust, other than a charitable trust, a trust for the care of an animal, or a trust
27 for another valid noncharitable purpose, have a definite beneficiary. While some
28 beneficiaries will be definitely ascertained as of the trust’s creation, subsection (b)
29 recognizes that others may be ascertained in the future as long as this occurs within
30 the applicable perpetuities period. The definite beneficiary requirement does not
31 prevent a settlor from making a disposition in favor of a class of persons. Class
32 designations are valid as long as the membership of the class will be finally
33 determined within the applicable perpetuities period. For background on the
34 definite beneficiary requirement, *see* RESTATEMENT (THIRD) OF TRUSTS §§ 44-46
35 (Tentative Draft No. 2, approved 1999); RESTATEMENT (SECOND) OF TRUSTS §§ 112-122
36 (1959).
37

38 **Trustee must have duties to perform.** Subsection (a)(4) recites standard
39 doctrine that a trust is created only if the trustee has duties to perform. *See*
40 RESTATEMENT (THIRD) OF TRUSTS § 2 (Tentative Draft No. 1, approved 1996);
41 RESTATEMENT (SECOND) OF TRUSTS § 2 (1959). Trustee duties are usually active, but a
42 validating duty may also be passive, implying only that the trustee has an obligation
43 not to interfere with the beneficiary’s enjoyment of the trust property. ... *See*
44 RESTATEMENT (THIRD) OF TRUSTS § 6 (Tentative Draft No. 1, approved 1996);
45 RESTATEMENT (SECOND) OF TRUSTS §§ 67-72 (1959).
46

1 **Doctrine of merger.** Subsection (a)(5) addresses the doctrine of merger,
2 which, as traditionally stated, provides that a trust is not created if the settlor is the
3 sole trustee and sole beneficiary of *all* beneficial interests. The doctrine of merger
4 has been inappropriately applied by the courts in some jurisdictions to invalidate
5 self-declarations of trust in which the settlor is the sole life beneficiary but other
6 persons are designated as beneficiaries of the remainder. The doctrine of merger is
7 properly applicable only if all beneficial interests, both life interests and remainders,
8 are vested in the same person, whether in the settlor or someone else. An example
9 of a trust to which the doctrine of merger would apply is a trust of which the settlor
10 is sole trustee, sole beneficiary for life, and with the remainder payable to the
11 settlor's probate estate. On the doctrine of merger generally, *see* RESTATEMENT
12 (THIRD) OF TRUSTS § 69 (Tentative Draft No. 3, 2001); RESTATEMENT (SECOND) OF
13 TRUSTS § 341 (1959).

14
15 **Power in trustee to select beneficiary from indefinite class.** Subsection (c)
16 allows a settlor to empower the trustee to select the beneficiaries even if the class
17 from whom the selection may be made cannot be ascertained. Such a provision
18 would fail under traditional doctrine; it is an imperative power with no designated
19 beneficiary capable of enforcement. Such a provision is valid, however, under both
20 this Code and the Restatement, if there is at least one person who can meet the
21 description. If the trustee does not exercise the power within a reasonable time, then
22 the power fails and the property will pass by resulting trust. *See* RESTATEMENT
23 (THIRD) OF TRUSTS § 46 (Tentative Draft No. 2, approved 1999). *See also* RESTATEMENT
24 (SECOND) OF TRUSTS § 122 (1959); RESTATEMENT (SECOND) OF PROPERTY: DONATIVE
25 TRANSFERS § 12.1 cmt. e (1986).

26
27 **Section 19-3B-403. Trusts Created in Other Jurisdictions.**

28 A trust not created by will is validly created if
29 its creation complies with the law of the jurisdiction in
30 which the trust instrument was executed, or the law of the
31 jurisdiction in which, at the time of creation:

32 (1) the settlor was domiciled, had a place of abode,
33 or was a national;

34 (2) a trustee was domiciled or had a place of
35 business; or

36 (3) any trust property was located.

1 *Alabama Comment*

2
3 **Comparison to Uniform Code.** Section 403 is the same as Section 403 of the
4 Uniform Trust Code (2001). The Committee notes that this section governs only the
5 validity of a trust. Issues related to governing law are addressed in Section 107 of
6 the Code.

7
8 *Uniform Comment*

9
10 **Purpose and scope.** This section is comparable to Section 2-506 of the
11 Uniform Probate Code, which validates wills executed in compliance with the law of
12 a variety of places in which the testator had a significant contact. Unlike the UPC,
13 however, this section is not limited to execution of the instrument but applies to the
14 entire process of a trust's creation, including compliance with the requirement that
15 there be trust property. In addition, unlike the UPC, this section validates a trust
16 valid under the law of the domicile or place of business of the designated trustee, or
17 if valid under the law of the place where any of the trust property is located. For the
18 requirements for creating a trust, see Section 402.

19
20 **Section 19-3B-404. Trust Purposes.**

21 A trust may be created only to the extent its
22 purposes are lawful, not contrary to public policy, and
23 possible to achieve. A trust and its terms must be for the
24 benefit of its beneficiaries.

25
26 *Alabama Comment*

27
28 **Comparison to Uniform Code.** Section 404 is the same as Section 404 of the
29 Uniform Trust Code (2001).

30
31 *Uniform Comment*

32
33 **Purpose and scope.** For an explication of the requirement that a trust must
34 not have a purpose that is unlawful or against public policy, *see* RESTATEMENT
35 (THIRD) OF TRUSTS §§ 27-30 (Tentative Draft No. 2, approved 1999); RESTATEMENT
36 (SECOND) OF TRUSTS §§ 59-65 (1959). A trust with a purpose that is unlawful or
37 against public policy is invalid. Depending on when the violation occurred, the
38 trust may be invalid at its inception or it may become invalid at a later date. The
39 invalidity may also affect only particular provisions. Generally, a trust has a
40 purpose which is illegal if (1) its performance involves the commission of a criminal
41 or tortious act by the trustee; (2) the settlor's purpose in creating the trust was to
42 defraud creditors or others; or (3) the consideration for the creation of the trust was
43 illegal. *See* RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a (Tentative Draft No. 2,
44 approved 1999); RESTATEMENT (SECOND) OF TRUSTS § 60 cmt. a (1959). Purposes

1 violative of public policy include those that tend to encourage criminal or tortious
2 conduct, that interfere with freedom to marry or encourage divorce, that limit
3 religious freedom, or which are frivolous or capricious. *See* RESTATEMENT (THIRD) OF
4 TRUSTS § 29 cmt. d-h (Tentative Draft No. 2, 1999); RESTATEMENT (SECOND) OF TRUSTS
5 § 62 (1959).

6
7 Pursuant to Section 402(a), a trust must have an identifiable beneficiary
8 unless the trust is of a type that does not have beneficiaries in the usual sense, such
9 as a charitable trust or, as provided in Sections 408 and 409, trusts for the care of an
10 animal or other valid noncharitable purpose. The general purpose of trusts having
11 identifiable beneficiaries is to benefit those beneficiaries in accordance with their
12 interests as defined in the trust's terms. The requirement of this section that a trust
13 and its terms be for the benefit of its beneficiaries, which is derived from
14 Restatement (Third) of Trusts § 27(2) (Tentative Draft No. 2, approved 1999),
15 implements this general purpose. While a settlor has considerable latitude in
16 specifying how a particular trust purpose is to be pursued, the administrative and
17 other nondispositive trust terms must reasonably relate to this purpose and not
18 divert the trust property to achieve a trust purpose that is invalid, such as one which
19 is frivolous or capricious. *See* RESTATEMENT (THIRD) OF TRUSTS § 27 cmt. b (Tentative
20 Draft No. 2, approved 1999).

21
22 Section 412(b), which allows the court to modify administrative terms that are
23 impracticable, wasteful, or impair the trust's administration, is a specific application
24 of the requirement that a trust and its terms be for the benefit of the beneficiaries.
25 The fact that a settlor suggests or directs an unlawful or other inappropriate means
26 for performing a trust does not invalidate the trust if the trust has a substantial
27 purpose that can be achieved by other methods. *See* RESTATEMENT (THIRD) OF TRUSTS
28 § 28 cmt. e (Tentative Draft No. 2, approved 1999).

29
30 **Section 19-3B-405. Charitable Purposes; Enforcement.**

31 (a) A charitable trust may be created for the relief
32 of poverty, the advancement of education or religion, the
33 promotion of health, governmental or municipal purposes, or
34 other purposes the achievement of which is beneficial to the
35 community.

36 (b) If the terms of a charitable trust do not
37 indicate a particular charitable purpose or beneficiary, then
38 the court may select one or more charitable purposes or
39 beneficiaries. The selection must be consistent with the
40 settlor's intention to the extent it can be ascertained.

1 (c) The settlor of a charitable trust, among others,
2 may maintain a proceeding to enforce the trust.

3
4 *Alabama Comment*

5
6 **Comparison to Uniform Code.** Section 405 is the same as Section 405 of the
7 Uniform Trust Code (2001). In Alabama, beneficiaries with a sufficient special
8 interest in the enforcement of a charitable trust can institute a suit as to that trust.
9 *See Jones v. Grant*, 344 So.2d 1210 (Ala. 1977).

10
11 *Uniform Comment*

12
13 **Purpose and scope.** The required purposes of a charitable trust specified in
14 subsection (a) restate the well-established categories of charitable purposes listed in
15 Restatement (Third) of Trusts § 28 (Tentative Draft No. 3, 2001), and Restatement
16 (Second) of Trusts § 368 (1959), which ultimately derive from the Statute of
17 Charitable Uses, 43 Eliz. I, c.4 (1601). The directive to the courts to validate purposes
18 the achievement of which are beneficial to the community has proved to be
19 remarkably adaptable over the centuries. The drafters concluded that it should not
20 be disturbed.

21
22 Charitable trusts are subject to the restriction in Section 404 that a trust
23 purpose must be legal and not contrary to public policy. This would include trusts
24 that involve invidious discrimination. *See* RESTATEMENT (THIRD) OF TRUSTS § 28 cmt.
25 f (Tentative Draft No. 3, 2001).

26
27 **General charitable purpose does not fail when settlor neglects to specify**
28 **purpose.** Under subsection (b), a trust that states a general charitable purpose does
29 not fail if the settlor neglected to specify a particular charitable purpose or
30 organization to receive distributions. The court may instead validate the trust by
31 specifying particular charitable purposes or recipients, or delegate to the trustee the
32 framing of an appropriate scheme. *See* RESTATEMENT (SECOND) OF TRUSTS § 397 cmt.
33 d (1959). Subsection (b) of this section is a corollary to Section 413, which states the
34 doctrine of *cy pres*. Under Section 413(a), a trust failing to state a general charitable
35 purpose does not fail upon failure of the particular means specified in the terms of
36 the trust. The court must instead apply the trust property in a manner consistent
37 with the settlor's charitable purposes to the extent they can be ascertained.

38
39 Subsection (b) does not apply to the long-established estate planning
40 technique of delegating to the trustee the selection of the charitable purposes or
41 recipients. In that case, judicial intervention to supply particular terms is not
42 necessary to validate the creation of the trust. The necessary terms instead will be
43 supplied by the trustee. *See* RESTATEMENT (SECOND) OF TRUSTS § 396 (1959). Judicial
44 intervention under subsection (b) will become necessary only if the trustee fails to
45 make a selection. *See* RESTATEMENT (SECOND) OF TRUSTS § 397 cmt. d (1959).
46 Pursuant to Section 110(b), the charitable organizations selected by the trustee

1 would not have the rights of qualified beneficiaries under this Code because they are
2 not expressly designated to receive distributions under the terms of the trust.

3
4 **Settlor may maintain an action to enforce charitable trust.** Contrary to
5 Restatement (Second) of Trusts § 391 (1959), subsection (c) grants a settlor standing
6 to maintain an action to enforce a charitable trust. The grant of standing to the
7 settlor does not negate the right of the state attorney general or persons with special
8 interests to enforce either the trust or their interests. For the law on the enforcement
9 of charitable trusts, see Susan N. Gary, *Regulating the Management of Charities: Trust*
10 *Law, Corporate Law, and Tax Law*, 21 U. HAWAII L. REV. 593 (1999).

11
12 **Section 19-3B-406. Creation of Trust Induced by Fraud, Duress**
13 **or Undue Influence.**

14 A trust is void to the extent its creation was
15 induced by fraud, duress, or undue influence.

16
17 *Alabama Comment*

18
19 **Comparison to Uniform Code.** Section 406 is the same as Section 406 of the
20 Uniform Trust Code (2001).

21
22 *Uniform Comment*

23
24 **Purpose and scope.** This section is a specific application of Restatement
25 (Third) of Trusts § 12 (Tentative Draft No. 1, approved 1996), and Restatement
26 (Second) of Trusts § 333 (1959), which provide that a trust can be set aside or
27 reformed on the same grounds as those which apply to a transfer of property not in
28 trust, among which include undue influence, duress, and fraud, and mistake. This
29 section addresses undue influence, duress, and fraud. For reformation of a trust on
30 grounds of mistake, see Section 415. See also RESTATEMENT (THIRD) OF PROPERTY:
31 WILLS AND OTHER DONATIVE TRANSFERS § 8.3 (Tentative Draft No. 3, 2001), which
32 closely tracks the language above. Similar to a will, the invalidity of a trust on
33 grounds of undue influence, duress, or fraud may be in whole or in part.

34
35 **Section 19-3B-407. Evidence of Oral Trust.**

36 Except as required by a statute other than this
37 chapter, a trust need not be evidenced by a trust instrument,
38 but the creation of an oral trust and its terms may be
39 established only by clear and convincing evidence.

Comparison to Uniform Code. Section 407 is the same as Section 407 of the Uniform Trust Code (2001). While an oral trust is permissible, ALA. CODE § 35-4-255 (1975) provides that “no trust concerning lands, except such as results by implication or construction of law, or which may be transferred or extinguished by operation of law, can be created, unless by instrument in writing, signed by the party creating or declaring the same ...”

Uniform Comment

Purpose and scope. While it is always advisable for a settlor to reduce a trust to writing, the Uniform Trust Code 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 a higher standard than is in effect in many states. See RESTATEMENT (THIRD) OF TRUSTS § 20 Reporter’s Notes (Tentative Draft No. 1, approved 1996). 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.

For the Statute of Frauds generally, see RESTATEMENT (SECOND) OF TRUSTS §§ 40-52 (1959). 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, approved 1996); RESTATEMENT (SECOND) OF TRUSTS § 46-49 (1959). For a discussion of when the writing must be signed, see RESTATEMENT (THIRD) OF TRUSTS § 23 (Tentative Draft No. 1, approved 1996); RESTATEMENT (SECOND) OF TRUSTS § 41-42 (1959). For the law of oral trusts, see RESTATEMENT (THIRD) OF TRUSTS § 20 (Tentative Draft No. 1, approved 1996); RESTATEMENT (SECOND) OF TRUSTS §§ 43-45 (1959).

Section 19-3B-408. Trust for Care of Animal.

(a) A trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor's lifetime, upon the death of the last surviving animal.

(b) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court. A person having an interest in the welfare of the

1 animal may request the court to appoint a person to enforce
2 the trust or to remove a person appointed.

3 (c) Property of a trust authorized by this section
4 may be applied only to its intended use, except to the extent
5 the court determines that the value of the trust property
6 exceeds the amount required for the intended use. Except as
7 otherwise provided in the terms of the trust, property not
8 required for the intended use must be distributed to the
9 settlor, if then living, otherwise to the settlor's successors
10 in interest.

11 *Alabama Comment*

12
13 **Comparison to Uniform Code.** Section 408 is the same as Section 408 of the
14 Uniform Trust Code (2001).

15 *Uniform Comment*

16
17
18 **Purpose and scope.** This section and the next section of the Code validate so
19 called honorary trusts. Unlike honorary trusts created pursuant to the common law
20 of trusts, which are arguably no more than powers of appointment, the trusts
21 created by this and the next section are valid and enforceable. For a discussion of the
22 common law doctrine, *see* RESTATEMENT (THIRD) OF TRUSTS § 47 (Tentative Draft No.
23 2, approved 1999); RESTATEMENT (SECOND) OF TRUSTS § 124 (1959).

24
25 This section addresses a particular type of honorary trust, the trust for the
26 care of an animal. Section 409 specifies the requirements for trusts without
27 ascertainable beneficiaries that are created for other noncharitable purposes. A trust
28 for the care of an animal may last for the life of the animal. While the animal will
29 ordinarily be alive on the date the trust is created, an animal may be added as a
30 beneficiary after that date as long as the addition is made prior to the settlor's death.
31 Animals in gestation but not yet born at the time of the trust's creation may also be
32 covered by its terms. A trust authorized by this section may be created to benefit
33 one designated animal or several designated animals.

34
35 **Enforcement of trust for animal.** Subsection (b) addresses enforcement.
36 Noncharitable trusts ordinarily may be enforced by their beneficiaries. Charitable
37 trusts may be enforced by the state's attorney general or by a person deemed to have
38 a special interest. *See* RESTATEMENT (SECOND) OF TRUSTS § 391 (1959). But at common
39 law, a trust for the care of an animal or a trust without an ascertainable beneficiary
40 created for a noncharitable purpose was unenforceable because there was no person
41 authorized to enforce the trustee's obligations.

1 Sections 408 and 409 close this gap. The intended use of a trust authorized by
2 either section may be enforced by a person designated in the terms of the trust or, if
3 none, by a person appointed by the court. In either case, Section 110(b) grants to the
4 person appointed the rights of a qualified beneficiary for the purpose of receiving
5 notices and providing consents. If the trust is created for the care of an animal, then
6 a person with an interest in the welfare of the animal has standing to petition for an
7 appointment. The person appointed by the court to enforce the trust should also be
8 a person who has exhibited an interest in the animal's welfare. The concept of
9 granting standing to a person with a demonstrated interest in the animal's welfare is
10 derived from the Uniform Guardianship and Protective Proceedings Act, which
11 allows a person interested in the welfare of a ward or protected person to file
12 petitions on behalf of the ward or protected person. *See, e.g.*, UNIFORM PROBATE
13 CODE §§ 5-210(b), 5-414(a).
14

15 **Excess funds.** Subsection (c) addresses the problem of excess funds. If the
16 court determines that the trust property exceeds the amount needed for the intended
17 purpose and that the terms of the trust do not direct the disposition, then a resulting
18 trust is ordinarily created in the settlor or settlor's successors in interest. *See*
19 RESTATEMENT (THIRD) OF TRUSTS § 47 (Tentative Draft No. 2, approved 1999);
20 RESTATEMENT (SECOND) OF TRUSTS § 124 (1959). Successors in interest include the
21 beneficiaries under the settlor's will, if the settlor has a will, or in the absence of an
22 effective will provision, the settlor's heirs. The settlor may also anticipate the
23 problem of excess funds by directing their disposition in the terms of the trust. The
24 disposition of excess funds is within the settlor's control. *See* Section 105(a). While a
25 trust for an animal is usually not created until the settlor's death, subsection (a)
26 allows such a trust to be created during the settlor's lifetime. Accordingly, if the
27 settlor is still living, subsection (c) provides for distribution of excess funds to the
28 settlor, and not to the settlor's successors in interest.
29

30 Should the means chosen not be particularly efficient, a trust created for the
31 care of an animal can also be terminated by the trustee or court under Section 414.
32 Termination of a trust under that section, however, requires that the trustee or court
33 develop an alternative means for carrying out the trust purposes. *See* Section 414(c).
34

35 This section and the next section are suggested by Section 2-907 of the
36 Uniform Probate Code, but much of this and the following section is new.
37

38 **Section 19-3B-409. Noncharitable Trust Without Ascertainable**
39 **Beneficiary.**

40 Except as otherwise provided in Section 19-3B-408
41 or by another statute, the following rules apply:

42 (1) A trust may be created for a noncharitable
43 purpose without a definite or definitely ascertainable

1 beneficiary or for a noncharitable but otherwise valid purpose
2 to be selected by the trustee. The trust may not be enforced
3 for more than 21 years.

4 (2) A trust authorized by this section may be
5 enforced by a person appointed in the terms of the trust or,
6 if no person is so appointed, by a person appointed by the
7 court.

8 (3) Property of a trust authorized by this section
9 may be applied only to its intended use, except to the extent
10 the court determines that the value of the trust property
11 exceeds the amount required for the intended use. Except as
12 otherwise provided in the terms of the trust, property not
13 required for the intended use must be distributed to the
14 settlor, if then living, otherwise to the settlor's successors
15 in interest.

16 *Alabama Comment*

17
18 **Comparison to Uniform Code.** Section 409 is the same as Section 409 of the
19 Uniform Trust Code (2001).

20 21 *Uniform Comment*

22
23 **Purpose and scope.** This section authorizes two types of trusts without
24 ascertainable beneficiaries; trusts for general but noncharitable purposes, and trusts
25 for a specific noncharitable purpose other than the care of an animal, on which see
26 Section 408. Examples of trusts for general noncharitable purposes include a
27 bequest of money to be distributed to such objects of benevolence as the trustee
28 might select. Unless such attempted disposition was interpreted as charitable, at
29 common law the disposition was honorary only and did not create a trust. Under
30 this section, however, the disposition is enforceable as a trust for a period of up to 21
31 years.

32
33 **Trust for care of cemetery plot.** The most common example of a trust for a
34 specific noncharitable purpose is a trust for the care of a cemetery plot. The lead-in
35 language to the section recognizes that some special purpose trusts, particularly
36 those for care of cemetery plots, are subject to other statutes. Such legislation will
37 typically endeavor to facilitate perpetual care as opposed to care limited to 21 years
38 as under this section.

1
2
3 **Purpose and scope.** Subsection (a) lists the grounds on which trusts typically
4 terminate. For a similar formulation, *see* RESTATEMENT (THIRD) OF TRUSTS § 61
5 (Tentative Draft No. 3, 2001). Terminations under subsection (a) may be in either in
6 whole or in part. Other types of terminations, all of which require action by a court,
7 trustee, or beneficiaries, are covered in Sections 411 - 414, which also address trust
8 modification. Of these sections, all but Section 411 apply to charitable trusts and all
9 but Section 413 apply to noncharitable trusts.

10
11 **Effect of withdrawal of property on trust.** Withdrawal of the trust property
12 is not an event terminating a trust. The trust remains in existence although the
13 trustee has no duties to perform unless and until property is later contributed to the
14 trust.

15
16 **Persons who have standing to seek approval of proposed trust**
17 **modifications.** Subsection (b) specifies the persons who have standing to seek court
18 approval or disapproval of proposed trust modifications, terminations,
19 combinations, or divisions. An approval or disapproval may be sought for an action
20 that does not require court permission, including a petition questioning the trustee's
21 distribution upon termination of a trust under \$50,000 (Section 414), and a petition
22 to approve or disapprove a proposed trust division or consolidation (Section 417).
23 Subsection (b) makes the settlor an interested person with respect to a judicial
24 proceeding brought by the beneficiaries under Section 411 to terminate or modify a
25 trust. Contrary to Restatement (Second) of Trusts § 391 (1959), subsection (b) grants
26 a settlor standing to petition the court under Section 413 to apply *cy pres* to modify
27 the settlor's charitable trust.

28
29 **Section 19-3B-411. Modification or Termination of**
30 **Noncharitable Irrevocable Trust by Consent.**

31 (a) If, upon petition, the court finds that the
32 settlor and all beneficiaries consent to the modification or
33 termination of an irrevocable trust, the court shall enter an
34 order approving the modification or termination even if the
35 modification or termination is inconsistent with a material
36 purpose of the trust. A settlor's power to consent to a
37 trust's modification or termination may be exercised by an
38 agent under a power of attorney only to the extent expressly
39 authorized by the power of attorney or the terms of the trust;
40 by the settlor's conservator with the approval of the court

1 supervising the conservatorship if an agent is not so
2 authorized; or by the settlor's guardian with the approval of
3 the court supervising the guardianship if an agent is not so
4 authorized and a conservator has not been appointed.

5 (b) A noncharitable irrevocable trust may be
6 terminated upon consent of all of the beneficiaries if the
7 court concludes that continuance of the trust is not necessary
8 to achieve any material purpose of the trust. A noncharitable
9 irrevocable trust may be modified upon consent of all of the
10 beneficiaries if the court concludes that modification is not
11 inconsistent with a material purpose of the trust.

12 (c) A spendthrift provision in the terms of the
13 trust is not presumed to constitute a material purpose of the
14 trust. This subsection applies only to irrevocable trusts
15 created on or after the effective date of this Code, and to
16 revocable trusts which become irrevocable on or after the
17 effective date of this Code.

18 (d) Upon termination of a trust under subsection (a)
19 or (b), the trustee shall distribute the trust property as
20 agreed by the beneficiaries.

21 (e) If not all of the beneficiaries consent to a
22 proposed modification or termination of the trust under
23 subsection (a) or (b), then the modification or termination
24 may be approved by the court if the court is satisfied that:

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

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

1
2 *Alabama Comment*
3

4 **Comparison to Uniform Code.** Section 411 is the same as
5 Section 411 of the Uniform Trust Code (2001).

6
7 *Uniform Comment*
8

9 **Purpose and scope.** This section describes the circumstances in which
10 termination or modification of a noncharitable irrevocable trust may be compelled
11 by the beneficiaries, with or without the concurrence of the settlor. For provisions
12 governing modification or termination of trusts without the need to seek beneficiary
13 consent, see Sections 412 (modification or termination due to unanticipated
14 circumstances or inability to administer trust effectively), 414 (termination or
15 modification of uneconomic noncharitable trust), and 416 (modification to achieve
16 settlor's tax objectives). If the trust is revocable by the settlor, then the method of
17 revocation specified in Section 602 applies.
18

19 **Test for termination or modification.** Subsection (a) states the test for
20 termination or modification by the beneficiaries with the concurrence of the settlor.
21 Subsection (b) states the test for termination or modification by unanimous consent
22 of the beneficiaries without the concurrence of the settlor. The rules on trust
23 termination in Subsections (a) - (b) carries forward the *Clafin* rule, first stated in the
24 famous case of *Clafin v. Clafin*, 20 N.E. 454 (Mass. 1889). Subsection (c) addresses
25 the effect of a spendthrift provision. Subsection (d) directs how the trust property is
26 to be distributed following a termination under either subsection (a) or (b).
27 Subsection (e) creates a procedure for judicial approval of a proposed termination or
28 modification when the consent of less than all of the beneficiaries is available.
29

30 Under this section, a trust may be modified or terminated over a trustee's
31 objection. However, pursuant to Section 410, the trustee has standing to object to a
32 proposed termination or modification.
33

34 **Tax effect of settlor's right to join beneficiaries in terminating or modifying**
35 **a trust.** The settlor's right to join the beneficiaries in terminating or modifying a
36 trust under this section does not rise to the level of a taxable power. See Treas. Reg.
37 § 20.2038-1(a)(2). No gift tax consequences result from a termination as long as the
38 beneficiaries agree to distribute the trust property in accordance with the value of
39 their proportionate interests.
40

41 **Representation under Article 3.** The provisions of Article 3 on
42 representation, virtual representation and the appointment and approval of
43 representatives appointed by the court apply to the determination of whether all
44 beneficiaries have signified consent under this section. The authority to consent on
45 behalf of another person, however, does not include authority to consent over the

1 other person’s objection. *See* Section 301(b). Regarding the persons who may
2 consent on behalf of a beneficiary, *see* Sections 302 through 305. A consent given by
3 a representative is invalid to the extent there is a conflict of interest between the
4 representative and the person represented. Given this limitation, virtual
5 representation of a beneficiary’s interest by another beneficiary pursuant to Section
6 304 will rarely be available in a trust termination case, although it should be
7 routinely available in cases involving trust modification, such as a grant to the
8 trustee of additional powers. If virtual or other form of representation is
9 unavailable, then Section 305 of the Code permits the court to appoint a
10 representative who may give the necessary consent to the proposed modification or
11 termination on behalf of the minor, incapacitated, unborn, or unascertained
12 beneficiary. The ability to use virtual and other forms of representation to consent
13 on a beneficiary’s behalf to a trust termination or modification has not traditionally
14 been part of the law, although there are some notable exceptions. *Compare*
15 RESTATEMENT (SECOND) OF TRUSTS § 337(1) (1959) (beneficiary must not be under
16 incapacity), *with Hatch v. Riggs National Bank*, 361 F.2d 559 (D.C. Cir. 1966) (guardian
17 *ad litem* authorized to consent on beneficiary’s behalf).
18

19 **Authority of agent, conservator or guardian to act on settlor’s behalf.**

20 Subsection (a) also addresses the authority of an agent, conservator, or guardian to
21 act on a settlor’s behalf. Consistent with Section 602 on revocation or modification
22 of a revocable trust, the section assumes that a settlor, in granting an agent general
23 authority, did not intend for the agent to have authority to consent to the
24 termination or modification of a trust, authority that could be exercised to radically
25 alter the settlor’s estate plan. In order for an agent to validly consent to a
26 termination or modification of the settlor’s revocable trust, such authority must be
27 expressly conveyed either in the power or in the terms of the trust.
28

29 Subsection (a), however, does not impose restrictions on consent by a
30 conservator or guardian, other than prohibiting such action if the settlor is
31 represented by an agent. The section instead leaves the issue of a conservator’s or
32 guardian’s authority to local law. Many conservatorship statutes recognize that
33 termination or modification of the settlor’s trust is a sufficiently important
34 transaction that a conservator should first obtain the approval of the court
35 supervising the conservatorship. *See, e.g.*, UNIFORM PROBATE CODE § 5-411(a)(4).
36 Because the Uniform Trust Code uses the term “conservator” to refer to the person
37 appointed by the court to manage an individual’s property (*see* Section 103(6)), a
38 guardian may act on behalf of a settlor under this section only if a conservator has
39 not been appointed.
40

41 Subsection (a) is similar to Restatement (Third) of Trusts § 65(2) (Tentative
42 Draft No. 3, 2001), and Restatement (Second) of Trusts § 338(2) (1959), both of which
43 permit termination upon joint action of the settlor and beneficiaries. Unlike
44 termination by the beneficiaries alone under subsection (b), termination with the
45 concurrence of the settlor does not require a finding that the trust no longer serves a
46 material purpose. No finding of failure of material purpose is required because all
47 parties with a possible interest in the trust’s continuation, both the settlor and
48 beneficiaries, agree there is no further need for the trust. Restatement Third goes

1 further than subsection (b) of this section and Restatement Second, however, in also
2 allowing the beneficiaries to compel termination of a trust that still serves a material
3 purpose if the reasons for termination outweigh the continuing material purpose.
4

5 **Modification by beneficiary action.** Subsection (b), similar to Restatement
6 Third but not Restatement Second, allows modification by beneficiary action. The
7 beneficiaries may modify any term of the trust if the modification is not inconsistent
8 with a material purpose of the trust. Restatement Third, though, goes further than
9 this Code in also allowing the beneficiaries to use trust modification as a basis for
10 removing the trustee if removal would not be inconsistent with a material purpose
11 of the trust. Under the Code, however, Section 706 is the exclusive provision on
12 removal of trustees. Section 706(b)(4) recognizes that a request for removal upon
13 unanimous agreement of the qualified beneficiaries is a factor for the court to
14 consider, but before removing the trustee the court must also find that such action
15 best serves the interests of all the beneficiaries, that removal is not inconsistent with
16 a material purpose of the trust, and that a suitable co-trustee or successor trustee is
17 available. *Compare* Section 706(b)(4), *with* RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. f
18 (Tentative Draft No. 3, 2001).
19

20 **Material purpose.** The requirement that the trust no longer serve a material
21 purpose before it can be terminated by the beneficiaries does not mean that the trust
22 have no remaining function. In order to be material, the purpose remaining to be
23 performed must be of some significance:
24

25 Material purposes are not readily to be
26 inferred. A finding of such a purpose
27 generally requires some showing of a
28 particular concern or objective on the part
29 of the settlor, such as concern with regard
30 to the beneficiary's management skills,
31 judgment, or level of maturity. Thus, a
32 court may look for some circumstantial or
33 other evidence indicating that the trust
34 arrangement represented to the settlor
35 more than a method of allocating the
36 benefits of property among multiple
37 beneficiaries, or a means of offering to the
38 beneficiaries (but not imposing on them) a
39 particular advantage. Sometimes, of
40 course, the very nature or design of a trust
41 suggests its protective nature or some other
42 material purpose.
43

44 RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. d (Tentative Draft No. 3, 2001).
45

46 **Effect of spendthrift provision on right of beneficiary to concur in**
47 **termination or modification.** Subsection (c) of this section deals with the effect of a
48 spendthrift provision on the right of a beneficiary to concur in a trust termination or

1 modification. Spendthrift terms have sometimes been construed to constitute a
2 material purpose without inquiry into the intention of the particular settlor. For
3 examples, see RESTATEMENT (SECOND) OF TRUSTS § 337 (1959); GEORGE G. BOGERT &
4 GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 1008 (Rev. 2d ed. 1983); and 4
5 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS § 337 (4th ed. 1989).
6 This result is troublesome because spendthrift provisions are often added to
7 instruments with little thought. Subsection (c), similar to Restatement (Third) of
8 Trusts § 65 cmt. e (Tentative Draft No. 3, 2001), does not negate the possibility that
9 continuation of a trust to assure spendthrift protection might have been a material
10 purpose of the particular settlor. The question of whether that was the intent of a
11 particular settlor is instead a matter of fact to be determined on the totality of the
12 circumstances.

13
14 **Distribution of trust property upon termination.** Subsection (d) recognizes
15 that the beneficiaries' power to compel termination of the trust includes the right to
16 direct how the trust property is to be distributed. While subsection (a) requires the
17 settlor's consent to terminate an irrevocable trust, the settlor does not control the
18 subsequent distribution of the trust property. Once termination has been approved,
19 how the trust property is to be distributed is solely for the beneficiaries to decide.
20

21 **Termination or modification by less than all the beneficiaries.** Subsection
22 (e), similar to Restatement (Third) of Trusts § 65 cmt. c (Tentative Draft No. 3, 2001),
23 and Restatement (Second) of Trusts §§ 338(2) and 340(2) (1959), addresses situations
24 in which a termination or modification is requested by less than all the beneficiaries,
25 either because a beneficiary objects, the consent of a beneficiary cannot be obtained,
26 or representation is either unavailable or its application uncertain. Subsection (e)
27 allows the court to fashion an appropriate order protecting the interests of the
28 nonconsenting beneficiaries while at the same time permitting the remainder of the
29 trust property to be distributed without restriction. The order of protection for the
30 nonconsenting beneficiaries might include partial continuation of the trust, the
31 purchase of an annuity, or the valuation and cashout of the interest.

32
33 **Section 19-3B-412. Modification or Termination Because of**
34 **Unanticipated Circumstances or Inability to Administer Trust**
35 **Effectively.**

36 (a) The court may modify the administrative or
37 dispositive terms of a trust or terminate the trust if,
38 because of circumstances not anticipated by the settlor,
39 modification or termination will further the purposes of the
40 trust. To the extent practicable, the modification must be
41 made in accordance with the settlor's probable intention.

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

5 (c) Upon termination of a trust under this section,
6 the trustee shall distribute the trust property in a manner
7 consistent with the purposes of the trust.

8
9 *Alabama Comment*

10
11 **Comparison to Uniform Code.** Section 412 is the same as Section 412 of the
12 Uniform Trust Code (2001).

13
14 *Uniform Comment*

15
16 **Purpose and scope.** This section broadens the court's ability to apply
17 equitable deviation to terminate or modify a trust. Subsection (a) allows a court to
18 modify the dispositive provisions of the trust as well as its administrative terms. For
19 example, modification of the dispositive provisions to increase support of a
20 beneficiary might be appropriate if the beneficiary has become unable to provide for
21 support due to poor health or serious injury. Subsection (a) is similar to Restatement
22 (Third) of Trusts § 66(1) (Tentative Draft No. 3, 2001), except that this section, unlike
23 the Restatement, does not impose a duty on the trustee to petition the court if the
24 trustee is aware of circumstances justifying judicial modification. The purpose of
25 the "equitable deviation" authorized by subsection (a) is not to disregard the
26 settlor's intent but to modify inopportune details to effectuate better the settlor's
27 broader purposes. Among other things, equitable deviation may be used to modify
28 administrative or dispositive terms due to the failure to anticipate economic change
29 or the incapacity of a beneficiary. For numerous illustrations, *see* RESTATEMENT
30 (THIRD) OF TRUSTS § 66 cmt. b (Tentative Draft No. 3, 2001). While it is necessary that
31 there be circumstances not anticipated by the settlor before the court may grant
32 relief under subsection (a), the circumstances may have been in existence when the
33 trust was created. This section thus complements Section 415, which allows for
34 reformation of a trust based on mistake of fact or law at the creation of the trust.

35
36 **Ability of court to modify administrative terms of trust.** Subsection (b)
37 broadens the court's ability to modify the administrative terms of a trust. The
38 standard under subsection (b) is similar to the standard for applying *cy pres* to a
39 charitable trust. *See* Section 413(a). Just as a charitable trust may be modified if its
40 particular charitable purpose becomes impracticable or wasteful, so can the
41 administrative terms of any trust, charitable or noncharitable. Subsections (a) and
42 (b) are not mutually exclusive. Many situations justifying modification of
43 administrative terms under subsection (a) will also justify modification under

1 subsection (b). Subsection (b) is also an application of the requirement in Section 404
2 that a trust and its terms must be for the benefit of its beneficiaries. *See also*
3 RESTATEMENT (THIRD) OF TRUSTS § 27(2) and cmt. b (Tentative Draft No. 2, approved
4 1999). Although the settlor is granted considerable latitude in defining the purposes
5 of the trust, the principle that a trust have a purpose which is for the benefit of its
6 beneficiaries precludes unreasonable restrictions on the use of trust property. An
7 owner's freedom to be capricious about the use of the owner's own property ends
8 when the property is impressed with a trust for the benefit of others. *See*
9 RESTATEMENT (SECOND) OF TRUSTS § 124 cmt. g (1959). Thus, attempts to impose
10 unreasonable restrictions on the use of trust property will fail. *See* RESTATEMENT
11 (THIRD) OF TRUSTS § 27 Reporter's Notes to cmt. b (Tentative Draft No. 2, approved
12 1999). Subsection (b), unlike subsection (a), does not have a direct precedent in the
13 common law, but various states have insisted on such a measure by statute. *See, e.g.,*
14 MO. REV. STAT. §456.590.1.

15
16 **Termination of trust.** Upon termination of a trust under this section,
17 subsection (c) requires that the trust be distributed in a manner consistent with the
18 purposes of the trust. As under the doctrine of *cy pres*, effectuating a distribution
19 consistent with the purposes of the trust requires an examination of what the settlor
20 would have intended had the settlor been aware of the unanticipated circumstances.
21 Typically, such terminating distributions will be made to the qualified beneficiaries,
22 often in proportion to the actuarial value of their interests, although the section does
23 not so prescribe. For the definition of qualified beneficiary, see Section 103(12).
24

25 **Modification not precluded by spendthrift provision.** Modification under
26 this section, because it does not require beneficiary action, is not precluded by a
27 spendthrift provision.

28
29 **Section 19-3B-413. Cy Pres.**

30 (a) Except as otherwise provided in subsection (b),
31 if a particular charitable purpose becomes unlawful,
32 impracticable, impossible to achieve, or wasteful:

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

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

36 (3) the court may apply *cy pres* to modify or
37 terminate the trust by directing that the trust property be
38 applied or distributed, in whole or in part, in a manner
39 consistent with the settlor's charitable purposes.

1 (b) A provision in the terms of a charitable trust
2 that would result in distribution of the trust property to a
3 noncharitable beneficiary prevails over the power of the court
4 under subsection (a) to apply *cy pres* to modify or terminate
5 the trust only if, when the provision takes effect:

6 (1) the trust property is to revert to the settlor
7 and the settlor is still living; or

8 (2) fewer than 21 years have elapsed since the date
9 of the trust's creation.

10 *Alabama Comment*

11 **Comparison to Uniform Code.** Section 413 is the same as Section 413 of the
12 Uniform Trust Code (2001). This section codifies the doctrine of equitable
13 approximation, by which terms of a charitable trust can be varied under certain
14 circumstances.
15
16

17 *Uniform Comment*

18 **Purpose and scope.** Subsection (a) codifies the court's inherent authority to
19 apply *cy pres*. The power may be applied to modify an administrative or dispositive
20 term. The court may order the trust terminated and distributed to other charitable
21 entities. Partial termination may also be ordered if the trust property is more than
22 sufficient to satisfy the trust's current purposes. Subsection (a), which is similar to
23 Restatement (Third) of Trusts § 67 (Tentative Draft No. 3, 2001), modifies the
24 doctrine of *cy pres* by presuming that the settlor had a general charitable intent when
25 a particular charitable purpose becomes impossible or impracticable to achieve.
26 Traditional doctrine did not supply that presumption, leaving it to the courts to
27 determine whether the settlor had a general charitable intent. If such an intent is
28 found, then the trust property is applied to other charitable purposes. If not, then
29 the charitable trust fails. *See* RESTATEMENT (SECOND) OF TRUSTS § 399 (1959). In the
30 great majority of cases the settlor would prefer that the property be used for other
31 charitable purposes. Courts are usually able to find a general charitable purpose to
32 which to apply the property, no matter how vaguely such purpose may have been
33 expressed by the settlor. Under subsection (a), if the particular purpose for which
34 the trust was created becomes impracticable, unlawful, impossible to achieve, or
35 wasteful, the trust does not fail. The court instead must either modify the terms of
36 the trust or distribute the property of the trust in a manner consistent with the
37 settlor's charitable purposes.
38
39
40

41 The settlor, with two exceptions, may not mandate that the trust property
42 pass to a noncharitable beneficiary upon failure of a particular charitable purpose.

1 Responding to concerns about the clogging of title and other administrative
2 problems caused by remote default provisions upon failure of a charitable purpose,
3 subsection (b) invalidates a gift over to a noncharitable beneficiary upon failure of a
4 particular charitable purpose unless the trust property is to revert to a living settlor
5 or fewer than 21 years have elapsed since the trust's creation. Subsection (b) will not
6 apply to a charitable lead trust, under which a charity receives payments for a term
7 certain with a remainder to a noncharity. In the case of a charitable lead trust, the
8 settlor's particular charitable purpose does not fail upon completion of the specified
9 trust term and distribution of the remainder to the noncharity. Upon completion of
10 the specified trust term, the settlor's particular charitable purpose has instead been
11 fulfilled. For a discussion of the reasons for a provision such as subsection (b), see
12 Ronald R. Chester, *Cy Pres of Gift Over: The Search for Coherence in Judicial Reform of*
13 *Failed Charitable Trusts*, 23 SUFFOLK U. L. REV. 41 (1989).

14
15 **Application of doctrine of *cy pres*.** The doctrine of *cy pres* is applied not only
16 to trusts, but also to other types of charitable dispositions, including those to
17 charitable corporations. This section does not control dispositions made in nontrust
18 form. However, in formulating rules for such dispositions, the courts often refer to
19 the principles governing charitable trusts, which would include this Code.

20
21 For the definition of charitable purpose, see Section 405(a). Pursuant to
22 Sections 405(c) and 410(b), a petition requesting a court to enforce a charitable trust
23 or to apply *cy pres* may be maintained by a settlor. Such actions can also be
24 maintained by a co-trustee, the state attorney general, or by a person having a
25 special interest in the charitable disposition. See RESTATEMENT (SECOND) OF TRUSTS §
26 391 (1959).

27
28 **Section 19-3B-414. Modification or Termination of Uneconomic**
29 **Trust.**

30 (a) After notice to the qualified beneficiaries, the
31 trustee of a trust consisting of trust property having a total
32 value less than \$50,000 may terminate the trust if the trustee
33 concludes that the value of the trust property is insufficient
34 to justify the cost of administration.

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

1 (c) Upon termination of a trust under this section,
2 the trustee shall distribute the trust property in a manner
3 consistent with the purposes of the trust.

4 (d) This section does not apply to an easement for
5 conservation or preservation.

6
7 *Alabama Comment*
8

9 **Comparison to Uniform Code.** Section 414 is the same as Section 414 of the
10 Uniform Trust Code (2001).
11

12 *Uniform Comment*
13

14 **Purpose and scope.** Subsection (a) assumes that a trust with a value of
15 \$50,000 or less is sufficiently likely to be inefficient to administer and that a trustee
16 should be able to terminate it without the expense of a judicial termination
17 proceeding. Because subsection (a) is a default rule, a settlor is free to set a higher or
18 lower figure or to specify different procedures or to prohibit termination without a
19 court order. *See* Section 105 and Article 4 General Comment.
20

21 **Modification or termination by court.** Subsection (b) allows the court to
22 modify or terminate a trust if the costs of administration would otherwise be
23 excessive in relation to the size of the trust. The court may terminate a trust under
24 this section even if the settlor has forbidden it. *See* Section 105(b)(4). Judicial
25 termination under this subsection may be used whether or not the trust is larger or
26 smaller than \$50,000.
27

28 When considering whether to terminate a trust under either subsection (a) or
29 (b), the trustee or court should consider the purposes of the trust. Termination
30 under this section is not always wise. Even if administrative costs may seem
31 excessive in relation to the size of the trust, protection of the assets from beneficiary
32 mismanagement may indicate that the trust be continued. The court may be able to
33 reduce the costs of administering the trust by appointing a new trustee.
34

35 **Distribution of trust property.** Upon termination of a trust under this
36 section, subsection (c) requires that the trust property be distributed in a manner
37 consistent with the purposes of the trust. In addition to outright distribution to the
38 beneficiaries, Section 816(21) authorizes payment to be made by a variety of
39 alternate payees. Distribution under this section will typically be made to the
40 qualified beneficiaries in proportion to the actuarial value of their interests.
41

42 **Creation of easements.** Even though not accompanied by the usual
43 trappings of a trust, the creation and transfer of an easement for conservation or
44 preservation will frequently create a charitable trust. The organization to whom the

1 easement was conveyed will be deemed to be acting as trustee of what will
2 ostensibly appear to be a contractual or property arrangement. Because of the
3 fiduciary obligation imposed, the termination or substantial modification of the
4 easement by the “trustee” could constitute a breach of trust. The drafters of the
5 Uniform Trust Code concluded that easements for conservation or preservation are
6 sufficiently different from the typical cash and securities found in small trusts that
7 they should be excluded from this section, and subsection (d) so provides. Most
8 creators of such easements, it was surmised, would prefer that the easement be
9 continued unchanged even if the easement, and hence the trust, has a relatively low
10 market value. For the law of conservation easements, see Restatement (Third) of
11 Property: Servitudes §1.6 (2000).

12
13 **Effect on honorary trusts.** While this section is not directed principally at
14 honorary trusts, it may be so applied. *See* Sections 408, 409.

15
16 **Impact of spendthrift provisions.** Because termination of a trust under this
17 section is initiated by the trustee or ordered by the court, termination is not
18 precluded by a spendthrift provision.

19
20 **Section 19-3B-415. Reformation to Correct Mistakes.**

21 The court may reform the terms of a trust, even if
22 unambiguous, to conform the terms to the settlor's intention
23 if it is proved by clear and convincing evidence that both the
24 settlor's intent and the terms of the trust were affected by a
25 mistake of fact or law, whether in expression or inducement.

26
27 *Alabama Comment*

28
29 **Comparison to Uniform Code.** Section 415 is the same as Section 415 of the
30 Uniform Trust Code (2001). This provision is a change in the common law of
31 Alabama, which provided that the terms of a trust could only be reformed in cases
32 where the terms were ambiguous, regardless of the settlor's intent.

33
34 *Uniform Comment*

35
36 **Purpose and scope.** Reformation of *inter vivos* instruments to correct a
37 mistake of law or fact is a long-established remedy. Restatement (Third) of
38 Property: Donative Transfers § 12.1 (Tentative Draft No. 1, approved 1995), which
39 this section copies, clarifies that this doctrine also applies to wills.

40
41 **Mistake of expression or inducement.** This section applies whether the
42 mistake is one of expression or one of inducement. A mistake of expression occurs
43 when the terms of the trust misstate the settlor's intention, fail to include a term that

1 was intended to be included, or include a term that was not intended to be excluded.
2 A mistake in the inducement occurs when the terms of the trust accurately reflect
3 what the settlor intended to be included or excluded but this intention was based on
4 a mistake of fact or law. See RESTATEMENT (THIRD) OF PROPERTY: DONATIVE
5 TRANSFERS § 12.1 cmt. I (Tentative Draft No. 1, approved 1995). Mistakes of
6 expression are frequently caused by scribes' errors while mistakes of inducement
7 often trace to errors of the settlor.
8

9 **Reformation *vis-à-vis* resolving an ambiguity.** Reformation is different
10 from resolving an ambiguity. Resolving an ambiguity involves the interpretation of
11 language already in the instrument. Reformation, on the other hand, may involve
12 the addition of language not originally in the instrument, or the deletion of language
13 originally included by mistake, if necessary to conform the instrument to the
14 settlor's intent. Because reformation may involve the addition of language to the
15 instrument, or the deletion of language that may appear clear on its face, reliance on
16 extrinsic evidence is essential. To guard against the possibility of unreliable or
17 contrived evidence in such circumstance, the higher standard of clear and
18 convincing proof is required. See RESTATEMENT (THIRD) OF PROPERTY: DONATIVE
19 TRANSFERS § 12.1 cmt. e (Tentative Draft No. 1, approved 1995).
20

21 **Determining original intent.** In determining the settlor's original intent, the
22 court may consider evidence relevant to the settlor's intention even though it
23 contradicts an apparent plain meaning of the text. The objective of the plain
24 meaning rule, to protect against fraudulent testimony, is satisfied by the
25 requirement of clear and convincing proof. See RESTATEMENT (THIRD) OF PROPERTY:
26 DONATIVE TRANSFERS § 12.1 cmt. d and Reporter's Notes (Tentative Draft No. 1,
27 approved 1995). See also John H. Langbein & Lawrence W. Waggoner, *Reformation of*
28 *Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV.
29 521 (1982).
30

31 For further discussion of the rule of this section and its application to
32 illustrative cases, see RESTATEMENT (THIRD) OF PROPERTY: DONATIVE TRANSFERS § 12.1
33 cmts. and Reporter's Notes (Tentative Draft No. 1, approved 1995).
34

35 **Section 19-3B-416. Modification to Achieve Settlor's Tax**
36 **Objectives.**

37 To achieve the settlor's tax objectives, the court
38 may modify the terms of a trust in a manner that is not
39 contrary to the settlor's probable intention. The court may
40 provide that the modification has retroactive effect.
41
42

1
2 *Alabama Comment*
3

4 **Comparison to Uniform Code.** Section 416 is the same as Section 416 of the
5 Uniform Trust Code (2001).
6

7 *Uniform Comment*
8

9 **Purpose and scope.** This section is copied from Restatement (Third) of
10 Property: Donative Transfers § 12.2 (Tentative Draft No. 1, approved 1995).
11 “Modification” under this section is to be distinguished from the “reformation”
12 authorized by Section 415. Reformation under Section 415 is available when the
13 terms of a trust fail to reflect the donor’s original, particularized intention. The
14 mistaken terms are then reformed to conform to this specific intent. The
15 modification authorized here allows the terms of the trust to be changed to meet the
16 settlor’s tax-saving objective as long as the resulting terms, particularly the
17 dispositive provisions, are not inconsistent with the settlor’s probable intent. The
18 modification allowed by this subsection is similar in concept to the *cy pres* doctrine
19 for charitable trusts (*see* Section 413), and the deviation doctrine for unanticipated
20 circumstances (*see* Section 412).
21

22 **Recognition of modification under federal tax law.** Whether a modification
23 made by the court under this section will be recognized under federal tax law is a
24 matter of federal law. Absent specific statutory or regulatory authority, binding
25 recognition is normally given only to modifications made prior to the taxing event,
26 for example, the death of the testator or settlor in the case of the federal estate tax.
27 *See* Rev. Rul. 73-142, 1973-1 C.B. 405. Among the specific modifications authorized
28 by the Internal Revenue Code or Service include the revision of split-interest trusts
29 to qualify for the charitable deduction, modification of a trust for a noncitizen
30 spouse to become eligible as a qualified domestic trust, and the splitting of a trust to
31 utilize better the exemption from generation-skipping tax.
32

33 For further discussion of the rule of this section and the relevant case law, see
34 Restatement (Third) of Property: Donative Transfers § 12.2 cmts. and Reporter’s
35 Notes (Tentative Draft No. 1, approved 1995).
36

37 **Section 19-3B-417. Combination and Division of Trusts.**

38 After notice to the qualified beneficiaries, a
39 trustee may combine two or more trusts into a single trust or
40 divide a trust into two or more separate trusts, if the result
41 does not impair rights of any beneficiary or adversely affect
42 achievement of the purposes of the trust.

1
2 *Alabama Comment*
3

4 **Comparison to Uniform Code.** Section 417 is the same as Section 417 of the
5 Uniform Trust Code (2001).
6

7 *Uniform Comment*
8

9 **Purpose and scope.** This section, which authorizes the combination or
10 division of trusts, is subject to contrary provision in the terms of the trust. *See*
11 Section 105 and Article 4 General Comment. Many trust instruments and
12 standardized estate planning forms include comprehensive provisions governing
13 combination and division of trusts. Except for the requirement that the qualified
14 beneficiaries receive advance notice of a proposed combination or division, this
15 section is similar to Restatement (Third) of Trusts § 68 (Tentative Draft No. 3, 2001).
16

17 **Reasons for combining trusts.** This section allows a trustee to combine two
18 or more trusts even though their terms are not identical. Typically the trusts to be
19 combined will have been created by different members of the same family and will
20 vary on only insignificant details, such as the presence of different perpetuities
21 savings periods. The more the dispositive provisions of the trusts to be combined
22 differ from each other the more likely it is that a combination would impair some
23 beneficiary's interest, hence the less likely that the combination can be approved.
24 Combining trusts may prompt more efficient trust administration and is sometimes
25 an alternative to terminating an uneconomic trust as authorized by Section 414.
26 Administrative economies promoted by combining trusts include a potential
27 reduction in trustees' fees, particularly if the trustee charges a minimum fee per
28 trust, the ability to file one trust income tax return instead of multiple returns, and
29 the ability to invest a larger pool of capital more effectively. Particularly if the terms
30 of the trust are identical, available administrative economies may suggest that the
31 trustee has a responsibility to pursue a combination. *See* Section 805 (duty to incur
32 only reasonable costs).
33

34 **Reasons for dividing trusts.** Division of trusts is often beneficial and, in
35 certain circumstances, almost routine. Division of trusts is frequently undertaken
36 due to a desire to obtain maximum advantage of exemptions available under the
37 federal generation-skipping tax. While the terms of the trusts which result from
38 such a division are identical, the division will permit differing investment objectives
39 to be pursued and allow for discretionary distributions to be made from one trust
40 and not the other. Given the substantial tax benefits often involved, a failure by the
41 trustee to pursue a division might in certain cases be a breach of fiduciary duty. The
42 opposite could also be true if the division is undertaken to increase fees or to fit
43 within the small trust termination provision. *See* Section 414.
44

45 **Resulting trusts may be dissimilar.** This section authorizes a trustee to
46 divide a trust even if the trusts that result are dissimilar. Conflicts among
47 beneficiaries, including differing investment objectives, often invite such a division,

1 although as in the case with a proposed combination of trusts, the more the terms of
2 the divided trusts diverge from the original plan, the less likely it is that the settlor's
3 purposes would be achieved and that the division could be approved.
4

5 **Approval of court or beneficiaries not required.** This section does not
6 require that a combination or division be approved either by the court or by the
7 beneficiaries. Prudence may dictate, however, that court approval under Section 410
8 be sought and beneficiary consent obtained whenever the terms of the trusts to be
9 combined or the trusts that will result from a division differ substantially one from
10 the other. For the provisions relating to beneficiary consent or ratification of a
11 transaction, or release of trustee from liability, see Section 1009.
12

13 **Advance notice required.** While the consent of the beneficiaries is not
14 necessary before a trustee may combine or divide trusts under this section, advance
15 notice to the qualified beneficiaries of the proposed combination or division is
16 required. This is consistent with Section 813, which requires that the trustee keep
17 the beneficiaries reasonably informed of trust administration, including the giving of
18 advance notice to the qualified beneficiaries of several specified actions that may
19 have a major impact on their interests.
20

21 **Actions of other states.** Other Numerous states have enacted statutes
22 authorizing division of trusts, either by trustee action or upon court order. For a list
23 of these statutes, see RESTATEMENT (THIRD) PROPERTY: DONATIVE TRANSFERS § 12.2
24 Statutory Note (Tentative Draft No. 1, approved 1995). Combination or division has
25 also been authorized by the courts in the absence of authorizing statute. *See, e.g., In*
26 *re Will of Marcus*, 552 N.Y.S. 2d 546 (Surr. Ct.1990) (combination); *In re Heller Inter*
27 *Vivos Trust*, 613 N.Y.S. 2d 809 (Surr. Ct. 1994) (division); and *BankBoston v. Marlow*,
28 701 N.E. 2d 304 (Mass. 1998) (division).
29

30 **Application of Section 816(22).** For a provision authorizing a trustee, in
31 distributing the assets of the divided trust, to make non-pro-rata distributions, see
32 Section 816(22).
33

34 ARTICLE 5

35 CREDITOR'S CLAIMS; SPENDTHRIFT AND DISCRETIONARY TRUSTS

36 37 **Section 19-3B-501. Rights of Beneficiary's Creditor or** 38 **Assignee.**

39 To the extent a beneficiary's interest is not
40 subject to a spendthrift provision, the court may authorize a
41 creditor or assignee of the beneficiary to reach the
42 beneficiary's interest by attachment of present or future

1 distributions to or for the benefit of the beneficiary or
2 other means. The court may limit the award to such relief as
3 is appropriate under the circumstances.

4
5 *Alabama Comment*
6

7 **Comparison to Uniform Code.** Section 501 is the same as Section 501 of the
8 Uniform Trust Code (2001).

9
10 *Uniform Comment*
11

12 **Purpose and scope.** This section applies only if the trust does not contain a
13 spendthrift provision or the spendthrift provision does not apply to a particular
14 beneficiary's interest. A settlor may subject to spendthrift protection the interests of
15 certain beneficiaries but not others. A settlor may also subject only a portion of the
16 trust to spendthrift protection such as an interest in the income but not principal.

17
18 Absent a valid spendthrift provision, a creditor may reach the interest of a
19 beneficiary the same as any other of the beneficiary's assets. This does not
20 necessarily mean that the creditor can collect all distributions made to the
21 beneficiary. Other creditor law of the state may limit the creditor to a specified
22 percentage of a distribution. *See, e.g.,* CAL. PROB. CODE § 15306.5. This section does
23 not prescribe the procedures for reaching a beneficiary's interest or for establishing
24 the priority among claimants, leaving those issues to the state's laws on creditor
25 rights. The section does clarify, however, that an order obtained against the trustee,
26 whatever state procedure may have been used, may extend to future distributions
27 whether made directly to the beneficiary or to others for the beneficiary's benefit. By
28 allowing an order to extend to future payments, the need for the creditor
29 periodically to return to court will be reduced.

30
31 Because proceedings to satisfy a claim are equitable in nature, the second
32 sentence of this section ratifies the court's discretion to limit the award as
33 appropriate under the circumstances. In exercising its discretion to limit relief, the
34 court may appropriately consider the circumstances of a beneficiary and the
35 beneficiary's family. *See* RESTATEMENT (THIRD) OF TRUSTS § 56 cmt. e (Tentative Draft
36 No. 2, approved 1999).

37
38 **Section 19-3B-502. Spendthrift Provision.**

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

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

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

12 *Alabama Comment*

13
14 **Comparison to Uniform Code.** Section 502 is the same as Section 502 of the
15 Uniform Trust Code (2001). Exceptions to the validity of a spendthrift provision
16 may be found in Section 503, subsection 504(c), Section 505 and Section 506.

17 *Uniform Comment*

18
19
20 **Purpose and scope.** Under this section, a settlor has the power to restrain the
21 transfer of a beneficiary's interest, regardless of whether the beneficiary has an
22 interest in income, in principal, or in both. Unless one of the exceptions under this
23 article applies, a creditor of the beneficiary is prohibited from attaching a protected
24 interest and may only attempt to collect directly from the beneficiary after payment
25 is made. This section is similar to Restatement (Third) of Trusts § 58 (Tentative Draft
26 No. 2, approved 1999), and Restatement (Second) of Trusts §§ 152-153 (1959). For
27 the definition of spendthrift provision, see Section 103(15).

28
29 **Requirements for effective spendthrift provision.** For a spendthrift
30 provision to be effective under this Code, it must prohibit both the voluntary and
31 involuntary transfer of the beneficiary's interest, that is, a settlor may not allow a
32 beneficiary to assign while prohibiting a beneficiary's creditor from collecting, and
33 vice versa. See RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. b (Tentative Draft No. 2,
34 approved 1999). See also RESTATEMENT (SECOND) OF TRUSTS § 152(2) (1959). A
35 spendthrift provision valid under this Code will also be recognized as valid in a
36 federal bankruptcy proceeding. See 11 U.S.C. § 541(c)(2).

37
38 Subsection (b), which is derived from TEX. PROP. CODE § 112.035(b), allows a
39 settlor to provide maximum spendthrift protection simply by stating in the
40 instrument that all interests are held subject to a "spendthrift trust" or words of
41 similar effect.

1
2 **Effect of spendthrift provision on disclaimers.** A disclaimer, because it is a
3 refusal to accept ownership of an interest and not a transfer of an interest already
4 owned, is not affected by the presence or absence of a spendthrift provision. Most
5 disclaimer statutes expressly provide that the validity of a disclaimer is not affected
6 by a spendthrift protection. *See, e.g.*, UNIFORM PROBATE CODE § 2-801(a). Releases
7 and exercises of powers of appointment are also not affected because they are not
8 transfers of property. *See* RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. c (Tentative
9 Draft No. 2, approved 1999).

10
11 **Effect on beneficial interest retained by the settlor.** A spendthrift provision
12 is ineffective against a beneficial interest retained by the settlor. *See* RESTATEMENT
13 (THIRD) OF TRUSTS § 58(2), approved 1999. This is a necessary corollary to Section
14 505(a)(2), which allows a creditor or assignee of the settlor to reach the maximum
15 amount that can be distributed to or for the settlor's benefit. This right to reach the
16 trust applies whether or not the trust contains a spendthrift provision.

17
18 **Trustee may choose to honor beneficiary's assignment.** A valid spendthrift
19 provision makes it impossible for a beneficiary to make a legally binding transfer,
20 but the trustee may choose to honor the beneficiary's purported assignment. The
21 trustee may recommence distributions to the beneficiary at anytime. The
22 beneficiary, not having made a binding transfer, can withdraw the beneficiary's
23 direction but only as to future payments. *See* RESTATEMENT (THIRD) OF TRUSTS § 58
24 cmt. d (Tentative Draft No. 2, approved 1999); RESTATEMENT (SECOND) OF TRUSTS §
25 152 cmt. I (1959).

26
27 **Section 19-3B-503. Exceptions to Spendthrift Provision.**

28 (a) In this section, "child" includes any person for
29 whom an order or judgment for child support has been entered
30 in this or another state.

31 (b) A spendthrift provision is unenforceable
32 against:

33 (1) a beneficiary's child, spouse, or former spouse
34 who has a judgment or court order against the beneficiary for
35 support or maintenance;

36 (2) a judgment creditor who has provided services
37 for the protection of a beneficiary's interest in the trust;
38 and

1 (3) a claim of this State or the United States to
2 the extent a statute of this State or federal law so provides.

3 (c) A claimant against whom a spendthrift provision
4 cannot be enforced may obtain from a court an order attaching
5 present or future distributions to or for the benefit of the
6 beneficiary. The court may limit the award to such relief as
7 is appropriate under the circumstances.

8
9 *Alabama Comment*

10
11 **Comparison to Uniform Code.** Section 503 is the same as Section 503 of the
12 Uniform Trust Code (2001).

13
14 *Uniform Comment*

15
16 **Purpose and scope.** This section exempts the claims of certain categories of
17 creditors from the effects of a spendthrift restriction.

18
19 **Exception for order to support child or former spouse.** The exception in
20 subsection (b)(1) for judgments or orders to support a beneficiary's child or current
21 or former spouse is in accord with Restatement (Third) of Trusts § 59(a) (Tentative
22 Draft No. 2, approved 1999), Restatement (Second) of Trusts § 157(a) (1959), and
23 numerous state statutes. It is also consistent with federal bankruptcy law, which
24 exempts such support orders from discharge. The effect of this exception is to
25 permit the claimant for unpaid support to attach present or future distributions that
26 would otherwise be made to the beneficiary. Distributions subject to attachment
27 include distributions required by the express terms of the trust, such as mandatory
28 payments of income, and distributions the trustee has otherwise decided to make,
29 such as through the exercise of discretion. Subsection (b)(1), unlike Section 504, does
30 not authorize the spousal or child claimant to compel a distribution from the trust.
31 Section 504 authorizes a spouse or child claimant to compel a distribution to the
32 extent the trustee has abused a discretion or failed to comply with a standard for
33 distribution.

34
35 Subsection (b)(1) refers both to "support" and "maintenance" in order to
36 accommodate differences among the states in terminology employed. No difference
37 in meaning between the two terms is intended.

38
39 **Definition of "child" intended to accommodate differing approaches of**
40 **states.** The definition of "child" in subsection (a) accommodates the differing
41 approaches states take to defining the class of individuals eligible for child support,
42 including such issues as whether support can be awarded to stepchildren. However
43 the state making the award chooses to define "child" will be recognized under this

1 Code, whether the order sought to be enforced was entered in the same or different
2 state.

3
4 **Exception for creditors who have provided services for protection of**
5 **beneficiary's interest.** The exception in subsection (b)(2) for a judgment creditor
6 who has provided services for the protection of a beneficiary's interest in the trust is
7 in accord with Restatement (Third) of Trusts § 59(b) (Tentative Draft No. 2,
8 approved 1999), and Restatement (Second) of Trusts § 157(c) (1959). This exception
9 allows a beneficiary of modest means to overcome an obstacle preventing the
10 beneficiary's obtaining services essential to the protection or enforcement of the
11 beneficiary's rights under the trust. *See* RESTATEMENT (THIRD) OF TRUSTS § 59 cmt. d
12 (Tentative Draft No. 2, approved 1999).

13
14 **Exceptions for federal and state claims.** Subsection (b)(3), which is similar to
15 Restatement (Third) of Trusts § 59 cmt. a (Tentative Draft No. 2, approved 1999),
16 exempts certain governmental claims from a spendthrift restriction. Federal
17 preemption guarantees that certain federal claims, such as claims by the Internal
18 Revenue Service, may bypass a spendthrift provision no matter what this Code
19 might say. The case law and relevant Internal Revenue Code provisions on the
20 exception for federal tax claims are collected in GEORGE G. BOGERT & GEORGE T.
21 BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 224 (Rev. 2d ed. 1992); and 2A AUSTIN
22 W. SCOTT & WILLIAM F. FRATCHER, *THE LAW OF TRUSTS* § 157.4 (4th ed. 1987).
23 Regarding claims by state governments, this subsection recognizes that states take a
24 variety of approaches with respect to collection, depending on whether the claim is
25 for unpaid taxes, for care provided at an institution, or for other charges.
26 Acknowledging this diversity, subsection (c) does not prescribe a rule, but refers to
27 other statutes of the state on whether particular claims are subject to or exempted
28 from spendthrift provisions.

29
30 **Effect on creditors who have furnished necessary services or supplies to**
31 **beneficiary.** Unlike Restatement (Third) of Trusts § 59(2) (Tentative Draft No. 2,
32 approved 1999), and Restatement (Second) of Trusts § 157(b) (1959), this Code does
33 not create an exception to the spendthrift restriction for creditors who have
34 furnished necessary services or supplies to the beneficiary. Most of these cases
35 involve claims by governmental entities, which the drafters concluded are better
36 handled by the enactment of special legislation as authorized by subsection (b)(3).
37 The drafters also declined to create an exception for tort claimants. For a discussion
38 of the exception for tort claims, which has not generally been recognized, *see*
39 RESTATEMENT (THIRD) OF TRUSTS § 59 Reporter's Notes to cmt. a (Tentative Draft No.
40 2, approved 1999). For a discussion of other exceptions to a spendthrift restriction,
41 recognized in some states, *see* GEORGE G. BOGERT & GEORGE T. BOGERT, *THE LAW OF*
42 *TRUSTS AND TRUSTEES* § 224 (Rev. 2d ed. 1992); and 2A AUSTIN W. SCOTT & WILLIAM F.
43 FRATCHER, *THE LAW OF TRUSTS* §§ 157-157.5 (4th ed. 1987).

44
45 **Remedy available to exception creditors.** Subsection (c) provides that the
46 only remedy available to an exception creditor is attachment of present or future
47 distributions of present or future distributions. Depending on other creditor law of
48 the state additional remedies may be available should the trust not contain a

1 spendthrift provision or the provision not apply to the beneficiary's interest. Section
2 501 provides that the creditor may reach the beneficiary's interest under that section
3 by attachment or "other means." Subsection (c) similar to Section 501 clarifies that
4 the court has the authority to limit the creditor's relief as appropriate under the
5 circumstances.
6

7 **Section 19-3B-504. Discretionary Trusts; Effect of Standard.**

8 (a) In this section, the terms "child", "spouse", or
9 "former spouse" include any person for whom an order or
10 judgment for child support has been entered in this or another
11 state.

12 (b) Except as otherwise provided in subsection (c),
13 whether or not a trust contains a spendthrift provision, a
14 creditor of a beneficiary may not compel a distribution that
15 is subject to the trustee's discretion, even if:

16 (1) the discretion is expressed in the form of a
17 standard of distribution; or

18 (2) the trustee has abused the discretion.

19 (c) To the extent a trustee has not complied with a
20 standard of distribution or has abused a discretion:

21 (1) a distribution may be ordered by the court to
22 satisfy a judgment or court order against the beneficiary for
23 support or maintenance of the beneficiary's child, spouse, or
24 former spouse; and

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

31 (d) This section does not limit the right of a
32 beneficiary to maintain a judicial proceeding against a

1 trustee for an abuse of discretion or failure to comply with a
2 standard for distribution.

3 (e) A creditor may not reach the interest of a
4 beneficiary who is also a trustee or co-trustee, or otherwise
5 compel a distribution, if the trustee's discretion to make
6 distributions for the trustee's own benefit is limited by an
7 ascertainable standard.

8
9 *Alabama Comment*

10
11 **Comparison to Uniform Code.** Section 504(a) was re-written to include the
12 terms "spouse" and "former spouse" for clarification. Sections 504(b) - (e) are the
13 same as Sections 504(b) - (e) of the Uniform Trust Code (2001).

14
15 *Uniform Comment*

16
17 **Purpose and scope.** This section addresses the ability of a beneficiary's
18 creditor to reach the beneficiary's discretionary trust interest, whether or not the
19 exercise of the trustee's discretion is subject to a standard. This section, similar to
20 the Restatement, eliminates the distinction between discretionary and support
21 trusts, unifying the rules for all trusts fitting within either of the former categories.
22 See RESTATEMENT (THIRD) OF TRUSTS § 60 Reporter's Notes to cmt. a (Tentative Draft
23 No. 2, approved 1999).

24
25 **Effect of valid spendthrift provision.** This section will have limited
26 application. Pursuant to Section 502, the effect of a valid spendthrift provision,
27 where applicable, is to prohibit a creditor from collecting on a distribution prior to
28 its receipt by the beneficiary. Only if the trust is not protected by a spendthrift
29 provision, or if the creditor falls within one of the exceptions to spendthrift
30 enforcement created by Section 503, does this section become relevant.

31
32 For a discussion of the definition of "child" in subsection (a), see Section 503
33 Comment.

34
35 **General rule.** Subsection (b), which establishes the general rule, forbids a
36 creditor from compelling a distribution from the trust, even if the trustee has failed
37 to comply with the standard of distribution or has abused a discretion. Under
38 subsection (d), the power to force a distribution due to an abuse of discretion or
39 failure to comply with a standard belongs solely to the beneficiary. Under Section
40 814(a), a trustee must always exercise a discretionary power in good faith and with
41 regard to the purposes of the trust and the interests of the beneficiaries.

1 **Exception for certain claims of a child, spouse or former spouse.** Subsection
2 (c) creates an exception for support claims of a child, spouse, or former spouse who
3 has a judgment or order against a beneficiary for support or maintenance. While a
4 creditor of a beneficiary generally may not assert that a trustee has abused a
5 discretion or failed to comply with a standard of distribution, such a claim may be
6 asserted by the beneficiary's child, spouse, or former spouse enforcing a judgment
7 or court order against the beneficiary for unpaid support or maintenance. The court
8 must direct the trustee to pay the child, spouse or former spouse such amount as is
9 equitable under the circumstances but not in excess of the amount the trustee was
10 otherwise required to distribute to or for the benefit of the beneficiary. Before fixing
11 this amount, the court having jurisdiction over the trust should consider that in
12 setting the respective support award, the family court has already considered the
13 respective needs and assets of the family. The Uniform Trust Code does not
14 prescribe a particular procedural method for enforcing a judgment or order against
15 the trust, leaving that matter to local collection law.

16
17 **Creditors of a beneficiary who is also acting as the trustee.** Trusts are
18 frequently drafted in which a trustee is also a beneficiary. A common example is
19 what is often referred to as a bypass trust, under which the settlor's spouse will
20 frequently be named as both trustee and beneficiary. An amount equal to the
21 exemption from federal estate tax will be placed in the bypass trust, and the trustee,
22 who will often be the settlor's spouse, will be given discretion to make distributions
23 to the beneficiaries, a class which will usually include the spouse-trustee. To
24 prevent the inclusion of the trust in the spouse-trustee's gross estate, the spouse's
25 discretion to make distributions for the spouse's own benefit will be limited by an
26 ascertainable standard relating to health, education, maintenance, or support.

27
28 The UTC, as currently drafted, does not specifically address the issue of
29 whether a creditor of a beneficiary may reach the interest of a beneficiary who is also
30 a trustee. However, Restatement (Third) of Trusts § 60, comment g, which was
31 approved by the American law Institute in 1999, does mandate this result. Because
32 the UTC is supplemented by the common law (see UTC Section 106), this
33 Restatement rule might also apply in states enacting the UTC. The drafting
34 committee has concluded that adoption of the Restatement rule would unduly
35 disrupt standard estate planning and should be limited. Consequently, Section 504
36 is amended to provide that the provisions of this section, which generally prohibit a
37 creditor of a beneficiary from reaching a beneficiary's discretionary interest, may
38 apply even if the beneficiary is also a trustee or cotrustee. The beneficiary-trustee is
39 protected from creditor claims to the extent the beneficiary-trustee's discretion is
40 protected by an ascertainable standard. The result is that the beneficiary- trustee's
41 interest is protected to the extent it is also exempt from federal estate tax. The
42 amendment thereby achieves its main purpose, which is to protect the trustee-
43 beneficiary of a bypass trust from creditor claims.

44
45 The protection conferred by this subsection however is no greater than if the
46 beneficiary had not been named trustee. If an exception creditor can reach the
47 beneficiary's interest under some other provision the interest is not insulated from
48 creditor claims by the fact the beneficiary is or becomes a trustee.

1
2 In addition, the definition of "power of withdrawal" in Section 103 is
3 amended to clarify that a power of withdrawal does not include a power exercisable
4 by the trustee that is limited by an ascertainable standard. The purpose of this
5 amendment is to preclude a claim that the power of a trustee-beneficiary to make
6 discretionary distributions for the trustee-beneficiary's own benefit results in an
7 enforceable claim of the trustee-beneficiary's creditors to reach the trustee-
8 beneficiary's interest as provided in Section 505(b). Similar to the amendment to
9 Section 504, the amendment to "power of withdrawal" is being made because of
10 concerns that Restatement (Third) of Trusts § 60, comment g, otherwise might allow
11 a beneficiary-trustee's creditors to reach the trustee's interest.
12

13 The Code does not specifically address the extent to which a creditor of a
14 trustee-beneficiary may reach a beneficial interest of a beneficiary-trustee that is not
15 limited by an ascertainable standard.
16

17 For the definition of "ascertainable standard," see Section 103(2).
18

19 **Section 19-3B-505. Creditor's Claim Against Settlor.**

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

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

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

32 (3) After the death of a settlor, and subject to the
33 settlor's right to direct the source from which liabilities
34 will be paid, the property of a trust that was revocable
35 immediately prior to the settlor's death is subject to claims
36 of the settlor's creditors, costs of administration of the

1 settlor's estate, the expenses of the settlor's funeral and
2 disposal of remains, and homestead allowance, exempt property
3 and family allowance to a surviving spouse and children to the
4 extent the settlor's probate estate is inadequate to satisfy
5 those claims, costs, expenses, and homestead allowance, exempt
6 property and family allowance.

7 (b) With respect to claims, expenses, and taxes in
8 connection with the settlement of a trust that was revocable
9 at the settlor's death:

10 (1) Any claim of a creditor which would be barred
11 against the fiduciary of a decedent's estate, the estate of
12 the decedent, or any creditor or beneficiary of the decedent's
13 estate, shall be barred against the trustee, the trust
14 property, and the creditors and beneficiaries of the trust.

15 (2) A trustee at any time may give notice to any
16 person the trustee has reason to believe may have a claim
17 against the settlor at death. The notice shall contain the
18 name and address of the trustee to whom the claim must be
19 presented. If the person fails to present the claim in writing
20 within 90 days from the date of the notice, then the person
21 shall be forever barred from asserting or recovering on the
22 claim from the trustee, the trust property and the creditors
23 and beneficiaries of the trust. Any person who presents a
24 claim on or before the date specified in the notice may not
25 later increase the claim following the expiration of the 90-
26 day period.

27 (3) If a claim is not presented in writing to the
28 personal representative of the settlor's estate or to the
29 trustee (i) within six months from the date of the appointment

1 of the initial personal representative of the settlor's
2 estate, or (ii) if no personal representative is appointed
3 within six months from the settlor's date of death and a claim
4 is not presented in writing to the trustee within six months
5 from the settlor's date of death, then no trustee shall be
6 chargeable for any assets that the trustee may pay or
7 distribute in good faith in satisfaction of any lawful claims,
8 expenses, or taxes or to any beneficiary before the claim was
9 presented. A payment or distribution of assets by a trustee
10 shall be deemed to have been made in good faith unless the
11 creditor can prove that the trustee had actual knowledge of
12 the claim at the time of the payment or distribution. The six-
13 month period shall not be interrupted or affected by the
14 death, resignation, or removal of a trustee, except that the
15 time during which there is no trustee in office shall not be
16 counted as part of the period.

17 (4) The provisions of Section 43-2-371 dealing with
18 the priority of payment of claims, expenses, and taxes from
19 the probate estate of a decedent shall apply to a revocable
20 trust to the extent the assets of the decedent's probate
21 estate are inadequate.

22 (c) For purposes of this section:

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

27 (2) upon the lapse, release, or waiver of the power,
28 the holder is treated as the settlor of the trust only to the
29 extent the value of the property affected by the lapse,

1 release, or waiver exceeds the greater of the amount specified
2 in Section 2041(b)(2), 2503(b), or 2514(e) of the Internal
3 Revenue Code of 1986, in each case as in effect on the
4 effective date of this chapter, or as later amended.

5 6 *Alabama Comment*

7
8 **Comparison to Uniform Code.** Section 505(a)(1) is consistent with ALA.
9 CODE § 35-4-290(b), which provides that “[w]hen the grantor in any conveyance
10 reserves to himself, for his own benefit, an absolute power of revocation, such
11 grantor must be taken as the absolute owner of the estate conveyed, as to the rights
12 of creditors and purchasers.”

13
14 In Section 505(a)(3), Alabama substitutes language “... the
15 property of a trust that was revocable at the settlor’s death ...” with “ ... the
16 property of a trust that was revocable *immediately prior to* the settlor’s death ...”
17 (emphasis added) for clarity.

18
19 In Section 505(a)(3) Alabama also provides that, to the extent that a settlor’s probate
20 estate is inadequate to satisfy the claims of a settlor’s surviving spouse and children
21 for the homestead allowance, exempt property and family allowance (as provided in
22 ALA. CODE §§ 43-8-110, 111 and 112, respectively), a trust that was revocable
23 immediately prior to the settlor’s death is subject to these claims. This is a
24 mandatory rule, pursuant to Section 105(b)(5).

25
26 The Alabama Trust Code is silent on the issue of whether a settlor can defeat
27 the right of a surviving spouse to an elective share under Ala. Code § 43-8-70, by
28 transferring the bulk of his or her estate to a revocable *inter vivos* trust (see *Russell v.*
29 *Russell*, 758 So.2d 533 (Ala. 1999)).

30
31 **Claims, expenses, and taxes in connection with the settlement of a trust that**
32 **was revocable at the settlor’s death.** In light of the policy considerations set forth in
33 the Uniform Trust Code comments, the Alabama committee believed that it made
34 sense to create a procedure parallel to that permitted for estates to bar the claims of
35 creditors. This language appears in new subsection (b). (Section 505(b) of the UTC
36 is renumbered as Section 505(c).) If a probate proceeding has commenced, then the
37 applicable probate non-claim statute and this statute will come into play. The
38 procedures set forth in subsection (b) will therefore operate in situations whether or
39 not there is a probate proceeding underway.

40
41 Section 505(b)(2) is permissive rather than mandatory in nature. If a trustee
42 elects to use the claim procedure set forth in Section 505(b)(2) to provide notice to
43 creditors, then a creditor’s claim is barred against the trust’s assets after ninety (90)
44 days, and Section 505(b)(3) will thereafter be inoperative with respect to that
45 creditor. If, on the other hand, a trustee does not elect to provide notice to creditors

1 pursuant to Section 505(b)(2), then Section 505(b)(3) will be operative. Although
2 Section 505(b)(3) does limit the rights of creditors against the trustee who, acting in
3 good faith, distributes property to such ultimate transferee, it does not attempt to
4 change whatever common law rights creditors may have under existing law against
5 the ultimate transferee of non-probate property passing under a revocable trust. It
6 should also be noted that § 6-102 of the Uniform Probate Code sets forth a statutory
7 framework for dealing with the rights of creditors against transferees of non-probate
8 property.

9 10 *Uniform Comment*

11
12 **Purpose and scope.** Subsection (a)(1) states what is now a well accepted
13 conclusion, that a revocable trust is subject to the claims of the settlor's creditors
14 while the settlor is living. See RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. e (Tentative
15 Draft No. 1, approved 1996). Such claims were not allowed at common law,
16 however. See RESTATEMENT (SECOND) OF TRUSTS § 330 cmt. o (1959). Because a
17 settlor usually also retains a beneficial interest that a creditor may reach under
18 subsection (a)(2), the common law rule, were it retained in this Code, would be of
19 little significance. See RESTATEMENT (SECOND) OF TRUSTS § 156(2) (1959).

20
21 **Effect of self-settled trust on settlor's creditors.** Subsection (a)(2), which is
22 based on Restatement (Third) of Trusts § 58(2) and cmt. e (Tentative Draft No. 2,
23 approved 1999), and Restatement (Second) of Trusts § 156 (1959), follows traditional
24 doctrine in providing that a settlor who is also a beneficiary may not use the trust as
25 a shield against the settlor's creditors. The drafters of the Uniform Trust Code
26 concluded that traditional doctrine reflects sound policy. Consequently, the drafters
27 rejected the approach taken in states like Alaska and Delaware, both of which allow
28 a settlor to retain a beneficial interest immune from creditor claims. See Henry J.
29 Lischer, Jr., *Domestic Asset Protection Trusts: Pallbearers to Liability*, 35 REAL PROP.
30 PROB. & TR. J. 479 (2000); John E. Sullivan, III, *Gutting the Rule Against Self-Settled*
31 *Trusts: How the Delaware Trust Law Competes with Offshore Trusts*, 23 DEL. J. CORP. L.
32 423 (1998). Under the Code, whether the trust contains a spendthrift provision or
33 not, a creditor of the settlor may reach the maximum amount that the trustee could
34 have paid to the settlor-beneficiary. If the trustee has discretion to distribute the
35 entire income and principal to the settlor, then the effect of this subsection is to place
36 the settlor's creditors in the same position as if the trust had not been created. For
37 the definition of "settlor," see Section 103(14).

38
39 **Insolvency of settlor at time of trust creation.** This section does not address
40 possible rights against a settlor who was insolvent at the time of the trust's creation
41 or was rendered insolvent by the transfer of property to the trust. This subject is
42 instead left to the state's law on fraudulent transfers. A transfer to the trust by an
43 insolvent settlor might also constitute a voidable preference under federal
44 bankruptcy law.

45
46 **Revocable trusts as will substitutes.** Subsection (a)(3) recognizes that a
47 revocable trust is usually employed as a will substitute. As such, the trust assets,
48 following the death of the settlor, should be subject to the settlor's debts and other

1 charges. However, in accordance with traditional doctrine, the assets of the settlor's
2 probate estate must normally first be exhausted before the assets of the revocable
3 trust can be reached. This section does not attempt to address the procedural issues
4 raised by the need first to exhaust the decedent's probate estate before reaching the
5 assets of the revocable trust. Nor does this section address the priority of creditor
6 claims or liability of the decedent's other nonprobate assets for the decedent's debts
7 and other charges. Subsection (a)(3), however, does ratify the typical pourover will,
8 revocable trust plan. As long as the rights of the creditor or family member claiming
9 a statutory allowance are not impaired, the settlor is free to shift liability from the
10 probate estate to the revocable trust. Regarding other issues associated with
11 potential liability of nonprobate assets for unpaid claims, see Section 6-102 of the
12 Uniform Probate Code, which was added to that Code in 1998.

13
14 **Power of withdrawal *vis-à-vis* power of revocation.** Subsection (b)(1) treats
15 a power of withdrawal as the equivalent of a power of revocation because the two
16 powers are functionally identical. This is also the approach taken in Restatement
17 (Third) of Trusts § 56 cmt. b (Tentative Draft No. 2, approved 1999). If the power is
18 unlimited, then the property subject to the power will be fully subject to the claims
19 of the power holder's creditors, the same as the power holder's other assets. If the
20 power holder retains the power until death, then the property subject to the power
21 may be liable for claims and statutory allowances to the extent the power holder's
22 probate estate is insufficient to satisfy those claims and allowances. For powers
23 limited either in time or amount, such as a right to withdraw a current contribution
24 to a trust in an amount equal to the annual exclusion under I.R.C. § 2503(b) for
25 federal gift tax purposes within 30 days, this subsection would limit the creditor to
26 the contribution and require the creditor to take action prior to the expiration of the
27 30-day period.

28
29 **Lapse, release or waiver of a power of withdrawal.** Upon the lapse, release,
30 or waiver of a power of withdrawal, the property formerly subject to the power will
31 normally be subject to the claims of the power holder's creditors and assignees the
32 same as if the power holder were the settlor of a now irrevocable trust. Pursuant to
33 subsection (a)(2), a creditor or assignee of the power holder generally may reach the
34 power holder's entire beneficial interest in the trust, whether or not distribution is
35 subject to the trustee's discretion. However, following the lead of ARIZ. REV. STAT. §
36 14-7705(g) and TEX. PROP. CODE § 112.035(e), subsection (b)(2) creates an exception
37 for trust property which was subject to a Crummey or five and five power. Upon
38 the lapse, release, or waiver of a power of withdrawal, the holder is treated as the
39 settlor of the trust only to the extent the value of the property subject to the power at
40 the time of the lapse, release, or waiver exceeded the greater of the amounts
41 specified in IRC §§ 2041(b)(2) or 2514(e) (that is, the greater of 5% or \$5,000), or IRC §
42 2503(b).

43
44 **Property subject to special power of appointment or testamentary general**
45 **power of appointment.** The Uniform Trust Code does not address creditor issues
46 with respect to property subject to a special power of appointment or a testamentary
47 general power of appointment. For creditor rights against such interests, *see*
48 RESTATEMENT (PROPERTY) SECOND: DONATIVE TRANSFERS §§ 13.1-13.7 (1986).

1
2
3 **Section 19-3B-506. Overdue Distribution.**

4 (a) In this section, "mandatory distribution" means
5 a distribution of income or principal that the trustee is
6 required to make to a beneficiary under the terms of the
7 trust, including a distribution upon termination of the trust.
8 The term excludes a distribution subject to the exercise of
9 the trustee's discretion regardless of whether the terms of
10 the trust (i) include a support or other standard to guide the
11 trustee in making distribution decisions or (ii) provide that
12 the trustee "may" or "shall" make discretionary distributions,
13 including distributions pursuant to a support or other
14 standard.

15 (b) Whether or not a trust contains a spendthrift
16 provision, a creditor or assignee of a beneficiary may compel
17 a mandatory distribution of income or principal to a
18 beneficiary, including a distribution upon termination of the
19 trust, if the trustee has not made the distribution to the
20 beneficiary within a reasonable time after the mandated
21 distribution date.

22 *Alabama Comment*

23
24 **Comparison to Uniform Code.** Alabama substitutes the word "compel" for
25 the word "reach" in Section 506 of the Uniform Trust Code (2001). In addition, the
26 prepositional phrase "to a beneficiary" is added for clarity. This change makes it
27 clear that, while a creditor may force a mandatory distribution to be made, the
28 distribution may still be made to the beneficiary and not necessarily directly to the
29 creditor. A failure to make a required distribution within a reasonable period of
30 time does not change the role of the trustee to that of a receiver or arbitrator of the
31 claims and obligations of the beneficiary.
32
33
34
35
36

1
2 *Uniform Comment*
3

4 **Purpose and scope.** The effect of a spendthrift provision is generally to
5 insulate totally a beneficiary's interest until a distribution is made and received by
6 the beneficiary. See Section 502. But this section, along with several other sections
7 in this article, recognizes exceptions to this general rule. Whether a trust contains a
8 spendthrift provision or not, a trustee should not be able to avoid creditor claims
9 against a beneficiary by refusing to make a distribution required to be made by the
10 express terms of the trust. On the other hand, a spendthrift provision would become
11 largely a nullity were a beneficiary's creditors able to attach all required payments
12 as soon as they became due. This section reflects a compromise between these two
13 competing principles. A creditor can reach a mandatory distribution, including a
14 distribution upon termination, if the trustee has failed to make the payment within a
15 reasonable time after the required distribution date. Following this reasonable
16 period, payments mandated by the express terms of the trust are in effect being held
17 by the trustee as agent for the beneficiary and should be treated as part of the
18 beneficiary's personal assets.
19

20 The definition of "mandatory distribution" in subsection (a) is to be
21 understood in its traditional sense such as provisions requiring that the beneficiary
22 receive an income or receive principal upon termination of the trust.
23

24 This section is similar to Restatement (Third) of Trusts § 58 cmt. d (Tentative
25 Draft No. 2, 1999).
26

27 **Section 19-3B-507. Personal Obligations of Trustee.**

28 Trust property is not subject to personal
29 obligations of the trustee, even if the trustee becomes
30 insolvent or bankrupt.
31

32 *Alabama Comment*
33

34 **Comparison to Uniform Code.** Section 507 is the same as Section 507 of the
35 Uniform Trust Code (2001).
36

37 *Uniform Comment*
38

39 **Purpose and scope.** Because the beneficiaries of the trust hold the beneficial
40 interest in the trust property and the trustee holds only legal title without the
41 benefits of ownership, the creditors of the trustee have only a personal claim against
42 the trustee. See RESTATEMENT (THIRD) OF TRUSTS § 5 cmt. k (Tentative Draft No.1,
43 approved 1996); RESTATEMENT (SECOND) OF TRUSTS § 12 cmt. a (1959). Similarly, a

1 personal creditor of the trustee who attaches trust property to satisfy the debt does
2 not acquire title as a bona fide purchaser even if the creditor is unaware of the trust.
3 See RESTATEMENT (SECOND) OF TRUSTS § 308 (1959). The protection afforded by this
4 section is consistent with that provided by the Bankruptcy Code. Property in which
5 the trustee holds legal title as trustee is not part of the trustee's bankruptcy estate.
6 11 U.S.C. § 541(d).

7
8 The exemption of the trust property from the personal obligations of the
9 trustee is the most significant feature of Anglo-American trust law by comparison
10 with the devices available in civil law countries. A principal objective of the Hague
11 Convention on the Law Applicable to Trusts and on their Recognition is to protect
12 the Anglo-American trust with respect to transactions in civil law countries. See
13 Hague Convention art. 11. See also Henry Hansmann & Ugo Mattei, *The Functions of*
14 *Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434 (1998);
15 John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*,
16 107 YALE L.J. 165, 179-80 (1997).

17
18 **Section 19-3B-508. Qualified Trusts Under the Internal Revenue**
19 **Code.**

20 (a) Any benefits provided under a plan which
21 includes a trust that constitutes a "qualified trust" may not
22 be assigned or alienated, voluntarily or involuntarily, and
23 shall be exempt from the operation of any bankruptcy or
24 insolvency laws under 11 U.S.C. § 522(b), as from time to time
25 amended. This subsection may not be waived by a participant or
26 beneficiary of any qualified plan.

27 (b) The securing of a loan made to a participant or
28 beneficiary of such a plan shall not be treated as an
29 assignment or alienation under subsection (a) if such loan is
30 secured by the participant's accrued nonforfeitable benefit
31 under the plan and is exempt from the tax imposed by Section
32 4975 of the code by reason of Section 4975(d)(1) of the code.

33 (c) Subsection (a) shall apply to the creation,
34 assignment, or recognition of a right to any benefit payable
35 with respect to a participant pursuant to a domestic relations

1 order, as such term is defined in Section 414(p) of the code,
2 except that subsection (a) shall not apply if the order is
3 determined to be a "qualified domestic relations order" in
4 accordance with Section 414(p) of the code. However, no
5 domestic relations order shall be deemed a qualified domestic
6 relations order except in accordance with the procedures for
7 such determination set forth in Section 414(p) and the related
8 provisions of the Employee Retirement Income Security Act of
9 1974, as from time to time amended.

10 (d) The provisions of this section shall be
11 interpreted so as to provide restrictions on alienation and
12 assignment to the extent, and only to the extent, the same are
13 required for a trust within the definition of "qualified
14 trust" herein to be a "qualified trust" under the applicable
15 provisions of the code, notwithstanding any attempted
16 assignment or alienation in violation of Section 401(a) or
17 other applicable provisions of the code. It is intended that
18 this section will constitute "a restriction of the transfer of
19 a beneficial interest of the debtor in a trust that is
20 enforceable under applicable nonbankruptcy law" for purposes
21 of Section 541(c)(2) of the Federal Bankruptcy Code, 11 U.S.C.
22 § 541(c)(2), as from time to time amended. This section shall
23 further be construed as a "state spendthrift trust law." It is
24 further intended for this section to provide an exemption from
25 creditors' claims within 11 U.S.C. § 522.

26 (e) As used in this section:

27 (1) ASSIGNMENT or ALIENATION, and any conjugation
28 thereof, includes any anticipation, assignment at law or in
29 equity, alienation, attachment, garnishment, levy, execution,

1 or other legal or equitable process. The term includes: (i)
2 any arrangement providing for the payment to the employer or
3 other sponsor of such plan of benefits that otherwise would be
4 due the participant under the plan; (ii) any direct or
5 indirect arrangement, whether revocable or irrevocable,
6 whereby any person acquires from a participant or beneficiary
7 of such plan a right or interest enforceable against the plan
8 in, or to, all or any part of a plan benefit which is, or may
9 become, payable to the participant or beneficiary; (iii) any
10 attachment, execution, seizure, or the like, or under any form
11 of legal process whatsoever; and (iv) the operation of any
12 bankruptcy or insolvency laws under 11 U.S.C. § 522(b) as from
13 time to time amended. Notwithstanding the foregoing, the term
14 does not include those items excluded from the definition by
15 Treasury Regulations § 1.401(a)-13(c)(2).

16 (2) CODE means the Internal Revenue Code of 1986, as
17 from time to time amended, or as at any time superseded by
18 reenactment, recodification, or adoption of any other similar
19 revenue law. Reference to specific sections of the code shall
20 include references to their successor sections as a result of
21 renumbering or recodification at any future date.

22 (3) TREASURY REGULATION means a valid regulation of
23 the United States Department of Treasury codified at Title 26
24 of the Code of Federal Regulations. References to specific
25 Treasury Regulations include references to amendments and
26 future reenactments or recodifications of such regulations,
27 regardless of how designated.

28 (4) QUALIFIED TRUST means a "qualified trust" as
29 such term is used in Section 401(a) of the code, and includes

1 any trust that would not be qualified but for this section. A
2 "qualified trust" includes, without limitations, any trust
3 that has received a favorable determination letter from the
4 Internal Revenue Service of the United States Department of
5 Treasury to the effect that such trust is, or will be upon the
6 satisfaction of certain administrative conditions, a
7 "qualified trust" under Section 401(a) of the code. "Qualified
8 trust" also includes: (i) a "retirement annuity" described in
9 Section 404(a)(2) of the code, including a retirement annuity
10 that would not satisfy the requirements of Section 404(a)(2)
11 of the code but for this section; (ii) an annuity described in
12 Section 403(b) of the code, including an annuity that would
13 not satisfy the requirements of Section 403(b) of the code but
14 for this section; (iii) an individual retirement plan
15 described in Section 7701(a)(37) of the code, including an
16 individual retirement plan that would not satisfy the
17 requirements of Section 7701(a)(37) of the code but for this
18 section; (iv) a retirement bond described in Section 409 of
19 the code, as in effect prior to January 1, 1984, including a
20 retirement bond that would not satisfy the requirements of
21 Section 409 of the code but for this section; (v) a
22 governmental plan described in Section 414(d) of the code;
23 (vi) a church plan described in Section 414(e) of the code;
24 and (vii) a tax credit employee stock ownership plan described
25 in Section 409 of the code, including a tax credit employee
26 stock ownership plan that would not satisfy the requirements
27 of Section 409 of the code but for this section.

1 (f) This section does not apply to the Employees'
2 Retirement System of Alabama, Teachers' Retirement System of
3 Alabama, and the Judicial Retirement Fund of Alabama.

4
5 *Alabama Comment*
6

7 **Comparison to Uniform Code.** Alabama adds Section 508, which is derived
8 (without substantive change) from former ALA. CODE § 19-3-1(b), to the Alabama
9 Trust Code.
10

11 **ARTICLE 6**

12 **REVOCABLE TRUSTS**

13
14 **Section 19-3B-601. Capacity of Settlor of Revocable Trust.**

15 The capacity required to create, amend, revoke, or
16 add property to a revocable trust, or to direct the actions of
17 the trustee of a revocable trust, is the same as that required
18 to make a will.

19 *Alabama Comment*
20

21 **Comparison to Uniform Code.** Section 601 is the same as Section 601 of the
22 Uniform Trust Code (2001).
23

24 The current state of the law in Alabama on whether the capacity required to
25 execute a revocable trust is higher than or the same as the standard for the execution
26 of a will is far from clear. The clear statement in Section 601 will eliminate that
27 uncertainty and seems consistent with the current practice of using a revocable trust
28 as a will substitute. In future years, this will allow courts and practitioners to make
29 use of the extensive case law on testamentary capacity to determine if a settlor was
30 competent to create a trust. As provided later in the Uniform Trust Code, capacity is
31 measured as of the date that the trust was created, not when it was funded.
32

33 While the capacity required to execute a revocable trust is the same as that
34 required to make a will, the capacity required to execute the relevant legal
35 instruments to transfer property will be determined by the higher standards
36 imposed under contract law.
37
38
39
40

1
2 *Uniform Comment*
3

4 **Purpose and scope.** This section is patterned after Restatement (Third) of
5 Trusts § 11(1) (Tentative Draft No. 1, approved 1996). The revocable trust is used
6 primarily as a will substitute, with its key provision being the determination of the
7 persons to receive the trust property upon the settlor's death. To solidify the use of
8 the revocable trust as a device for transferring property at death, the settlors usually
9 also executes a pourover will. The use of a pourover will assures that property not
10 transferred to the trust during life will be combined with the property the settlors
11 did manage to convey. Given this primary use of the revocable trust as a device for
12 disposing of property at death, the capacity standard for wills rather than that for
13 lifetime gifts should apply. The application of the capacity standard for wills does
14 not mean that the revocable trust must be executed with the formalities of a will.
15 There are no execution requirements under this Code for a trust not created by will,
16 and a trust not containing real property may be created by an oral statement. *See*
17 Section 407 and Comment.
18

19 The Uniform Trust Code does not explicitly spell out the standard of capacity
20 necessary to create other types of trusts, although Section 402 does require that the
21 settlors have capacity. This section includes a capacity standard for creation of a
22 revocable trust because of the uncertainty in the case law and the importance of the
23 issue in modern estate planning. No such uncertainty exists with respect to the
24 capacity standard for other types of trusts. To create a testamentary trust, the
25 settlors must have the capacity to make a will. To create an irrevocable trust, the
26 settlors must have the capacity that would be needed to transfer the property free of
27 trust. *See generally* RESTATEMENT (THIRD) OF TRUSTS § 11 (Tentative Draft No. 1,
28 approved 1996); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE
29 TRANSFERS § 8.1 (Tentative Draft No. 3, 2001).
30

31 **Section 19-3B-602. Revocation or Amendment of Revocable Trust.**

32 (a) Unless the terms of a trust expressly provide
33 that the trust is irrevocable, the settlor may revoke or amend
34 the trust. This subsection does not apply to a trust created
35 under an instrument executed before the effective date of this
36 chapter.

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

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

1 (2) to the extent the trust consists of property
2 other than community property, each settlor may revoke or
3 amend the trust with regard to the portion of the trust
4 property attributable to that settlor's contribution; and

5 (3) upon the revocation or amendment of the trust by
6 fewer than all of the settlors, the trustee shall promptly
7 notify the other settlors of the revocation or amendment.

8 (c) The settlor may revoke or amend a revocable
9 trust:

10 (1) by substantial compliance with a method provided
11 in the terms of the trust; or

12 (2) if the terms of the trust do not provide a
13 method or the method provided in the terms is not expressly
14 made exclusive, by:

15 (A) a later will or codicil that expressly refers to
16 the trust or that specifically devises property that would
17 otherwise have passed according to the terms of the trust; or

18 (B) any other method manifesting clear and
19 convincing evidence of the settlor's intent; provided,
20 however, that a written revocable trust may only be amended
21 and revoked by a later written instrument delivered to the
22 trustee.

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

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

1 (f) A conservator of the settlor or, if no
2 conservator has been appointed, a guardian of the settlor may
3 exercise a settlor's powers with respect to revocation,
4 amendment, or distribution of trust property only with the
5 approval of the court supervising the conservatorship or
6 guardianship.

7 (g) A trustee who does not have actual knowledge
8 that a trust has been revoked or amended is not liable to the
9 settlor or settlor's successors in interest for distributions
10 made and other actions taken on the assumption that the trust
11 had not been amended or revoked.

12 *Alabama Comment*

13
14
15 **Comparison to Uniform Code.** Section 602 is substantially the same as
16 Section 602 of the Uniform Trust Code (2001). Subsection (a), which provides that a
17 settlors may revoke or modify a trust unless the terms of the trust expressly state
18 that the trust is irrevocable, changes the law in Alabama.

19
20 In subparagraph (c)(2)(B), a clause is added, which restricts the method to
21 revoke or amend a written revocable trust to that of a written instrument.

22
23 In subsection (g), the word "know" is replaced by the words
24 "have actual knowledge." This is more restrictive, limiting "knowledge" to the first
25 of the three factors defined in Section 104(a)(1) - (3).

26 *Uniform Comment*

27
28
29 **Purpose and scope.** Subsection (a), which provides that a settlors may revoke
30 or modify a trust unless the terms of the trust expressly state that the trust is
31 irrevocable, changes the common law. Most states follow the rule that a trust is
32 presumed irrevocable absent evidence of contrary intent. *See* RESTATEMENT
33 (SECOND) OF TRUSTS § 330 (1959). California, Iowa, Montana, Oklahoma, and Texas
34 presume that a trust is revocable. The Uniform Trust Code endorses this minority
35 approach, but only for trusts created after its effective date. This Code presumes
36 revocability when the instrument is silent because the instrument was likely drafted
37 by a nonprofessional, who intended the trust as a will substitute. The most recent
38 revision of the Restatement of Trusts similarly reverses the former approach. A trust
39 is presumed revocable if the settlors has retained a beneficial interest. *See*
40 RESTATEMENT (THIRD) OF TRUSTS § 63 cmt. c (Tentative Draft No. 3, 2001). Because

1 professional drafters habitually spell out whether or not a trust is revocable,
2 subsection (a) will have limited application.

3
4 **A power of revocation includes the power to amend.** An unrestricted power
5 to amend may also include the power to revoke a trust. *See* RESTATEMENT (THIRD) OF
6 TRUSTS § 63 cmt. g (Tentative Draft No. 3, 2001); RESTATEMENT (SECOND) OF TRUSTS §
7 331 cmt. g and h (1959).

8
9 **Revocation or amendment of trust containing community property.**
10 Subsection (b), which is similar to Restatement (Third) of Trusts § 63 cmt. k
11 (Tentative Draft No. 3, 2001), provides default rules for revocation or amendment of
12 a trust having several settlors. The settlor's authority to revoke or modify the trust
13 depends on whether the trust contains community property. To the extent the trust
14 contains community property, the trust may be revoked by either spouse acting
15 alone but may be amended only by joint action of both spouses. The purpose of this
16 provision, and the reason for the use of joint trusts in community property states, is
17 to preserve the community character of property transferred to the trust. While
18 community property does not prevail in a majority of states, contributions of
19 community property to trusts created in noncommunity property states does occur.
20 This is due to the mobility of settlors, and the fact that community property retains
21 its community character when a couple move from a community to a
22 noncommunity state. For this reason, subsection (b), and its provision on
23 contributions of community property, should be enacted in all states, whether
24 community or noncommunity.

25
26 **Non-community property.** With respect to separate property contributed to
27 the trust, or all property of the trust if none of the trust property consists of
28 community property, subsection (b) provides that each settlors may revoke or
29 amend the trust as to the portion of the trust contributed by that settlors. The
30 inclusion of a rule for contributions of separate property does not mean that the
31 drafters of this Code concluded that the use of joint trusts should be encouraged.
32 The rule is included because of the widespread use of joint trusts in noncommunity
33 property states in recent years. Due to the desire to preserve the community
34 character of trust property, joint trusts are a necessity in community property states.
35 Unless community property will be contributed to the trust, no similarly important
36 reason exists for the creation of a joint trust in a noncommunity property state. Joint
37 trusts are often poorly drafted, confusing the dispositive provisions of the respective
38 settlors. Their use can also lead to unintended tax consequences. *See* Melinda S.
39 Merk, *Joint Revocable Trusts for Married Couples Domiciled in Common-Law Property*
40 *States*, 32 REAL PROP. PROB. & TR. J. 345 (1997).

41
42 **Proportionate contribution to a joint trust.** Subsection (b) does not address
43 the many technical issues that can arise in determining the settlors' proportionate
44 contribution to a joint trust. Most problematic are contributions of jointly-owned
45 property. In the case of joint tenancies in real estate, each spouse would presumably
46 be treated as having made an equal contribution because of the right to sever the
47 interest and convert it into a tenancy in common. This is in contrast to joint accounts
48 in financial institutions, ownership of which in most states is based not on fractional

1 interest but on actual dollar contribution. *See, e.g.,* UNIFORM PROBATE CODE § 6-211.
2 Most difficult may be determining a contribution rule for entireties property. In
3 *Holdener v. Fieser*, 971 S.W. 2d 946 (Mo. Ct. App. 1998), the court held that a
4 surviving spouse could revoke the trust with respect to the entire interest but did
5 not express a view as to revocation rights while both spouses were living
6

7 **Notification of all joint settlors.** This section does not explicitly require that
8 the other settlors or settlors be notified if a joint trust is revoked by less than all of
9 the settlors, but such notice would be required pursuant to Section 603. While a
10 trust is revocable and the settlors has capacity, Section 603(a) provides that the
11 duties of the trustee, including the duty to keep the beneficiaries informed of
12 administrative developments, are owed exclusively to the settlors. With respect to
13 trusts having several settlors, Section 603(c) clarifies that the trustee's duties,
14 including the duty to keep the beneficiaries informed of developments, are owed to
15 *all* settlors having capacity. Notifying the other settlors or settlors of the revocation
16 or amendment will place them in a better position to protect their interests. If the
17 revocation or amendment by less than all of the settlors breaches an implied
18 agreement not to revoke or amend the trust, then those harmed by the action can sue
19 for breach of contract. If the trustee fails to notify the other settlors or settlors of the
20 revocation or amendment, then the parties aggrieved by the trustee's failure can sue
21 the trustee for breach of trust.
22

23 **Method for revocation and amendment.** Subsection (c), which is similar to
24 Restatement (Third) of Trusts § 63 cmt. h and I (Tentative Draft No. 3, 2001),
25 specifies the method of revocation and amendment. Revocation of a trust differs
26 fundamentally from revocation of a will. Revocation of a will, because a will is not
27 effective until death, cannot affect an existing fiduciary relationship. With a trust,
28 however, because a revocation will terminate an already existing fiduciary
29 relationship, there is a need to protect a trustee who might act without knowledge
30 that the trust has been revoked. There is also a need to protect trustees against the
31 risk that they will misperceive the settlor's intent and mistakenly assume that an
32 informal document or communication constitutes a revocation when that was not in
33 fact the settlor's intent. To protect trustees against these risks, drafters habitually
34 insert provisions providing that a revocable trust may be revoked only by delivery
35 to the trustee of a formal revoking document. Some courts require strict compliance
36 with the stated formalities. Other courts, recognizing that the formalities were
37 inserted primarily for the trustee's and not the settlor's benefit, will accept other
38 methods of revocation as long as the settlor's intent is clear. *See* Restatement (Third)
39 of Trusts § 63 Reporter's Notes to cmt. h-j (Tentative Draft No. 3, 2001).
40

41 **Notice to trustee of revocation not required.** This Code tries to effectuate the
42 settlor's intent to the maximum extent possible while at the same time protecting a
43 trustee against inadvertent liability. While notice to the trustee of a revocation is
44 good practice, this section does not make the giving of such notice a prerequisite to a
45 trust's revocation. To protect a trustee who has not been notified of a revocation or
46 amendment, subsection (g) provides that a trustee who does not know that a trust
47 has been revoked or amended is not liable to the settlors or settlor's successors in
48 interest for distributions made and other actions taken on the assumption that the

1 trust, as unamended, was still in effect. However, to honor the settlor's intent,
2 subsection (c) generally honors a settlor's clear expression of intent even if
3 inconsistent with stated formalities in the terms of the trust.
4

5 **Revocation or amendment by substantial compliance with terms of trust.**

6 Under subsection (c), the settlors may revoke or amend a revocable trust by
7 substantially complying with the method specified in the terms of the trust or by a
8 later executed will or codicil or any other method manifesting clear and convincing
9 evidence of the settlor's intent. Only if the method specified in the terms of the trust
10 is made exclusive is use of the other methods prohibited. Even then, a failure to
11 comply with a technical requirement, such as required notarization, may be excused
12 as long as compliance with the method specified in the terms of the trust is
13 otherwise substantial.
14

15 **Other methods for revocation.** While revocation of a trust will ordinarily
16 continue to be accomplished by signing and delivering a written document to the
17 trustee, other methods, such as a physical act or an oral statement coupled with a
18 withdrawal of the property, might also demonstrate the necessary intent. These less
19 formal methods, because they provide less reliable indicia of intent, will often be
20 insufficient, however. The method specified in the terms of the trust is a reliable safe
21 harbor and should be followed whenever possible.
22

23 **Revocation or amendment by will.** Revocation or amendment by will is
24 mentioned in subsection (c) not to encourage the practice but to make clear that it is
25 not precluded by omission. *See* RESTATEMENT (THIRD) OF PROPERTY: WILL AND OTHER
26 DONATIVE TRANSFERS § 7.2 cmt. e (Tentative Draft No. 3, 2001), which validates
27 revocation or amendment of will substitutes by later will. Situations do arise,
28 particularly in death-bed cases, where revocation by will may be the only practicable
29 method. In such cases, a will, a solemn document executed with a high level of
30 formality, may be the most reliable method for expressing intent. A revocation in a
31 will ordinarily becomes effective only upon probate of the will following the
32 testator's death. For the cases, *see* RESTATEMENT (THIRD) OF TRUSTS § 63 Reporter's
33 Notes to cmt. h-I (Tentative Draft No. 3, 2001).
34

35 **Effect of residuary clause in a will.** A residuary clause in a will disposing of
36 the estate differently than the trust is alone insufficient to revoke or amend a trust.
37 The provision in the will must either be express or the will must dispose of specific
38 assets contrary to the terms of the trust. The substantial body of law on revocation
39 of Totten trusts by will offers helpful guidance. The authority is collected in William
40 H. Danne, Jr., *Revocation of Tentative ("Totten") Trust of Savings Bank Account by Inter*
41 *Vivos Declaration or Will*, 46 A.L.R. 3d 487 (1972).
42

43 **Trustee's concurrence not required.** Subsection (c) does not require that a
44 trustee concur in the revocation or amendment of a trust. Such a concurrence would
45 be necessary only if required by the terms of the trust. If the trustee concludes that
46 an amendment unacceptably changes the trustee's duties, then the trustee may
47 resign as provided in Section 705.
48

1 **Delivery of trust property upon revocation.** Subsection (d), providing that
2 upon revocation the trust property is to be distributed as the settlors directs, codifies
3 a provision commonly included in revocable trust instruments.
4

5 **Authority of agent under power of attorney to revoke or modify revocable**
6 **trust.** Subsection (e), which is similar to Restatement (Third) of Trusts § 63 cmt. 1
7 (Tentative Draft No. 3, 2001), authorizes an agent under a power of attorney to
8 revoke or modify a revocable trust only to the extent the terms of the trust or power
9 of attorney expressly so permit. An express provision is required because most
10 settlors usually intend that the revocable trust, and not the power of attorney, to
11 function as the settlor’s principal property management device. The power of
12 attorney is usually intended as a backup for assets not transferred to the revocable
13 trust or to address specific topics, such as the power to sign tax returns or apply for
14 government benefits, which may be beyond the authority of a trustee or are not
15 customarily granted to a trustee.
16

17 **Authority of conservator or guardian to revoke or amend revocable trust.**
18 Subsection (f) addresses the authority of a conservator or guardian to revoke or
19 amend a revocable trust. Under the Uniform Trust Code, a “conservator” is
20 appointed by the court to manage the ward’s party, a “guardian” to make decisions
21 with respect to the ward’s personal affairs. *See* Section 103. Consequently,
22 subsection (f) authorizes a guardian to exercise a settlor’s power to revoke or amend
23 a trust only if a conservator has not been appointed.
24

25 Many state conservatorship statutes authorize a conservator to exercise the
26 settlor’s power of revocation with the prior approval of the court supervising the
27 conservatorship. *See, e.g.,* UNIFORM PROBATE CODE § 411(a)(4). Subsection (f) ratifies
28 this practice. Under the Code, a conservator may exercise a settlor’s power of
29 revocation, amendment, or right to withdraw trust property upon approval of the
30 court supervising the conservatorship. Because a settlors often creates a revocable
31 trust for the very purpose of avoiding conservatorship, this power should be
32 exercised by the court reluctantly. Settlers concerned about revocation by a
33 conservator may wish to deny a conservator a power to revoke. However, while
34 such a provision in the terms of the trust is entitled to considerable weight, the court
35 may override the restriction if it concludes that the action is necessary in the
36 interests of justice. *See* Section 105(b)(13).
37

38 Steps a conservator can take to stem possible abuse is not limited to
39 petitioning to revoke the trust. The conservator could petition for removal of the
40 trustee under Section 706. The conservator, acting on the settlors-beneficiary’s
41 behalf, could also bring an action to enforce the trust according to its terms.
42 Pursuant to Section 303, a conservator may act on behalf of the beneficiary whose
43 estate the conservator controls whenever a consent or other action by the beneficiary
44 is required or may be given under the Code.
45

46 If a conservator has not been appointed, then subsection (f) authorizes a
47 guardian to exercise a settlor’s power to revoke or amend the trust upon approval of
48 the court supervising the guardianship. The court supervising the guardianship will

1 need to determine whether it can grant a guardian authority to revoke a revocable
2 trust under local law or whether it will be necessary to appoint a conservator for that
3 purpose.
4

5 **Section 19-3B-603. Settlor's Powers; Powers of Withdrawal.**

6 (a) While a trust is revocable, rights of the
7 beneficiaries are subject to the control of, and the duties of
8 the trustee are owed exclusively to, the settlor.

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

13
14 *Alabama Comment*

15
16 **Comparison to Uniform Code.** Section 603 is the same as Section 603 of the
17 Uniform Trust Code (2001).

18
19 *Uniform Comment*

20
21 **Purpose and scope.** This section has the effect of postponing the enjoyment
22 of the rights of the beneficiaries of a revocable trust until the death or incapacity of
23 the settlors or other person holding the power to revoke the trust. This section thus
24 recognizes that the settlors of a revocable trust is in control of the trust and should
25 have the right to enforce the trust.
26

27 **Duty to inform and report extends to all settlors having capacity.** Pursuant
28 to this section, the duty under Section 813 to inform and report to beneficiaries is
29 owed to the settlors of a revocable trust as long as the settlors has capacity. In the
30 case of a trust having several settlors, subsection (b) clarifies that this duty extends
31 to all settlors having capacity. Should fewer than all settlors revoke or modify their
32 portion of the trust, the trustee must notify the other settlors or settlors of the action.
33 *See Section 602 Comment.*
34

35 **Incapacity of settlors.** If the settlors loses capacity, then subsection (a)
36 clarifies that the rights of the beneficiaries are no longer subject to the settlor's
37 control. During the period a settlors lacks capacity, the beneficiaries are entitled to
38 request information concerning the trust, and the trustee must provide the
39 beneficiaries with annual trustee reports and whatever other information may be
40 required under Section 813. However, because this section may be freely overridden
41 in the terms of the trust, a settlors is free to deny the beneficiaries these rights, even
42 to the point of directing the trustee not to inform them of the existence of the trust.

1 Also, should an incapacitated settlors later regain capacity, the beneficiaries' rights
2 will again be subject to the settlor's control. The cessation of the settlor's control
3 upon the settlor's incapacity or death does not mean that the beneficiaries may
4 reopen transactions the settlors approved while having capacity.
5

6 Typically, the settlors of a revocable trust will also be the sole or primary
7 beneficiary of the trust. Upon the settlor's incapacity, any right of action the settlors-
8 trustee may have against the trustee for breach of fiduciary duty will pass to the
9 settlor's agent or conservator.
10

11 **Holder of a power of withdrawal.** Subsection (c) makes clear that a holder of
12 a power of withdrawal has the same powers over the trust as the settlors of a
13 revocable trust. Equal treatment is warranted due to the holder's equivalent power
14 to control the trust. For the definition of power of withdrawal, see Section 103(10).
15

16 **Capacity of settlors to revoke trust.** The drafting committee added an
17 amendment to the UTC in 2004, making optional a clause in subsection (a), which
18 followed the introductory clause "[w]hile a trust is revocable," and which read, "and
19 the settlors has capacity to revoke the trust."
20

21 Section 603 generally provides that while a trust is revocable, all rights that
22 the trusts's beneficiaries would otherwise possess are subject to the control of the
23 settlors. This section, however, negates the settlor's control if the settlors is
24 incapacitated. In such case, the beneficiaries are entitled to assert all rights provided
25 to them under the Code, including the right to information concerning the trust.
26

27 Two issues have arisen concerning this incapacity limitation. First, because
28 determining when a settlors is incapacitated is not always clear, concern has been
29 expressed that it will often be difficult in a particular case to determine whether the
30 settlors has become incapacitated and the settlor's control of the beneficiary's rights
31 have ceased. Second, concern has been expressed that this section prescribes a
32 different rule for revocable trusts than for wills and that the rules for both should
33 instead be the same. In the case of a will, the devisees have no right to know of the
34 dispositions made in their favor until the testator's death, whether or not the testator
35 is incapacitated. Under Section 603, however, the remainder beneficiary's right to
36 know commences on the settlor's incapacity.
37

38 **Section 19-3B-604. Limitation on Action Contesting Validity of**
39 **Revocable Trust; Distribution of Trust Property.**

40 (a) A person may commence a judicial proceeding to
41 contest the validity of all or part of the terms of a trust
42 that was revocable at the settlor's death within the earlier
43 of:

1 (1) two years after the settlor's death; or
2 (2) six months after the trustee sent the person a
3 copy of the trust instrument and a notice informing the person
4 of the trust's existence, of the trustee's name and address,
5 and of the time allowed for commencing a proceeding.

6 (b) Upon the death of the settlor of a trust that
7 was revocable at the settlor's death, the trustee may proceed
8 to distribute the trust property in accordance with the terms
9 of the trust. The trustee is not subject to liability for
10 doing so unless:

11 (1) the trustee has actual knowledge of a pending
12 judicial proceeding contesting the validity of all or part of
13 the terms of the trust; or

14 (2) if, prior to the trustee's actual distribution,
15 a potential contestant has notified the trustee of a possible
16 judicial proceeding to contest the trust and a judicial
17 proceeding is commenced within 60 days after the contestant
18 sent the notification.

19 (c) A beneficiary of a trust that is determined to
20 have been invalid in whole or in part is liable to return any
21 distribution received to the extent that the invalidity
22 applies to the distribution.

23

24

Alabama Comment

25

26 **Comparison to Uniform Code.** Alabama uses language in subsection (a),
27 paragraph (b)(1) and subsection (c) to provide that an action contesting the validity
28 of a revocable trust may be limited to part of the terms of a trust, and that an action
29 does not have to apply to the entire trust. Alabama uses a two year limitation on
30 actions contesting the validity of a trust in paragraph (a)(1) in order to parallel the
31 statute of limitation on actions against a trustee in Section 1005 of this Code.

32

33 The word "know" is replaced by the phrase "has actual knowledge" in
34 paragraph (b)(1) for clarity and consistency with Section 104(a)(1) of this Code.

1 Finally, Alabama adds an introductory clause, “if, prior to the trustee’s actual
2 distribution,” to paragraph (b)(2) as a logical limitation on the notification of the
3 trustee by a potential contestant. Distributions of trust property under Section
4 604(b) should be made after following the procedures set forth in Section 505(b).
5

6 Finally, Alabama rewrites Subsection (c) to provide guidance in situations
7 where a trust has been held invalid in whole or in part. Subsection (c) originally
8 read as follows: “[a] beneficiary of a trust that is determined to have been invalid is
9 liable to return any distribution received.”
10

11 *Uniform Comment*

12

13 **Purpose and scope.** This section provides finality to the question of when a
14 contest of a revocable trust may be brought. The section is designed to allow an
15 adequate time in which to bring a contest while at the same time permitting the
16 expeditious distribution of the trust property following the settlor’s death.
17

18 **Grounds for contest.** A trust can be contested on a variety of grounds. For
19 example, the contestant may allege that no trust was created due to lack of intent to
20 create a trust or lack of capacity (*see* Section 402), that undue influence, duress, or
21 fraud was involved in the trust’s creation (*see* Section 406), or that the trust had been
22 revoked or modified (*see* Section 602). A “contest” is an action to invalidate all or
23 part of the terms of the trust or of property transfers to the trustee. An action
24 against a beneficiary or other person for intentional interference with an inheritance
25 or gift, not being a contest, is not subject to this section. For the law on intentional
26 interference, *see* RESTATEMENT (SECOND) OF TORTS § 774B (1979). Nor does this
27 section preclude an action to determine the validity of a trust that is brought during
28 the settlor’s lifetime, such as a petition for a declaratory judgment, if such action is
29 authorized by other law. *See* Section 106 (Uniform Trust Code supplemented by
30 common law of trusts and principles of equity).
31

32 **Irrevocability upon death of settlors.** This section applies only to a revocable
33 trust that becomes irrevocable by reason of the settlor’s death. A trust that became
34 irrevocable by reason of the settlor’s lifetime release of the power to revoke is
35 outside its scope. A revocable trust does not become irrevocable upon a settlor’s
36 loss of capacity. Pursuant to Section 602, the power to revoke may be exercised by
37 the settlor’s agent, conservator, or guardian, or personally by the settlors if the
38 settlors regains capacity.
39

40 **Time limit for contest.** Subsection (a) specifies a time limit on when a
41 contest can be brought. A contest is barred upon the first to occur of two possible
42 events. The maximum possible time for bringing a contest is three years from the
43 settlor’s death. This should provide potential contestants with ample time in which
44 to determine whether they have an interest that will be affected by the trust, even if
45 formal notice of the trust is lacking. The three-year period is derived from Section 3-
46 108 of the Uniform Probate Code. Three years is the maximum limit under the UPC
47 for contesting a nonprobated will.
48

1 A trustee who wishes to shorten the contest period may do so by giving
2 notice. Drawing from CALIFORNIA PROBATE CODE § 16061.7, subsection (a)(2) bars a
3 contest by a potential contestant 120 days after the date the trustee sent that person a
4 copy of the trust instrument and informed the person of the trust's existence, of the
5 trustee's name and address, and of the time allowed for commencing a contest. The
6 120 day period in subsection (a)(2) is subordinate to the three-year bar in subsection
7 (a)(1). A contest is automatically barred three years after the settlor's death even if
8 notice is sent by the trustee less than 120 days prior to the end of that period.

9
10 **Distribution by trustee upon death of settlors.** Because only a small
11 minority of trusts are actually contested, trustees should not be restrained from
12 making distributions because of concern about possible liability should a contest
13 later be filed. Absent a protective statute, a trustee is ordinarily absolutely liable for
14 misdelivery of the trust assets, even if the trustee reasonably believed that the
15 distribution was proper. *See* RESTATEMENT (SECOND) OF TRUSTS § 226 (1959).
16 Subsection (b) addresses liability concerns by allowing the trustee, upon the settlor's
17 death, to proceed expeditiously to distribute the trust property. The trustee may
18 distribute the trust property in accordance with the terms of the trust until and
19 unless the trustee receives notice of a pending judicial proceeding contesting the
20 validity of the trust, or until notified by a potential contestant of a possible contest,
21 followed by its filing within 60 days.

22
23 **Liability of beneficiary to return distribution from trust determined to be**
24 **invalid.** Even though a distribution in compliance with subsection (b) discharges
25 the trustee from potential liability, subsection (c) makes the beneficiaries of what
26 later turns out to have been an invalid trust liable to return any distribution
27 received. Issues as to whether the distribution must be returned with interest, or
28 with income earned or profit made are not addressed in this section but are left to
29 the law of restitution.

30
31 **Notice requirements.** For purposes of notices under this section, the
32 substitute representation principles of Article 3 are applicable. The notice by the
33 trustee under subsection (a)(2) or by a potential contestant under subsection (b)(2)
34 must be given in a manner reasonably suitable under the circumstances and likely to
35 result in its receipt. *See* Section 109(a).

36
37 **Liability for debts of deceased settlors.** This section does not address
38 possible liability for the debts of the deceased settlors or a trustee's possible liability
39 to creditors for distributing trust assets. For possible liability of the trust, see Section
40 505(a)(3) and Comment. Whether a trustee can be held personally liable for creditor
41 claims following distribution of trust assets is addressed in Uniform Probate Code §
42 6-102, which was added to that Code in 1998.

43
44
45

1 **ARTICLE 7**

2 **OFFICE OF TRUSTEE**

3 **Section 19-3B-701. Accepting or Declining Trusteeship.**

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

6 (1) by substantially complying with a method of
7 acceptance provided in the terms of the trust; or

8 (2) if the terms of the trust do not provide a
9 method or the method provided in the terms is not expressly
10 made exclusive, by accepting delivery of the trust property,
11 exercising powers or performing duties as trustee, or
12 otherwise indicating acceptance of the trusteeship.

13 (b) A person designated as trustee who has not yet
14 accepted the trusteeship may reject the trusteeship. A
15 designated trustee who does not accept the trusteeship within
16 a reasonable time after knowing of the designation is deemed
17 to have rejected the trusteeship.

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

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

24 (2) inspect or investigate trust property to
25 determine potential liability under environmental or other law
26 or for any other purpose.

27 *Alabama Comment*

28 **Comparison to Uniform Code.** Section 701 is the same as Section 701 of the
29 Uniform Trust Code (2001).
30
31

1
2 Under the provisions of ALA. CODE § 43-2-830, adopted as part of the Probate
3 Procedures Act and made effective January 1, 1994, upon the death of a person, the
4 decedent's real property devolves to the persons to whom it was devised by will. In
5 cases where a will generally designates that real property is to fund to a
6 testamentary trust, many times it is subject to the discretion of the personal
7 representative to determine what assets are used to fund the trust. Accordingly, the
8 named trustee of the testamentary trust will be informed by the personal
9 representative of the assets to be used to fund the trust, and the trustee then has the
10 opportunity to decide whether or not to accept the trustee designation under the
11 terms of the will. Even in cases where certain real property is specifically devised to
12 a testamentary trust, the personal representative of the decedent's estate still has the
13 right under ALA. CODE § 43-2-837 to take possession or control of real property if
14 necessary for the purposes of administration of the estate.

15
16 **Waiver of notice by persons to be notified.** To facilitate administration,
17 Section 109(c) allows waiver of the Section 701(c)(1) notice requirement.

18
19 *Uniform Comment*
20

21 **Purpose and scope.** This section, which specifies the requirements for a valid
22 acceptance of the trusteeship, implicates many of the same issues that arise in
23 determining whether a trust has been revoked. Consequently, the two provisions
24 track each other closely. *Compare* Section 701(a) *with* Section 602(c) (procedure for
25 revoking or modifying trust). Procedures specified in the terms of the trust are
26 recognized, but only substantial, not literal compliance is required. A failure to meet
27 technical requirements, such as notarization of the trustee's signature, does not
28 result in a failure to accept. Ordinarily, the trustee will indicate acceptance by
29 signing the trust instrument or signing a separate written instrument. However, this
30 section validates any other method demonstrating the necessary intent, such as by
31 knowingly exercising trustee powers, unless the terms of the trust make the
32 specified method exclusive. This section also does not preclude an acceptance by
33 estoppel. For general background on issues relating to trustee acceptance and
34 rejection, *see* RESTATEMENT (THIRD) OF TRUSTS § 35 (Tentative Draft No. 2, approved
35 1999); RESTATEMENT (SECOND) OF TRUSTS § 102 (1959). Consistent with Section
36 201(b), which emphasizes that continuing judicial supervision of a trust is the rare
37 exception, not the rule, the Uniform Trust Code does not require that a trustee
38 qualify in court.

39
40 **Failure by trustee to accept within a reasonable time.** To avoid the inaction
41 that can result if the person designated as trustee fails to communicate a decision
42 either to accept or to reject the trusteeship, subsection (b) provides that a failure to
43 accept within a reasonable time constitutes a rejection of the trusteeship. What will
44 constitute a reasonable time depends on the facts and circumstances of the particular
45 case. A major consideration is possible harm that might occur if a vacancy in a
46 trusteeship is not filled in a timely manner. A trustee's rejection normally precludes
47 a later acceptance but does not cause the trust to fail. *See* RESTATEMENT (THIRD) OF

1 TRUSTS § 35 cmt. c (Tentative Draft No. 2, approved 1999). Regarding the filling of a
2 vacancy in the event of a rejection, see Section 704.

3
4 **Formal rejection not required.** A person designated as trustee who decides
5 not to accept the trusteeship need not provide a formal rejection, but a clear and
6 early communication is recommended. The appropriate recipient of the rejection
7 depends upon the circumstances. Ordinarily, it would be appropriate to
8 communicate the rejection to the person who informed the designee of the proposed
9 trusteeship. If judicial proceedings involving the trust are pending, then the
10 rejection could be filed with the court. In the case of a person named as trustee of a
11 revocable trust, it would be appropriate to communicate the rejection to the settlors.
12 In any event, it would be best to inform a beneficiary with a significant interest in
13 the trust because that beneficiary might be more motivated than others to seek
14 appointment of a new trustee.

15
16 **Actions by nominated trustee.** Subsection (c)(1) makes clear that a
17 nominated trustee may act expeditiously to protect the trust property without being
18 considered to have accepted the trusteeship. However, upon conclusion of the
19 intervention, the nominated trustee must send a rejection of office to the settlors, if
20 living and competent, otherwise to a qualified beneficiary.

21
22 **Inspection of trust property to determine environmental liability.** Because
23 of the potential liability that can inhere in trusteeship, subsection (c)(2) allows a
24 person designated as trustee to inspect the trust property without accepting the
25 trusteeship. The condition of real property is a particular concern, including
26 possible tort liability for the condition of the premises or liability for violation of
27 state or federal environmental laws such as CERCLA, 42 U.S.C. § 9607. For a
28 provision limiting a trustee's personal liability for obligations arising from
29 ownership or control of trust property, see Section 1010(b).

30
31 **Section 19-3B-702. Trustee's Bond.**

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

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

1 *Alabama Comment*

2
3 **Comparison to Uniform Code.** Subsection (a) and subsection (b) are the
4 same as those in Section 702 of the Uniform Trust Code (2001). Subsection (c) of the
5 Uniform Code is deleted in its entirety. ALA. CODE §§ 5-11A-5 and 5-11A-9 (1975),
6 when applied in combination, make it clear that an Alabama bank which deposits
7 sufficient securities with the Alabama State Treasurer will generally be entitled to
8 exemption from giving bond in an estate.

9
10 *Uniform Comment*

11
12 **Purpose and scope.** This provision is consistent with the Restatement Third
13 and with the bonding provisions of the Uniform Probate Code. *See* RESTATEMENT
14 (THIRD) OF TRUSTS § 34(3) and cmt. a (Tentative Draft No. 2, approved 1999);
15 UNIFORM PROBATE CODE §§ 3-604 (personal representatives), 5-415 (conservators),
16 and 7-304 (trustees). Because a bond is required only if the terms of the trust require
17 bond or a bond is found by the court to be necessary to protect the interests of
18 beneficiaries, bond should rarely be required under this Code.

19
20 Despite the ability of the court pursuant to Section 105(b)(6) to override a
21 term of the trust waiving bond, the court should order bond in such cases only for
22 good reasons. Similarly, the court should rarely dispense with bond if the settlors
23 directed that the trustee give bond.

24
25 **Bonding requirements.** This section does not attempt to detail all of the
26 technical bonding requirements that the court may impose. Typical requirements
27 are listed in the Uniform Probate Code sections cited above. The amount of a bond
28 otherwise required may be reduced by the value of trust property deposited in a
29 manner that prevents its unauthorized disposition, and by the value of real property
30 which the trustee, by express limitation of power, lacks power to convey without
31 court authorization. Also, the court may excuse or otherwise modify a requirement
32 of a bond, reduce or increase the amount of a bond, release a surety, or permit the
33 substitution of another bond with the same or different sureties.

34
35 **Section 19-3B-703. Co-trustees.**

36 (a) Co-trustees who are unable to reach a unanimous
37 decision after consultation among all the co-trustees may act
38 by majority decision.

39 (b) If a vacancy occurs in a co-trusteeship, then
40 the remaining co-trustees may act for the trust.

41 (c) A co-trustee must participate in the performance
42 of a trustee's function and consult with the other co-trustees

1 unless the co-trustee is unavailable to perform the function
2 because of absence, illness, disqualification under other law,
3 or other temporary incapacity or the co-trustee has properly
4 delegated the performance of the function to another trustee.

5 (d) If a co-trustee is unavailable to perform duties
6 because of absence, illness, disqualification under other law,
7 or other temporary incapacity, and prompt action is necessary
8 to achieve the purposes of the trust or to avoid injury to the
9 trust property, then the remaining co-trustee or a majority of
10 the remaining co-trustees may act for the trust.

11 (e) A trustee may delegate to a co-trustee the
12 performance of any function other than a function that the
13 terms of the trust expressly require the trustees to perform
14 jointly. Unless a delegation was irrevocable, a trustee may
15 revoke a delegation previously made.

16 (f) Except as otherwise provided in subsection (g),
17 a trustee who does not join in an action of another trustee is
18 not liable for the action.

19 (g) Each trustee shall exercise reasonable care to:
20 (i) prevent a co-trustee from committing a serious breach of
21 trust; and (ii) compel a co-trustee to redress a serious
22 breach of trust.

23 (h) A dissenting trustee who joins in an action at
24 the direction of the majority of the trustees and who notified
25 any co-trustee of the dissent at or before the time of the
26 action is not liable for the action unless the action is a
27 serious breach of trust.

28
29

1
2 *Alabama Comment*
3

4 **Comparison to Uniform Code.** Alabama adds a clause, “after consultation
5 among all the co-trustees,” to subsection (a), and a clause, “and consult with the
6 other co-trustees,” in subsection (c), to make it clear that co-trustees may not exclude
7 a co-trustee from the decision-making process, thereby acting upon a majority
8 decision without the knowledge of a co-trustee.
9

10 Alabama rewrites subsection 703(e), which allows the delegation of the
11 performance of a function by a trustee to a co-trustee unless the terms of the trust
12 expressly require that the function be performed jointly by the co-trustees – an
13 objective standard. This language differs from the uniform language, which
14 prohibits the delegation of the performance of a function that “settlers reasonably
15 expected the trustees to perform jointly” – a subjective standard. Subsection 703(e)
16 specifically contemplates the delegation of certain functions to a trustee who is more
17 appropriate or able to perform the task. An example is the delegation of investment
18 management or record keeping duties to a professional who is the co-trustee.

19
20 *Uniform Comment*
21

22 **Purpose and scope.** This section contains most but not all of the Code’s
23 provisions on co-trustees. Other provisions relevant to co-trustees include Sections
24 704 (vacancy in trusteeship need not be filled if co-trustee remains in office), 705
25 (notice of resignation must be given to co-trustee), 706 (lack of cooperation among
26 co-trustees as ground for removal), 707 (obligations of resigning or removed
27 trustee), 813 (reporting requirements upon vacancy in trusteeship), and 1013
28 (authority of co-trustees to authenticate documents).
29

30 **Reasons for appointment of co-trustees.** Co-trustees are appointed for a
31 variety of reasons. Having multiple decision-makers serves as a safeguard against
32 eccentricity or misconduct. Co-trustees are often appointed to gain the advantage of
33 differing skills, perhaps a financial institution for its permanence and professional
34 skills, and a family member to maintain a personal connection with the beneficiaries.
35 On other occasions, co-trustees are appointed to make certain that all family lines
36 are represented in the trust’s management.
37

38 Co-trusteeship should not be called for without careful reflection. Division of
39 responsibility among co-trustees is often confused, the accountability of any
40 individual trustee is uncertain, obtaining consent of all trustees can be burdensome,
41 and unless an odd number of trustees is named deadlocks requiring court resolution
42 can occur. Potential problems can be reduced by addressing division of
43 responsibilities in the terms of the trust. Like the other sections of this article, this
44 section is freely subject to modification in the terms of the trust. *See* Section 105.
45

1 Much of this section is based on comparable provisions of the Restatement of
2 Trusts, although with extensive modifications. Reference should also be made to
3 ERISA § 405 (29 U.S.C. § 1105), which in recent years has been the statutory base for
4 the most significant case law on the powers and duties of co-trustees.
5

6 **Unanimity not required.** Subsection (a) is in accord with Restatement
7 (Third) of Trusts § 39 (Tentative Draft No. 2, approved 1999), which rejects the
8 common law rule, followed in earlier Restatements, requiring unanimity among the
9 trustees of a private trust. *See* RESTATEMENT (SECOND) OF TRUSTS § 194 (1959). This
10 section is consistent with the prior Restatement rule applicable to charitable trusts,
11 which allowed for action by a majority of trustees. *See* RESTATEMENT (SECOND) OF
12 TRUSTS § 383 (1959).
13

14 **Remaining trustees may act if vacancy occurs.** Under subsection (b), a
15 majority of the remaining trustees may act for the trust when a vacancy occurs in a
16 co-trusteeship. Section 704 provides that a vacancy in a co-trusteeship need be filled
17 only if there is no trustee remaining in office.
18

19 **Performance by co-trustee of a trustee function.** Pursuant to subsection (c),
20 a co-trustee must participate in the performance of a trustee function unless the co-
21 trustee has properly delegated performance to another co-trustee, or the co-trustee is
22 unable to participate due to temporary incapacity or disqualification under other
23 law. Other laws under which a co-trustee might be disqualified include federal
24 securities law and the ERISA prohibited transactions rules. Subsection (d)
25 authorizes a co-trustee to assume some or all of the functions of another trustee who
26 is unavailable to perform duties as provided in subsection (c).
27

28 **Delegation of functions to co-trustee.** Subsection (e) addresses the extent to
29 which a trustee may delegate the performance of functions to a co-trustee. The
30 standard differs from the standard for delegation to an agent as provided in Section
31 807 because the two situations are different. Section 807, which is identical to
32 Section 9 of the Uniform Prudent Investor Act, recognizes that many trustees are not
33 professionals. Consequently, trustees should be encouraged to delegate functions
34 they are not competent to perform. Subsection (e) is premised on the assumption
35 that the settlors selected co-trustees for a specific reason and that this reason ought
36 to control the scope of a permitted delegation to a co-trustee. Subsection (e)
37 prohibits a trustee from delegating to another trustee functions the settlors
38 reasonably expected the trustees to perform jointly. The exact extent to which a
39 trustee may delegate functions to another trustee in a particular case will vary
40 depending on the reasons the settlors decided to appoint co-trustees. The better
41 practice is to address the division of functions in the terms of the trust, as allowed by
42 Section 105. Subsection (e) is based on language derived from Restatement (Second)
43 of Trusts § 171 (1959). This section of the Restatement Second, which applied to
44 delegations to both agents and co-trustees, was superseded, as to delegation to
45 agents, by Restatement (Third) of Trusts: Prudent Investor Rule § 171 (1992).
46

47 **Protection of co-trustee who refuses to join in an action.** By permitting the
48 trustees to act by a majority, this section contemplates that there may be a trustee or

1 trustees who might dissent. Trustees who dissent from the acts of a co-trustee are in
2 general protected from liability. Subsection (f) protects trustees who refused to join
3 in the action. Subsection (h) protects a dissenting trustee who joined the action at
4 the direction of the majority, such as to satisfy a demand of the other side to a
5 transaction, if the trustee expressed the dissent to a co-trustee at or before the time of
6 the action in question. However, the protections provided by subsections (f) and (h)
7 no longer apply if the action constitutes a serious breach of trust. In that event,
8 subsection (g) may impose liability against a dissenting trustee for failing to take
9 reasonable steps to rectify the improper conduct. The responsibility to take action
10 against a breaching co-trustee codifies the substance of Sections 184 and 224 of the
11 Restatement (Second) of Trusts (1959).

12
13 **Section 19-3B-704. Vacancy in Trusteeship; Appointment of**
14 **Successor.**

15 (a) A vacancy in a trusteeship occurs if:

16 (1) a person designated as trustee rejects the
17 trusteeship;

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

20 (3) a trustee resigns;

21 (4) a trustee is disqualified or removed;

22 (5) a trustee dies; or

23 (6) a guardian or conservator is appointed for an
24 individual serving as trustee.

25 (b) If one or more co-trustees remain in office,
26 then a vacancy in a trusteeship need not be filled. A vacancy
27 in a trusteeship must be filled if the trust has no remaining
28 trustee.

29 (c) A vacancy in a trusteeship of a noncharitable
30 trust that is required to be filled must be filled in the
31 following order of priority:

32 (1) by a person designated in the terms of the trust
33 to act as successor trustee;

1 (2) by a person appointed by unanimous agreement of
2 the adult qualified beneficiaries and any entity which is a
3 qualified beneficiary; or

4 (3) by a person appointed by the court.

5 (d) A vacancy in a trusteeship of a charitable trust
6 that is required to be filled must be filled in the following
7 order of priority:

8 (1) by a person designated in the terms of the trust
9 to act as successor trustee;

10 (2) by a person selected by the charitable
11 organizations expressly designated to receive distributions
12 under the terms of the trust; or

13 (3) by a person appointed by the court.

14 (e) A vacancy in a trusteeship of a trust that is
15 both noncharitable and charitable and that is required to be
16 filled must be filled in the following order of priority:

17 (1) by a person designated in the terms of the trust
18 to act as successor trustee;

19 (2) by a person appointed by unanimous agreement of
20 the adult qualified beneficiaries, any entity which is a
21 qualified beneficiary and the charitable organizations
22 expressly designated to receive distributions under the terms
23 of the trust; or

24 (3) by a person appointed by the court.

25 (f) If a person is acting as the sole trustee of a
26 trust and if there is no provision in the trust for a
27 successor trustee, then the sole trustee and the adult
28 qualified beneficiaries, by unanimous written agreement, may
29 designate a successor trustee, which shall become trustee of

1 the trust upon the vacancy in the trusteeship. The agreement
2 may be recorded in the probate court or filed in the records
3 of the trust.

4 (g) Whether or not a vacancy in a trusteeship exists
5 or is required to be filled, the court may appoint an
6 additional trustee or special fiduciary whenever the court
7 considers the appointment necessary for the administration of
8 the trust.

9 *Alabama Comment*

10
11 **Comparison to Uniform Code.** Section 704 is substantially the same as
12 Section 704 of the Uniform Trust Code (2001). Alabama adds subsection (e) in order
13 to address the vacancy in a trusteeship of a split-interest trust. Alabama also adds
14 subsection (f) and renumbers subsection (e) of the Uniform Code as subsection (g).
15 This addition is to provide a non-judicial procedure for the designation of a
16 successor trustee in those instances where the terms of the trust are silent. This
17 procedure, which is consistent with former Alabama law, requires the unanimous
18 consent of the sole trustee and the adult qualified beneficiaries.

19 *Uniform Comment*

20
21
22 **Purpose and scope.** This section lists the ways in which a trusteeship
23 becomes vacant and the rules on filling the vacancy. *See also* Sections 701 (accepting
24 or declining trusteeship), 705 (resignation), and 706 (removal). Good drafting
25 practice suggests that the terms of the trust deal expressly with the problem of
26 vacancies, naming successors and specifying the procedure for filling vacancies.
27 This section applies only if the terms of the trust fail to specify a procedure.

28
29 **Disqualification or removal of trustee.** The disqualification of a trustee
30 referred to in subsection (a)(4) would include a financial institution whose right to
31 engage in trust business has been revoked or removed. Such disqualification might
32 also occur if the trust's principal place of administration is transferred to a
33 jurisdiction in which the trustee, whether an individual or institution, is not
34 qualified to act.

35
36 **Vacancy in the co-trusteeship.** Subsection (b) provides that a vacancy in the
37 co-trusteeship must be filled only if the trust has no remaining trustee. If a vacancy
38 in the co-trusteeship is not filled, then Section 703 authorizes the remaining co-
39 trustees to continue to administer the trust. However, as provided in subsection (d),
40 the court, exercising its inherent equity authority, may always appoint additional
41 trustees if the appointment would promote better administration of the trust. *See*
42 RESTATEMENT (THIRD) OF TRUSTS § 34 cmt. e (Tentative Draft No. 2, approved 1999);
43 RESTATEMENT (SECOND) OF TRUSTS § 108 cmt. e (1959).

1
2 **Waiver of notice by persons to be notified.** To facilitate administration,
3 Section 109(c) allows waiver of the Section 705(a)(1) notice requirement.
4

5 *Uniform Comment*
6

7 **Purpose and scope.** This section rejects the common law rule that a trustee
8 may resign only with permission of the court, and goes further than the
9 Restatements, which allow a trustee to resign with the consent of the beneficiaries.
10 See RESTATEMENT (THIRD) OF TRUSTS § 36 (Tentative Draft No. 2, approved 1999);
11 RESTATEMENT (SECOND) OF TRUSTS § 106 (1959). Concluding that the default rule
12 ought to approximate standard drafting practice, the Drafting Committee provided
13 in subsection (a) that a trustee may resign by giving notice to the qualified
14 beneficiaries and any co-trustee. A resigning trustee may also follow the traditional
15 method and resign with approval of the court.
16

17 **Resignation does not release trustee from liability.** Restatement (Third) of
18 Trusts § 36 cmt. d (Tentative Draft No. 2, approved 1999), and Restatement (Second)
19 of Trusts § 106 cmt. b (1959), provide, similar to subsection (c), that a resignation
20 does not release the resigning trustee from potential liabilities for acts or omissions
21 while in office. The act of resignation can give rise to liability if the trustee resigns
22 for the purpose of facilitating a breach of trust by a co-trustee. See *Ream v. Frey*, 107
23 F.3d 147 (3rd Cir. 1997).
24

25 **Responsibilities of resigning trustee.** Regarding the residual responsibilities
26 of a resigning trustee until the trust property is delivered to a successor trustee, see
27 Section 707.
28

29 **Resignation by trustee of a revocable trust.** In the case of a revocable trust,
30 because the rights of the qualified beneficiaries are subject to the settlor's control (*see*
31 Section 603), resignation of the trustee is accomplished by giving notice to the
32 settlors instead of the beneficiaries.
33

34 **Section 19-3B-706. Removal of Trustee.**

35 (a) The settlor, a co-trustee, or a beneficiary may
36 request the court to remove a trustee, or a trustee may be
37 removed by the court on its own initiative.

38 (b) The court may remove a trustee if:

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

41 (2) lack of cooperation among co-trustees
42 substantially impairs the administration of the trust;

1 (3) because of unfitness, unwillingness, or
2 persistent failure of the trustee to administer the trust
3 effectively, the court determines that removal of the trustee
4 best serves the interests of the beneficiaries; or

5 (4)(A) there has been a substantial change of
6 circumstances or removal is requested by all of the qualified
7 beneficiaries;

8 (B) the court finds that removal of the trustee best
9 serves the interests of all of the beneficiaries and is not
10 inconsistent with a material purpose of the trust; and

11 (C) a suitable co-trustee or successor trustee is
12 available.

13 (c) Pending a final decision on a request to remove
14 a trustee, or in lieu of or in addition to removing a trustee,
15 the court may order such appropriate relief under Section 19-
16 3B-1001(b) as may be necessary to protect the trust property
17 or the interests of the beneficiaries.

18
19 *Alabama Comment*

20
21 **Comparison to Uniform Code.** Section 706 is substantially the same as
22 Section 706 of the Uniform Trust Code (2001). Roman numerals are inserted in
23 paragraph (b)(4) for ease of construction.

24
25 *Uniform Comment*

26
27 **Purpose and scope.** Subsection (a), contrary to the common law, grants the
28 settlors of an irrevocable trust the right to petition for removal of a trustee. The right
29 to petition for removal does not give the settlors of an irrevocable trust any other
30 rights, such as the right to an annual report or to receive other information
31 concerning administration of the trust. The right of a beneficiary to petition for
32 removal does not apply to a revocable trust while the settlors has capacity. Pursuant
33 to Section 603(a), while a trust is revocable and the settlors has capacity, the rights of
34 the beneficiaries are subject to the settlor's exclusive control.

35
36 **Terms of trust prevail.** Trustee removal may be regulated by the terms of the
37 trust. *See* Section 105. In fashioning a removal provision for an irrevocable trust, the

1
2 drafter should be cognizant of the danger that the trust may be included in the
3 settlor's federal gross estate if the settlor retains the power to be appointed as
4 trustee or to appoint someone who is not independent. *See* Rev. Rul. 95-58, 1995-2
5 C.B. 191.

6
7 **Grounds for removal of the trustee.** Subsection (b) lists the grounds for
8 removal of the trustee. The grounds for removal are similar to those found in
9 Restatement (Third) of Trusts § 37 cmt. e (Tentative Draft No. 2, approved 1999). A
10 trustee may be removed for untoward action, such as for a serious breach of trust,
11 but the section is not so limited. A trustee may also be removed under a variety of
12 circumstances in which the court concludes that the trustee is not best serving the
13 interests of the beneficiaries. The term "interests of the beneficiaries" means the
14 beneficial interests as provided in the terms of the trust, not as defined by the
15 beneficiaries. *See* Section 103(7). Removal for conduct detrimental to the interests of
16 the beneficiaries is a well-established standard for removal of a trustee. *See*
17 RESTATEMENT (THIRD) OF TRUSTS § 37 cmt. d (Tentative Draft No. 2, approved 1999);
18 RESTATEMENT (SECOND) OF TRUSTS § 107 cmt. a (1959).

19
20 **Breach must be "serious."** Subsection (b)(1), consistent with Restatement
21 (Third) of Trusts § 37 cmt. e and g (Tentative Draft No. 2, approved 1999), makes
22 clear that not every breach of trust justifies removal of the trustee. The breach must
23 be "serious." A serious breach of trust may consist of a single act that causes
24 significant harm or involves flagrant misconduct. A serious breach of trust may also
25 consist of a series of smaller breaches, none of which individually justify removal
26 when considered alone, but which do so when considered together. A particularly
27 appropriate circumstance justifying removal of the trustee is a serious breach of the
28 trustee's duty to keep the beneficiaries reasonably informed of the administration of
29 the trust or to comply with a beneficiary's request for information as required by
30 Section 813. Failure to comply with this duty may make it impossible for the
31 beneficiaries to protect their interests. It may also mask more serious violations by
32 the trustee.

33
34 **Failure of trustees to agree.** The lack of cooperation among trustees
35 justifying removal under subsection (b)(2) need not involve a breach of trust. The
36 key factor is whether the administration of the trust is significantly impaired by the
37 trustees' failure to agree. Removal is particularly appropriate if the naming of an
38 even number of trustees, combined with their failure to agree, has resulted in
39 deadlock requiring court resolution. The court may remove one or more or all of the
40 trustees. If a co-trustee remains in office following the removal, then under Section
41 704 the appointment of a successor trustee is not required.

42
43 **Lack of cooperation among co-trustees.** Subsection (b)(2) deals only with
44 lack of cooperation among co-trustees, not with friction between the trustee and
45 beneficiaries. Friction between the trustee and beneficiaries is ordinarily not a basis
46 for removal. However, removal might be justified if a communications breakdown
47 is caused by the trustee or appears to be incurable. *See* RESTATEMENT (THIRD) OF
48 TRUSTS § 37 cmt. e (Tentative Draft No. 2, approved 1999).

1
2 **Unfitness, unwillingness or persistent failure to administer trust.**

3 Subsection (b)(3) authorizes removal for a variety of grounds, including unfitness,
4 unwillingness, or persistent failure to administer the trust effectively. Removal in
5 any of these cases is allowed only if it best serves the interests of the beneficiaries.
6 For the definition of “interests of the beneficiaries,” see Section 103(7). “Unfitness”
7 may include not only mental incapacity but also lack of basic ability to administer
8 the trust. Before removing a trustee for unfitness the court should consider the
9 extent to which the problem might be cured by a delegation of functions the trustee
10 is personally incapable of performing. “Unwillingness” includes not only cases
11 where the trustee refuses to act but also a pattern of indifference to some or all of the
12 beneficiaries. See RESTATEMENT (THIRD) OF TRUSTS § 37 cmt. e (Tentative Draft No. 2,
13 approved 1999). A “persistent failure to administer the trust effectively” might
14 include a long-term pattern of mediocre performance, such as consistently poor
15 investment results when compared to comparable trusts.
16

17 **Substantial change in circumstances, best interests of beneficiaries and**
18 **availability of suitable successor trustee.** It has traditionally been more difficult to
19 remove a trustee named by the settlors than a trustee named by the court,
20 particularly if the settlors at the time of the appointment was aware of the trustee’s
21 failings. See RESTATEMENT (THIRD) OF TRUSTS § 37 cmt. f (Tentative Draft No. 2,
22 approved 1999); RESTATEMENT (SECOND) OF TRUSTS § 107 cmt. f-g (1959). Because of
23 the discretion normally granted to a trustee, the settlor’s confidence in the judgment
24 of the particular person whom the settlors selected to act as trustee is entitled to
25 considerable weight. This deference to the settlor’s choice can weaken or dissolve if
26 a substantial change in the trustee’s circumstances occurs. To honor a settlor’s
27 reasonable expectations, subsection (b)(4) lists a substantial change of circumstances
28 as a possible basis for removal of the trustee. Changed circumstances justifying
29 removal of a trustee might include a substantial change in the character of the
30 service or location of the trustee. A corporate reorganization of an institutional
31 trustee is not itself a change of circumstances if it does not affect the service
32 provided the individual trust account. Before removing a trustee on account of
33 changed circumstances, the court must also conclude that removal is not
34 inconsistent with a material purpose of the trust, that it will best serve the interests
35 of the beneficiaries, and that a suitable co-trustee or successor trustee is available.
36

37 **Removal must not be inconsistent with material purpose of trust.**

38 Subsection (b)(4) also contains a specific but more limited application of Section 411.
39 Section 411 allows the beneficiaries by unanimous agreement to compel
40 modification of a trust if the court concludes that the particular modification is not
41 inconsistent with a material purpose of the trust. Subsection (b)(4) of this section
42 similarly allows the qualified beneficiaries to request removal of the trustee if the
43 designation of the trustee was not a material purpose of the trust. Before removing
44 the trustee the court must also find that removal will best serve the interests of the
45 beneficiaries and that a suitable co-trustee or successor trustee is available.
46

47 **Intervention by court pending decision on request to remove a trustee.**

48 Subsection (c) authorizes the court to intervene pending a final decision on a request

1 to remove a trustee. Among the relief that the court may order under Section
2 1001(b) is an injunction prohibiting the trustee from performing certain acts and the
3 appointment of a special fiduciary to perform some or all of the trustee's functions.
4 Pursuant to Section 1004, the court may also award attorney's fees as justice and
5 equity may require.
6

7 **Section 19-3B-707. Delivery of Property by Former Trustee.**

8 (a) Unless a co-trustee remains in office or the
9 court otherwise orders, and until the trust property is
10 delivered to a successor trustee or other person entitled to
11 it, a trustee who has resigned or been removed has:

12 (1) the duties of a trustee; and

13 (2) the powers necessary to protect the trust
14 property.

15 (b) A trustee who has resigned or been removed shall
16 proceed expeditiously to deliver the trust property within the
17 trustee's possession to the co-trustee, successor trustee, or
18 other person entitled to it.

19
20 *Alabama Comment*

21
22 **Comparison to Uniform Code.** Section 707 is substantially the same as
23 Section 707 of the Uniform Trust Code (2001). Numerals are inserted in subsection
24 (a) for ease of construction.

25 *Uniform Comment*

26
27 **Purpose and scope.** This section addresses the continuing authority and duty
28 of a resigning or removed trustee. Subject to the power of the court to make other
29 arrangements or unless a co-trustee remains in office, a resigning or removed trustee
30 has continuing authority until the trust property is delivered to a successor. If a co-
31 trustee remains in office, then there is no reason to grant a resigning or removed
32 trustee any continuing authority, and none is granted under this section. In
33 addition, if a co-trustee remains in office, the former trustee need not submit a final
34 trustee's report. *See* Section 813(c).
35

36 **Appointment of special fiduciary.** There is ample authority in the Uniform
37 Trust Code for the appointment of a special fiduciary, an appointment which can
38 avoid the need for a resigning or removed trustee to exercise residual powers until a
39 successor can take office. *See* Sections 704(d) (court may appoint additional trustee
40 or special fiduciary whenever court considers appointment necessary for

1 administration of trust), 705(b) (in approving resignation, court may impose
2 conditions necessary for protection of trust property), 706(c) (pending decision on
3 petition for removal, court may order appropriate relief), and 1001(b)(5) (to remedy
4 breach of trust, court may appoint special fiduciary as necessary to protect trust
5 property or interests of beneficiary).
6

7 **Death of trustee.** If the former trustee has died, then the Uniform Trust Code
8 does not require that the trustee's personal representative windup the deceased
9 trustee's administration. Nor is a trustee's conservator or guardian required to
10 complete the former trustee's administration if the trustee's authority terminated
11 due to an adjudication of incapacity. However, to limit the former trustee's liability,
12 the personal representative, conservator or guardian may submit a trustee's report
13 on the former trustee's behalf as authorized by Section 813(c). Otherwise, the former
14 trustee remains liable for actions taken during the trustee's term of office until
15 liability is otherwise barred.

16
17 **Section 19-3B-708. Compensation of Trustee.**

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

21 (b) If the terms of a trust specify the trustee's
22 compensation, the trustee has entered into a written fee
23 agreement with the settlor, or the trustee has entered into a
24 written fee agreement with the adult current permissible
25 distributees of income and, in the event the trustee's
26 compensation is allocated to principal, the adult presumptive
27 remainder beneficiaries of the trust, then the trustee is
28 entitled to be compensated as specified in the applicable
29 agreement, but the court may allow more or less compensation
30 if:

31 (1) the duties of the trustee are substantially
32 different from those contemplated when the trust was created
33 or when the applicable agreement was executed; or

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

4 (c) A trustee who invests in any common trust fund
5 or other collective investment fund maintained by any
6 regulated financial institution, or securities of, or other
7 interests in any open-end or closed-end management type
8 investment company or investment trust registered under the
9 Investment Company Act of 1940, as from time to time amended,
10 to which the trustee, or its affiliate, provides services such
11 as investment advisor, sponsor, distributor, custodian,
12 transfer agent, registrar, broker, or otherwise, may be
13 compensated by the investment company or investment trust for
14 providing those services out of fees charged to the investment
15 company or the investment trust or to the trust, if the
16 trustee at least annually notifies the persons entitled under
17 Section 19-3B-813(a) to receive a copy of the trustee's annual
18 report, prospectus, or other report, of the rate and method by
19 which the compensation was determined.

20 (d) Compensation paid to a business entity
21 affiliated with the trustee shall be presumed to be reasonable
22 if the compensation is consistent with the published fee
23 schedule maintained by the affiliated business entity in the
24 ordinary course of business.

25
26 *Alabama Comment*
27

28 **Comparison to Uniform Code.** Alabama adds the clause, "if the trustee has
29 entered into a written fee agreement with the settlors, or if the trustee has entered
30 into a written fee agreement with the adult current permissible distributees of
31 income (and in the event the trustee's compensation is allocated to principal, the
32 adult presumptive remainder beneficiaries) of the trust," to subsection (b) to provide

1 for additional parties, specifically the settlors and the adult current permissible
2 distributees of income and principal of the trust, to enter into written fee agreements
3 with the trustee. Alabama also adds the phrase “or the applicable agreement” to
4 paragraphs (1) and (2) of subsection (b) to provide consistency in the drafting of the
5 main body of subsection (b) – the introductory clause of subsection (b) includes both
6 “the terms of a trust” (that is, the trust instrument) and “a written fee agreement.”
7 Fees paid pursuant to these written agreements are presumed to be reasonable.
8

9 Alabama adds subsection (c), which is derived from former ALA. CODE § 19-3-
10 120.1. Finally, Alabama adds subsection (d), which is derived from the last sentence
11 of former ALA. CODE § 19-3-322(26), to complement Section 802(f). See ALA. CODE §
12 19-3A-502(a), which allows a trustee to pay from principal an amount not to exceed
13 50% of the trustee’s regular compensation.
14

15 *Uniform Comment*

16
17
18 **Purpose and scope.** Subsection (a) establishes a standard of reasonable
19 compensation. Relevant factors in determining this compensation, as specified in
20 the Restatement, include the custom of the community; the trustee’s skill,
21 experience, and facilities; the time devoted to trust duties; the amount and character
22 of the trust property; the degree of difficulty, responsibility and risk assumed in
23 administering the trust, including in making discretionary distributions; the nature
24 and costs of services rendered by others; and the quality of the trustee’s
25 performance. See RESTATEMENT (THIRD) OF TRUSTS § 38 cmt. c (Tentative Draft No. 2,
26 approved 1999); RESTATEMENT (SECOND) OF TRUSTS § 242 cmt. b (1959).
27

28 **Factors for downward or upward adjustments of trustee’s fees.** In setting
29 compensation, the services actually performed and responsibilities assumed by the
30 trustee should be closely examined. A downward adjustment of fees may be
31 appropriate if a trustee has delegated significant duties to agents. See Section 807
32 (delegation by trustee). On the other hand, a trustee with special skills..., may be
33 entitled to extra compensation for performing services that would ordinarily be
34 delegated. See RESTATEMENT (THIRD) OF TRUSTS § 38 cmt. d (Tentative Draft No. 2,
35 approved 1999); RESTATEMENT (SECOND) OF TRUSTS § 242 cmt. d (1959).
36

37 **Reasonable compensation among co-trustees.** Because “trustee” as defined
38 in Section 103(19) includes not only an individual trustee but also co-trustees, each
39 trustee, including a co-trustee, is entitled to reasonable compensation under the
40 circumstances. The fact that a trust has more than one trustee does not mean that
41 the trustees together are entitled to more compensation than had either acted alone.
42 Nor does the appointment of more than one trustee mean that the trustees are
43 eligible to receive the compensation in equal shares. The total amount of the
44 compensation to be paid and how it will be divided depend on the totality of the
45 circumstances. Factors to be considered include the settlor’s reasons for naming
46 more than one trustee and the level of responsibility assumed and exact services
47 performed by each trustee. Often the fees of co-trustees will be in the aggregate
48 higher than the fees for a single trustee because of the duty of each trustee to

1 participate in administration and not delegate to a co-trustee duties the settlors
2 expected the trustees to perform jointly. See RESTATEMENT (THIRD) OF TRUSTS § 38
3 cmt. I (Tentative Draft No. 2, approved 1999). The trust may benefit in such cases
4 from the enhanced quality of decision-making resulting from the collective
5 deliberations of the trustees.
6

7 **Published fee schedules for corporate trustees.** Financial institution trustees
8 normally base their fees on published fee schedules. Published fee schedules are
9 subject to the same standard of reasonableness under the Uniform Trust Code as are
10 other methods for computing fees. The courts have generally upheld published fee
11 schedules but this is not automatic. Among the more litigated topics is the issue of
12 termination fees. Termination fees are charged upon termination of the trust and
13 sometimes upon transfer of the trust to a successor trustee. Factors relevant to
14 whether the fee is appropriate include the actual work performed; whether a
15 termination fee was authorized in the terms of the trust; whether the fee schedule
16 specified the circumstances in which a termination fee would be charged; whether
17 the trustee's overall fees for administering the trust from the date of the trust's
18 creation, including the termination fee, were reasonable; and the general practice in
19 the community regarding termination fees. ... For representative cases, see
20 *Cleveland Trust Co. v. Wilmington Trust Co.*, 258 A.2d 58 (Del. 1969); *In re Trusts Under*
21 *Will of Dwan*, 371 N.W. 2d 641 (Minn. Ct. App. 1985); *Mercer v. Merchants National*
22 *Bank*, 298 A.2d 736 (N.H. 1972); *In re Estate of Payson*, 562 N.Y.S. 2d 329 (Surr. Ct.
23 1990); *In re Indenture Agreement of Lawson*, 607 A. 2d 803 (Pa. Super. Ct. 1992); *In re*
24 *Estate of Ischy*, 415 A.2d 37 (Pa. 1980); *Memphis Memorial Park v. Planters National*
25 *Bank*, 1986 Tenn. App. LEXIS 2978 (May 7, 1986); *In re Trust of Sensenbrenner*, 252
26 N.W. 2d 47 (Wis. 1977).
27

28 **Dual fees when trustee hires its own law firm.** This Code does not take a
29 specific position on whether dual fees may be charged when a trustee hires its own
30 law firm to represent the trust. The trend is to authorize dual compensation as long
31 as the overall fees are reasonable. For a discussion, see Ronald C. Link, *Developments*
32 *Regarding the Professional Responsibility of the Estate Administration Lawyer: The Effect of*
33 *the Model Rules of Professional Conduct*, 26 REAL PROP. PROB. & TR. J. 1, 22-38 (1991)
34

35 **Terms of trust may override reasonable compensation standard.** Subsection
36 (b) permits the terms of the trust to override the reasonable compensation standard,
37 subject to the court's inherent equity power to make adjustments downward or
38 upward in appropriate circumstances. Compensation provisions should be drafted
39 with care. Common questions include whether a provision in the terms of the trust
40 setting the amount of the trustee's compensation is binding on a successor trustee,
41 whether a dispositive provision for the trustee in the terms of the trust is in addition
42 to or in lieu of the trustee's regular compensation, and whether a dispositive
43 provision for the trustee is conditional on the person performing services as trustee.
44 See RESTATEMENT (THIRD) OF TRUSTS § 38 cmt. e (Tentative Draft No. 2, approved
45 1999); RESTATEMENT (SECOND) OF TRUSTS § 242 cmt. f (1959).
46

47 **Compensation may be set by agreement.** A trustee may enter into an
48 agreement with the beneficiaries for lesser or increased compensation, although an

1 agreement increasing compensation is not binding on a nonconsenting beneficiary.
2 See Section 111(d) (matters that may be resolved by nonjudicial settlement). See
3 also RESTATEMENT (THIRD) OF TRUSTS § 38 cmt. f (Tentative Draft No. 2, approved
4 1999); RESTATEMENT (SECOND) OF TRUSTS § 242 cmt. I (1959). A trustee may also
5 agree to waive compensation and should do so prior to rendering significant
6 services if concerned about possible gift and income taxation of the compensation
7 accrued prior to the waiver. See Rev. Rul. 66-167, 1966-1 C.B. 20. See also
8 RESTATEMENT (THIRD) OF TRUSTS § 38 cmt. g (Tentative Draft No. 2, approved 1999);
9 RESTATEMENT (SECOND) OF TRUSTS § 242 cmt. j (1959).

10
11 **Ability of trustee to pay its compensation without prior court review.**

12 Section 816(15) grants the trustee authority to fix and pay its compensation without
13 the necessity of prior court review, subject to the right of a beneficiary to object to
14 the compensation in a later judicial proceeding. Allowing the trustee to pay its
15 compensation without prior court approval promotes efficient trust administration
16 but does place a significant burden on a beneficiary who believes the compensation
17 is unreasonable. To provide a beneficiary with time to take action, and because of
18 the importance of trustee's fees to the beneficiaries' interests, Section 813(b)(4)
19 requires a trustee to provide the qualified beneficiaries with advance notice of any
20 change in the method or rate of the trustee's compensation. ...

21
22 **Allocation of trustee's fees between principal and income.** Under Sections
23 501-502 of the Uniform Principal and Income Act (1997), one-half of a trustee's
24 regular compensation is charged to income and the other half to principal.
25 Chargeable to principal are fees for acceptance, distribution, or termination of the
26 trust, and fees charged on disbursements made to prepare property for sale.

27
28 **Section 19-3B-709. Reimbursement of Expenses.**

29 (a) A trustee is entitled to be reimbursed out of
30 the trust property, with interest as appropriate for:

31 (1) expenses that were properly incurred in the
32 administration of the trust, including the defense or
33 prosecution of any action, whether successful or not, unless
34 the trustee is determined to have willfully or wantonly
35 committed a material breach of the trust; and

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

1 (b) An advance by the trustee of money for the
2 protection of the trust gives rise to a lien against trust
3 property to secure reimbursement with reasonable interest.

4
5 *Alabama Comment*
6

7 **Comparison to Uniform Code.** Alabama rewrites Section 709(a)(1) and
8 changes the “good faith” standard of former ALA. CODE § 19-3-326 to a “willful or
9 wanton” standard. The remaining provisions of Section 709 are the same as the
10 corresponding provisions of Section 709 of the Uniform Trust Code (2001).

11
12 *Uniform Comment*
13

14 **Purpose and scope.** A trustee has the authority to expend trust funds as
15 necessary in the administration of the trust, including expenses incurred in the
16 hiring of agents. *See* Sections 807 (delegation by trustee) and 816(15) (trustee to pay
17 expenses of administration from trust).

18
19 **Expenses must be properly incurred.** Subsection (a)(1) clarifies that a trustee
20 is entitled to reimbursement from the trust for incurring expenses within the
21 trustee’s authority. The trustee may also withhold appropriate reimbursement for
22 expenses before making distributions to the beneficiaries. *See* Restatement (Third) of
23 Trusts § 38 cmt. b (Tentative Draft No. 2, approved 1999); RESTATEMENT (SECOND) OF
24 TRUSTS § 244 cmt. b (1959). A trustee is ordinarily not entitled to reimbursement for
25 incurring unauthorized expenses. Such expenses are normally the personal
26 responsibility of the trustee.

27
28 **Unauthorized expenses.** As provided in subsection (a)(2), a trustee is
29 entitled to reimbursement for unauthorized expenses only if the unauthorized
30 expenditures benefitted the trust. The purpose of this provision, which is derived
31 from Restatement (Second) of Trusts § 245 (1959), is not to ratify the unauthorized
32 conduct of the trustee, but to prevent unjust enrichment of the trust. Given this
33 purpose, a court, on appropriate grounds, may delay or even deny reimbursement
34 for expenses which benefitted the trust. Appropriate grounds include: (1) whether
35 the trustee acted in bad faith in incurring the expense; (2) whether the trustee knew
36 that the expense was inappropriate; (3) whether the trustee reasonably believed the
37 expense was necessary for the preservation of the trust estate; (4) whether the
38 expense has resulted in a benefit; and (5) whether indemnity can be allowed without
39 defeating or impairing the purposes of the trust. *See* RESTATEMENT (SECOND) OF
40 TRUSTS § 245 cmt. g (1959).

41
42 **Advances by the trustee.** Subsection (b) implements Section 802(h)(5), which
43 creates an exception to the duty of loyalty for advances by the trustee for the
44 protection of the trust if the transaction is fair to the beneficiaries.
45

1 perform a duty prescribed by the terms of the trust if performance would be
2 impossible, illegal or contrary to public policy.

3
4 For background on the trustee's duty to administer the trust, *see* RESTATEMENT
5 (SECOND) OF TRUSTS §§ 164 - 169 (1959).

6
7 **Section 19-3B-802. Duty of Loyalty.**

8 (a) A trustee shall administer the trust solely in
9 the interests of the beneficiaries.

10 (b) Subject to the rights of persons dealing with or
11 assisting the trustee as provided in Section 19-3B-1012, a
12 sale, encumbrance, or other transaction involving the
13 investment or management of trust property entered into by the
14 trustee for the trustee's own personal account or which is
15 otherwise affected by a conflict between the trustee's
16 fiduciary and personal interests is voidable by a beneficiary
17 affected by the transaction unless:

18 (1) the transaction was authorized by the terms of
19 the trust;

20 (2) the transaction was approved by the court;

21 (3) the beneficiary did not commence a judicial
22 proceeding within the time allowed by Section 19-3B-1005;

23 (4) the beneficiary consented to the trustee's
24 conduct, ratified the transaction, or released the trustee in
25 compliance with Section 19-3B-1009; or

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

29 (c) A sale, encumbrance, or other transaction
30 involving the investment or management of trust property is

1 presumed to be affected by a conflict between personal and
2 fiduciary interests if it is entered into by the trustee with:

3 (1) the trustee's spouse;

4 (2) the trustee's descendants, siblings, parents, or
5 their spouses;

6 (3) an agent or attorney of the trustee; or

7 (4) a corporation or other person or enterprise in
8 which the trustee, or a person that owns a significant
9 interest in the trustee, has an interest that might affect the
10 trustee's best judgment.

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

16 (e) A trustee that is a regulated financial
17 institution may engage in transactions with departments of the
18 institution, with related affiliates of the institution, or
19 other business entities of the institution. Transactions are
20 not presumed to be affected by a conflict of interest between
21 a trustee's personal and fiduciary interests provided that the
22 transaction and any investment made pursuant to the
23 transaction otherwise complies with the Prudent Investor Rule
24 of Article 9. Transactions may include, but not be limited to,
25 the following:

26 (1) investment by a trustee in securities of, or
27 other interests in, any entity to which the trustee, or its
28 affiliates, provides services, including, without limitation,
29 any common trust fund or other collective investment fund

1 maintained by any regulated financial institution, any open-
2 end or closed-end management type investment company or
3 investment trust registered under the Investment Company Act
4 of 1940, as from time to time amended, (the "Investment
5 Company Act"), or any entity that is exempt from the
6 definition of investment company by Section 3(c) of the
7 Investment Company Act;

8 (2) an investment by a trustee in an insurance
9 contract purchased from an insurance agency owned by or
10 affiliated with the trustee or its affiliate;

11 (3) the placing of securities transactions by a
12 trustee through a securities broker-dealer that is a part of
13 the same company as the trustee, is owned by the trustee, or
14 is affiliated with the trustee;

15 (4) the borrowing of funds or entering into any
16 lending relationship by a trustee with a related department or
17 its affiliate company; and

18 (5) the purchase of bonds for which the trustee in
19 another capacity performed services as underwriter of the
20 bonds or participates in the distribution of the bonds. If the
21 trustee receives compensation for any transaction described in
22 this subsection in addition to fees charged to the trust, or
23 from the affiliate business entity, then the trustee must at
24 least annually notify the persons entitled under Section 19-
25 3B-813(a) to receive a copy of the trustee's annual report,
26 prospectus, or other report, of the rate and method by which
27 the compensation was determined.

28 (f) In other forms of enterprise, the trustee shall
29 act in the best interests of the beneficiaries. If the trust

1 is the sole owner of a corporation or other form of
2 enterprise, then the trustee shall elect or appoint directors
3 or other managers who will manage the corporation or
4 enterprise in the best interests of the beneficiaries.

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

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

9 (2) payment of reasonable compensation to the
10 trustee;

11 (3) a transaction between a trust and another trust,
12 decedent's estate, or conservatorship of which the trustee is
13 a fiduciary or in which a beneficiary has an interest;

14 (4) a deposit of trust money in a regulated
15 financial-service institution operated by the trustee; or

16 (5) an advance by the trustee of money for the
17 protection of the trust and for any or all expenses, losses,
18 and liabilities sustained in the administration of the trust
19 or as a result of the holding or ownership of any asset by the
20 trust.

21 (h) The court may appoint a special fiduciary to
22 make a decision with respect to any proposed transaction that
23 might violate this section if entered into by the trustee.

24
25 *Alabama Comment*
26

27 **Comparison to Uniform Code.** Sections 802(a) through 802(c) are
28 substantially the same as Section 802(a) through 802(c) of the Uniform Trust Code
29 (2001).
30

31 The presumption created by subsection (c) is intended to be a "presumption
32 affecting the burden of proof" within the meaning of Alabama Rule of Evidence
33 301(b)(2), which provides that:

1
2 “[e]very rebuttable presumption is either ...
3 or a presumption affecting the burden of
4 proof by imposing upon the party against
5 whom it operates the burden of proving the
6 nonexistence of the presumed fact.”
7

8 Alabama deletes subsection (d) of the Uniform Trust Code – the Uniform
9 Comment notes that this subsection is limited in scope. This deletion is not intended
10 to imply that the prohibition against the trustee’s self dealing is being undermined.
11 The drafters of the Alabama Trust Code recognize, however, that commercial
12 relationships (not related to the trust property) may exist between a corporate
13 trustee and the beneficiary; accordingly, transactions in the normal course of
14 business between a corporate trustee and a beneficiary not involving trust property
15 should not be presumed to be an abuse by the trustee of a confidential relationship
16 with the beneficiary. Subsections (e), (f), (g), (h) and (i) are renumbered as (d), (e),
17 (f), (g) and (h), respectively.
18

19 Alabama rewrites subsection (f) of the Uniform Trust Code (renumbered as
20 subsection (e)) in order to provide guidance where corporate trustees who are
21 regulated financial institutions enter into transactions with related affiliates or other
22 business entities and to address other customary commercial transactions that are
23 not mentioned in the Uniform Trust Code and which corporate trustees enter into.
24

25 Alabama adds a clause, “and for any or all expenses, losses and liabilities
26 sustained in the administration of the trust or as a result of the holding or ownership
27 of any asset by the trust,” to Section 802(h)(5) in order to reflect existing Alabama
28 law (*see* former ALA. CODE § 19-3-322(15)).

29 **Notification by delivery of a prospectus.** Because the disclosure standards
30 for investment companies, common trust funds and investments trusts are regulated
31 by the U.S. Securities and Exchange Commission and other federal and state
32 regulatory agencies, the notification requirements of Section 802(f) may be satisfied
33 by delivery of a prospectus. (*See also* Alabama comment to Section 813.)
34

35 *Uniform Comment*

36
37 **Purpose and scope.** This section addresses the duty of loyalty, perhaps the
38 most fundamental duty of the trustee. Subsection (a) states the general principle,
39 which is copied from Restatement (Second) of Trusts § 170(1) (1959), and is also
40 derived from Section 5 of the Uniform Prudent Investor Act (1994). A trustee owes a
41 duty of loyalty to the beneficiaries, a principle which is sometimes expressed as the
42 obligation of the trustee not to place the trustee’s own interests over those of the
43 beneficiaries. Most but not all violations of the duty of loyalty concern transactions
44 involving the trust property, but breaches of the duty can take other forms. For a
45 discussion of the different types of violations, *see* GEORGE G. BOGERT & GEORGE T.
46 BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 543 (Rev. 2d ed. 1993); and 2A AUSTIN
47 W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS §§ 170-170.24 (4th ed. 1987).

1 The “interests of the beneficiaries” to which the trustee must be loyal are the
2 beneficial interests as provided in the terms of the trust. *See* Section 103(7).

3
4 The duty of loyalty is not limited to settings entailing self-dealing or conflict
5 of interest in which the trustee would benefit personally from the trust. “The trustee
6 is under a duty to the beneficiary in administering the trust not to be guided by the
7 interest of any third person. Thus, it is improper for the trustee to sell trust property
8 to a third person for the purpose of benefitting the third person rather than the
9 trust.” RESTATEMENT (SECOND) OF TRUSTS § 170, cmt. q, at 371 (1959). (*See* comment
10 to Section 5, Loyalty, of the Uniform Prudent Investor Act (1994).)

11
12 The concept that the duty of prudence in trust administration, especially in
13 investing and managing trust assets, entails adherence to the duty of loyalty is
14 familiar. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B), extracted in the Comment to
15 Section 1 of the UPIA, effectively merges the requirements of prudence and loyalty.
16 A fiduciary cannot be prudent in the conduct of investment functions if the fiduciary
17 is sacrificing the interests of the beneficiaries. (*See* comment to Section 5, Loyalty, of
18 the Uniform Prudent Investor Act (1994).)

19
20 **Application of duty of loyalty to charitable and noncharitable trusts.** The
21 duty of loyalty applies to both charitable and noncharitable trusts, even though the
22 beneficiaries of charitable trusts are indefinite. In the case of a charitable trust, the
23 trustee must administer the trust solely in the interests of effectuating the trust’s
24 charitable purposes. *See* RESTATEMENT (SECOND) OF TRUSTS § 379 cmt. a (1959).

25
26 **Issues arising in connection with beneficiary who is also the trustee.** Duty
27 of loyalty issues often arise in connection with the settlor’s designation of the
28 trustee. For example, it is not uncommon that the trustee will also be a beneficiary.
29 Or the settlors will name a friend or family member who is an officer of a company
30 in which the settlors owns stock. In such cases, settlors should be advised to
31 consider addressing in the terms of the trust how such conflicts are to be handled.
32 Section 105 authorizes a settlors to override an otherwise applicable duty of loyalty
33 in the terms of the trust. Sometimes the override is implied. The grant to a trustee of
34 authority to make a discretionary distribution to a class of beneficiaries that includes
35 the trustee implicitly authorizes the trustee to make distributions for the trustee’s
36 own benefit.

37
38 **Social investing.** No form of so-called “social investing” is consistent with
39 the duty of loyalty if the investment activity entails sacrificing the interests of trust
40 beneficiaries – for example, by accepting below-market returns – in favor of the
41 interests of the persons supposedly benefitted by pursuing the particular social
42 cause. *See, e.g.,* John H. Langbein & Richard Posner, *Social Investing and the Law of*
43 *Trusts*, 79 MICHIGAN L. REV. 72, 96-97 (1980) (collecting authority). For pension trust
44 assets, *see generally* Ian D. Lanoff, *The Social Investment of Private Pension Plan Assets:*
45 *May it Be Done Lawfully under ERISA?*, 31 LABOR L.J. 387 (1980). Commentators
46 supporting social investing tend to concede the overriding force of the duty of
47 loyalty. They argue instead that particular schemes of social investing may not
48 result in below-market returns. *See, e.g.,* Marcia O’Brien Hylton, “Socially

1 *Responsible" Investing: Doing Good Versus Doing Well in an Inefficient Market*, 42
2 AMERICAN U.L. REV. 1 (1992). In 1994, the Department of Labor issued an
3 Interpretive Bulletin reviewing its prior analysis of social investing questions and
4 reiterating that pension trust fiduciaries may invest only in conformity with the
5 prudence and loyalty standards of ERISA §§ 403-404. Interpretive Bulletin 94-1, 59
6 Fed. Reg. 32606 (Jun. 22, 1994), to be codified as 29 CFR § 2509.94-1. The Bulletin
7 reminds fiduciary investors that they are prohibited from "subordinat[ing] the
8 interests of participants and beneficiaries in their retirement income to unrelated
9 objectives." (See comment to Section 5, Loyalty, of the Uniform Prudent Investor Act
10 (1994).)

11
12 **Transactions affected by a conflict of interest.** Subsection (b) states the
13 general rule with respect to transactions involving trust property that are affected
14 by a conflict of interest. A transaction affected by a conflict between the trustee's
15 fiduciary and personal interests is voidable by a beneficiary who is affected by the
16 transaction. Subsection (b) carries out the "no further inquiry" rule by making
17 transactions involving trust property entered into by a trustee for the trustee's own
18 personal account voidable without further proof. Such transactions are irrebuttably
19 presumed to be affected by a conflict between personal and fiduciary interests. It is
20 immaterial whether the trustee acts in good faith or pays a fair consideration. See
21 RESTATEMENT (SECOND) OF TRUSTS § 170 cmt. b (1959).

22
23 **Voidable transactions.** The rule is less severe with respect to transactions
24 involving trust property entered into with persons who have close business or
25 personal ties with the trustee. Under subsection (c), a transaction between a trustee
26 and certain relatives and business associates is presumptively voidable, not void.
27 Also presumptively voidable are transactions with corporations or other enterprises
28 in which the trustee, or a person who owns a significant interest in the trustee, has
29 an interest that might affect the trustee's best judgment. The presumption is
30 rebutted if the trustee establishes that the transaction was not affected by a conflict
31 between personal and fiduciary interests. Among the factors tending to rebut the
32 presumption are whether the consideration was fair and whether the other terms of
33 the transaction are similar to those that would be transacted with an independent
34 party.

35
36 Even where the presumption under subsection (c) does not apply, a
37 transaction may still be voided by a beneficiary if the beneficiary proves that a
38 conflict between personal and fiduciary interests existed and that the transaction
39 was affected by the conflict. The right of a beneficiary to void a transaction affected
40 by a conflict of interest is optional. If the transaction proves profitable to the trust
41 and unprofitable to the trustee, then the beneficiary will likely allow the transaction
42 to stand. For a comparable provision regulating fiduciary investments by national
43 banks, see 12 C.F.R. § 9.12(a).

44
45 **Authorized transactions.** As provided in subsection (b), no breach of the
46 duty of loyalty occurs if the transaction was authorized by the terms of the trust or
47 approved by the court, or if the beneficiary failed to commence a judicial proceeding
48 within the time allowed or chose to ratify the transaction, either prior to or

1 subsequent to its occurrence. In determining whether a beneficiary has consented to
2 a transaction, the principles of representation from Article 3 may be applied.

3
4 Subsection (b)(5), which is derived from Section 3-713(1) of the Uniform
5 Probate Code, allows a trustee to implement a contract or pursue a claim that the
6 trustee entered into or acquired before the person became or contemplated
7 becoming trustee. While this subsection allows the transaction to proceed without
8 automatically being voidable by a beneficiary, the transaction is not necessarily free
9 from scrutiny. In implementing the contract or pursuing the claim, the trustee must
10 still complete the transaction in a way that avoids a conflict between the trustee's
11 fiduciary and personal interests. Because avoiding such a conflict will frequently be
12 difficult, the trustee should consider petitioning the court to appoint a special
13 fiduciary, as authorized by subsection (i), to work out the details and complete the
14 transaction.

15
16 **Transactions between a trustee and beneficiary.** Subsection (d) (*deleted in*
17 *Alabama*) creates a presumption that a transaction between a trustee and a
18 beneficiary not involving trust property is an abuse by the trustee of a confidential
19 relationship with the beneficiary. This subsection has limited scope. If the trust has
20 terminated, then there must be proof that the trustee's influence with the beneficiary
21 remained. Furthermore, whether or not the trust has terminated, there must be
22 proof that the trustee obtained an advantage from the relationship. The fact the
23 trustee profited is insufficient to show an abuse if a third party would have similarly
24 profited in an arm's length transaction. Subsection (d) is based on Cal. Prob. Code
25 §16004(c). *See also* 2A AUSTIN W. SCOTT & WILLIAM F. FRATCHER § 170.25 (4th ed.
26 1987), which states the same principle in a slightly different form: "Where he deals
27 directly with the beneficiaries, the transaction may stand, but only if the trustee
28 makes full disclosure and takes no advantage of his position and the transaction is in
29 all respects fair and reasonable."

30
31 **Transactions voidable by a beneficiary.** Subsection (e) (*renumbered as*
32 *subsection (d) in Alabama*), which allows a beneficiary to void a transaction entered
33 into by the trustee that involved an opportunity belonging to the trust, is based on
34 Restatement (Second) of Trusts § 170 cmt. k (1959). While normally associated with
35 corporations and with their directors and officers, what is usually referred to as the
36 corporate opportunity doctrine also applies to other types of fiduciary. The doctrine
37 prohibits the trustee's pursuit of certain business activities, such as entering into a
38 business in direct competition with a business owned by the trust, or the purchasing
39 of an investment that the facts suggest the trustee was expected to purchase for the
40 trust. For discussion of the corporate opportunity doctrine, see Kenneth B. Davis,
41 Jr., *Corporate Opportunity and Comparative Advantage*, 84 IOWA L. REV. 211 (1999); and
42 Richard A. Epstein, *Contract and Trust in Corporate Law: The Case of Corporate*
43 *Opportunity*, 21 Del. J. Corp. L. 5 (1996). *See also* PRINCIPLES OF CORPORATE
44 GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 5.05 (American Law Inst. 1994).

45
46 **Exception to the "no further inquiry" rule - investments in mutual funds.**
47 Sub-section (f) (*re-written in its entirety and renumbered as subsection (e) in*
48 *Alabama*), creates an exception to the no further inquiry rule for trustee investment

1 in mutual funds. This exception applies even though the mutual fund company pays
2 the financial-service institution trustee a fee for providing investment advice and
3 other services, such as custody, transfer agent, and distribution, that would
4 otherwise be provided by agents of the fund. ...
5

6 Subsection (f) attempts to retain the advantages of mutual funds while at the
7 same time making clear that such investments are subject to traditional fiduciary
8 responsibilities. Nearly all of the states have enacted statutes authorizing trustees to
9 invest in funds from which the trustee might derive additional compensation.
10 Portions of subsection (f) are based on these statutes. Subsection (f) makes clear that
11 such dual investment-fee arrangements are not automatically presumed to involve a
12 conflict between the trustee's personal and fiduciary interests, but subsection (f)
13 does not otherwise waive or lessen a trustee's fiduciary obligations. The trustee, in
14 deciding whether to invest in a mutual fund, must not place its own interests ahead
15 of those of the beneficiaries. ... To obtain the protection afforded by subsection (f),
16 the trustee must disclose at least annually to the beneficiaries entitled to receive a
17 copy of the trustee's annual report the rate and method by which the additional
18 compensation was determined. Furthermore, the selection of a mutual fund, and
19 the resulting delegation of certain of the trustee's functions, may be taken into
20 account under Section 708 in setting the trustee's regular compensation. *See also*
21 UNIFORM PRUDENT INVESTOR ACT §§ 7 and 9 and Comments; RESTATEMENT (THIRD)
22 OF TRUSTS: PRUDENT INVESTOR RULE § 227 cmt. m (1992).
23

24 Subsection (f) applies whether the services to the fund are provided directly
25 by the trustee or by an affiliate. While the term "affiliate" is not used in subsection
26 (c), the individuals and entities listed there are examples of affiliates. The term is
27 also used in the regulations under ERISA. An "affiliate" of a fiduciary includes (1)
28 any person who directly or indirectly, through one or more intermediaries, controls,
29 is controlled by, or is under common control with the fiduciary; (2) any officer,
30 director, partner, employee, or relative of the fiduciary, and any corporation or
31 partnership of which the fiduciary is an officer, director or partner. *See* 29 C.F.R. §
32 2510.3-21(e).
33

34 **Overlap between trust and corporate law.** Subsection (g) (*renumbered as*
35 *subsection (f) in Alabama*), addresses an overlap between trust and corporate law.
36 It is based on Restatement of Trusts (Second) § 193 cmt. a (1959), which provides
37 that "[i]t is the duty of the trustee in voting shares of stock to use proper care to
38 promote the interest of the beneficiary," and that the fiduciary responsibility of a
39 trustee in voting a control block "is heavier than where he holds only a small
40 fraction of the shares." Similarly, the Department of Labor construes ERISA's duty
41 of loyalty to make share voting a fiduciary function. *See* 29 C.F.R. §2509.94-2. When
42 the trust owns the entirety of the shares of a corporation, the corporate assets are in
43 effect trust assets that the trustee determines to hold in corporate form. The trustee
44 may not use the corporate form to escape the fiduciary duties of trust law. Thus, for
45 example, a trustee whose duty of impartiality would require the trustee to make
46 current distributions for the support of current beneficiaries may not evade that
47 duty by holding assets in corporate form and pleading the discretion of corporate
48 directors to determine dividend policy. Rather, the trustee must vote for corporate

1 directors who will follow a dividend policy consistent with the trustee’s trust-law
2 duty of impartiality.

3
4 **Exceptions to the general duty of loyalty.** Subsection (h) (*renumbered as*
5 *subsection (g) in Alabama*), contains several exceptions to the general duty of
6 loyalty, which apply if the transaction was fair to the beneficiaries. Subsection (h)(1)
7 - (2) clarify that a trustee is free to contract about the terms of appointment and rate
8 of compensation. Consistent with Restatement (Second) of Trusts § 170 cmt. r
9 (1959), subsection (h)(3) authorizes a trustee to engage in a transaction involving
10 another trust of which the trustee is also trustee, a transaction with a decedent’s
11 estate or a conservatorship estate of which the trustee is personal representative or
12 conservator, or a transaction with another trust or other fiduciary relationship in
13 which a beneficiary of the trust has an interest. The authority of a trustee to deposit
14 funds in a financial institution operated by the trustee, as provided in subsection
15 (h)(4), is recognized in Restatement (Second) of Trusts § 170 cmt. m (1959). The
16 power to deposit funds in its own institution does not negate the trustee’s
17 responsibility to invest prudently, including the obligation to earn a reasonable rate
18 of interest on deposits. Subsection (h)(5) authorizes a trustee to advance money for
19 the protection of the trust. Such advances usually are of small amounts and are
20 made in emergencies or as a matter of convenience. Pursuant to Section 709(b), the
21 trustee has a lien against the trust property for any advances made.

22 23 24 **Section 19-3B-803. Impartiality.**

25 If a trust has two or more beneficiaries, then the
26 trustee shall act impartially in investing, managing, and
27 distributing the trust property, giving due regard to the
28 beneficiaries' respective interests and the purposes of the
29 trust.

30 *Alabama Comment*

31
32 **Comparison to Uniform Code.** Alabama adds the clause “and
33 the purposes of the trust” to Section 803 in order to provide for consideration of the
34 stated intent, as well as the interests of the beneficiaries.

35 36 *Uniform Comment*

37
38 **Purpose and scope.** The duty of impartiality is an important aspect of the
39 duty of loyalty. This section is identical to Section 6 of the Uniform Prudent Investor
40 Act (1994), except that this section also applies to all aspects of trust administration
41 and to decisions by a trustee with respect to distributions. The UPIA is limited to
42 duties with respect to the investment and management of trust property. The
43 differing beneficial interests for which the trustee must act impartially include those

1 of the current beneficiaries versus those of beneficiaries holding interests in the
2 remainder; and among those currently eligible to receive distributions. In fulfilling
3 the duty to act impartially, the trustee should be particularly sensitive to allocation
4 of receipts and disbursements between income and principal and should consider,
5 in an appropriate case, a reallocation of income to the principal account and vice
6 versa, if allowable under local law. For an example of such authority, *see* UNIFORM
7 PRINCIPAL AND INCOME ACT § 104 (1997).

8
9 The duty to act impartially does not mean that the trustee must treat the
10 beneficiaries equally. Rather, the trustee must treat the beneficiaries equitably in
11 light of the purposes and terms of the trust. A settlor who prefers that the trustee,
12 when making decisions, generally favor the interests of one beneficiary over those of
13 others should provide appropriate guidance in the terms of the trust. *See*
14 RESTATEMENT (SECOND) OF TRUSTS § 183 cmt. a (1959).

15
16 **Section 19-3B-804. Prudent Administration.**

17 A trustee shall administer the trust as a prudent
18 person would, by considering the purposes, terms,
19 distributional requirements, and other circumstances of the
20 trust. In satisfying this standard, the trustee shall exercise
21 reasonable care, skill, and caution.

22
23 *Alabama Comment*

24
25 **Comparison to Uniform Code.** Section 804 is the same as Section 804 of the
26 Uniform Trust Code (2001).

27
28 *Uniform Comment*

29
30 **Purpose and scope.** The duty to administer a trust with prudence is a
31 fundamental duty of the trustee. This duty does not depend on whether the trustee
32 receives compensation. The duty may be altered by the terms of the trust. *See*
33 Section 105. This section is similar to Section 2(a) of the Uniform Prudent Investor
34 Act and Restatement (Third) of Trusts: Prudent Investor Rule § 227 (1992).

35
36 The language of this section diverges from the language of the previous
37 Restatement. The prior Restatement can be read as applying the same standard -
38 "man of ordinary prudence would exercise in dealing with his own property" -
39 regardless of the type or purposes of the trust. *See* RESTATEMENT (SECOND) OF TRUSTS
40 § 174 cmt. a (1959). This section appropriately bases the standard on the purposes
41 and other circumstances of the particular trust.
42

1 A settlor who wishes to modify the standard of care specified in this section
2 is free to do so, but there is a limit. Section 1008 prohibits a settlor from exculpating
3 a trustee from liability for breach of trust committed in bad faith or with reckless
4 indifference to the purposes of the trust or to the interests of the beneficiaries.
5

6 **Section 19-3B-805. Costs of Administration.**

7 In administering a trust, the trustee may incur
8 costs that are reasonable in relation to the trust property,
9 the purposes of the trust, and the skills of the trustee.

10
11 *Alabama Comment*

12
13 **Comparison to Uniform Code.** Section 805 is substantially the same as
14 Section 805 of the Uniform Trust Code (2001). Alabama deletes the word “only,”
15 which precedes the word “cost” in the uniform language. While cost is an important
16 consideration when administering a trust, it should not be the sole consideration.
17 For example, when choosing an investment product, the trustee may consider cost
18 among several factors, and it may be reasonable not to select the lowest cost
19 provider in the marketplace.
20

21 *Uniform Comment*

22
23 **Purpose and scope.** This section is similar to Section 7 of the Uniform
24 Prudent Investor Act (1994) and is consistent with the rules concerning costs in
25 Restatement (Third) of Trusts: Prudent Investor Rule § 227(c)(3) (1992). For related
26 rules concerning compensation and reimbursement of trustees, see Sections 708 and
27 709. The duty not to incur unreasonable costs applies when a trustee decides
28 whether and how to delegate to agents, as well as to other aspects of trust
29 administration. In deciding whether and how to delegate, the trustee must be alert
30 to balancing projected benefits against the likely costs. To protect the beneficiary
31 against excessive costs, the trustee should also be alert to adjusting compensation for
32 functions which the trustee has delegated to others. The obligation to incur only
33 necessary or appropriate costs of administration has long been part of the law of
34 trusts. *See* RESTATEMENT (SECOND) OF TRUSTS § 188 (1959).
35

36 **Section 19-3B-806. Trustee's Skills.**

37 A trustee who has special skills or expertise, or is
38 named trustee in reliance upon the trustee's representation
39 that the trustee has special skills or expertise, shall use
40 those special skills or expertise.

1
2 *Alabama Comment*
3

4 **Comparison to Uniform Code.** Section 806 is the same as Section 806 of the
5 Uniform Trust Code (2001).
6

7 *Uniform Comment*
8

9 **Purpose and scope.** This section is similar to Section 7-302 of the Uniform
10 Probate Code, Restatement (Second) of Trusts § 174 (1959), and Section 2(f) of the
11 Uniform Prudent Investor Act of 1994 (the “UPIA”).
12

13 **Professional fiduciaries.** The distinction taken in Section 806 between
14 amateur and professional trustees is familiar law. The prudent investor standard
15 applies to a range of fiduciaries, from the most sophisticated professional
16 investment management firms and corporate fiduciaries, to family members of
17 minimal experience. Because the standard of prudence is relational, it follows that
18 the standard for professional trustees is the standard of prudent professionals; for
19 amateurs, it is the standard of prudent amateurs. RESTATEMENT (SECOND) OF TRUSTS
20 § 174 (1959) provides: “The trustee is under a duty to the beneficiary in
21 administering the trust to exercise such care and skill as a man of ordinary prudence
22 would exercise in dealing with his own property; and if the trustee has or procures
23 his appointment as trustee by representing that he has greater skill than that of a
24 man of ordinary prudence, he is under a duty to exercise such skill.” Case law
25 strongly supports the concept of the higher standard of care for the trustee
26 representing itself to be expert or professional. *See* Annotation, *Standard of Care*
27 *Required of Trustee Representing Itself to Have Expert Knowledge or Skill*, 91 A.L.R. 3d
28 904 (1979) & 1992 Supp. at 48-49.
29

30 The Drafting Committee for the UPIA declined the suggestion that the UPIA
31 should create an exception to the prudent investor rule (or to the diversification
32 requirement of Section 3 of the UPIA in the case of smaller trusts. The Committee
33 believes that Section 2(b) and Section 2(c) of the UPIA emphasize factors that are
34 sensitive to the traits of small trusts; and that Section 2(f) of the UPIA (as codified in
35 this Section 806 of the Alabama Trust Code) adjusts helpfully for the distinction
36 between professional and amateur trusteeship. Furthermore, it is always open to the
37 settlors of a trust under Section 1(b) of the UPIA to reduce the trustee’s standard of
38 care if the settlors deems such a step appropriate. The official comments to the 1992
39 Restatement observe that pooled investments, such as mutual funds and bank
40 common trust funds, are especially suitable for small trusts. RESTATEMENT (THIRD)
41 OF TRUSTS: PRUDENT INVESTOR RULE § 227, cmt. h at 28; cmt. m at 51; reporter’s note to
42 cmt. g, *id.* at 83. [The preceding comment is from the Uniform Comment to Section
43 2(f) of the UPIA.]
44
45

1 **Section 19-3B-807. Delegation by Trustee.**

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

6 (1) selecting an agent;

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

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

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

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

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

23 *Alabama Comment*

24
25 **Comparison to Uniform Code.** Section 807 is the same as
26 Section 807 of the Uniform Trust Code (2001), with the following exceptions.
27 Alabama strikes the words "of comparable skills," which appear after "prudent
28 trustee" in the first sentence of subsection (a), because the original text may create
29 unnecessary confusion and inadvertently limit the power to delegate. This change
30 conforms with RESTATEMENT (THIRD) OF TRUSTS § 117. In subsection (b), Alabama
31 adds the words "skill and caution" after "reasonable care" in order to be consistent
32 with the language in subsection (a).

1
2 *Uniform Comment*
3

4 **Purpose and scope.** This section permits trustees to delegate various aspects
5 of trust administration to agents, subject to the standards of the section. The
6 language is derived from Section 9 of the Uniform Prudent Investor Act of 1994 (the
7 “UPIA”). *See also* John H. Langbein, *Reversing the Nondelegation Rule of Trust-*
8 *Investment Law*, 59 MO. L. REV. 105 (1994) (discussing prior law).
9

10 This section encourages and protects the trustee in making delegations
11 appropriate to the facts and circumstances of the particular trust. Whether a
12 particular function is delegable is based on whether it is a function that a prudent
13 trustee might delegate under similar circumstances. For example, delegating some
14 administrative and reporting duties might be prudent for a family trustee but
15 unnecessary for a corporate trustee.
16

17 This section applies only to delegation to agents, not to delegation to a co-
18 trustee. For the provision regulating delegation to a co-trustee, see Section 703(e).
19

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

28 The Restatement (Second) of Trusts admitted in a comment that “There is not
29 a clear-cut line dividing the acts which a trustee can properly delegate from those
30 which he cannot properly delegate.” Instead, the comment directed attention to a
31 list of factors that “may be of importance: (1) the amount of discretion involved; (2)
32 the value and character of the property involved; (3) whether the property is
33 principal or income; (4) the proximity or remoteness of the subject matter of the
34 trust; (5) the character of the act as one involving professional skill or facilities
35 possessed or not possessed by the trustee himself.” RESTATEMENT (SECOND) OF
36 TRUSTS § 171, cmt. d (1959). The 1959 Restatement further said: “A trustee cannot
37 properly delegate to another power to select investments.” RESTATEMENT (SECOND)
38 OF TRUSTS § 171, cmt. h (1959).
39

40 For discussion and criticism of the former rule *see* William L. Cary & Craig B.
41 Bright, *The Delegation of Investment Responsibility for Endowment Funds*, 74 COLUMBIA
42 L. REV. 207 (1974); John H. Langbein & Richard A. Posner, *Market Funds and Trust-*
43 *Investment Law*, 1976 AMERICAN BAR FOUNDATION RESEARCH J. 1, 18-24.
44

45 **The modern trend to favor delegation.** The trend of subsequent legislation,
46 culminating in the RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE (1992),
47 has been strongly hostile to the nondelegation rule. *See* John H. Langbein, *Reversing*
48 *the Nondelegation Rule of Trust-Investment Law*, 59 MISSOURI L. REV. 105 (1994).

1
2 **The delegation rule of the Uniform Trustee Powers Act.** The Uniform
3 Trustee Powers Act (1964) effectively abrogates the nondelegation rule. It
4 authorizes trustees “to employ persons, including attorneys, auditors, investment
5 advisors, or agents, even if they are associated with the trustee, to advise or assist
6 the trustee in the performance of his administrative duties; to act without
7 independent investigation upon their recommendations; and instead of acting
8 personally, to employ one or more agents to perform any act of administration,
9 whether or not discretionary ...” Uniform Trustee Powers Act § 3(24), 7B Uniform
10 Laws Ann. 743 (1985). This Act has been enacted in 16 states, *see* “Record of Passage
11 of Uniform and Model Acts as of September 30, 1993,” 1993-94 Reference Book of
12 Uniform Law Commissioners (unpaginated, following page 111) (1993).

13
14 **UMIFA’s delegation rule.** The Uniform Management of Institutional Funds
15 Act (1972) (UMIFA), authorizes the governing boards of eleemosynary institutions,
16 who are trustee-like fiduciaries, to delegate investment matters either to a committee
17 of the board or to outside investment advisors, investment counsel, managers,
18 banks, or trust companies. UMIFA § 5, 7A Uniform Laws Ann. 705 (1985). UMIFA
19 has been enacted in 38 states, *see* “Record of Passage of Uniform and Model Acts as
20 of September 30, 1993,” 1993-94 Reference Book of Uniform Law Commissioners
21 (unpaginated, following page 111) (1993).

22
23 **ERISA’s delegation rule.** The Employee Retirement Income Security Act of
24 1974, the federal statute which prescribes fiduciary standards for investing the assets
25 of pension and employee benefit plans, allows a pension or employee benefit plan to
26 provide that “authority to manage, acquire or dispose of assets of the plan is
27 delegated to one or more investment managers ...” ERISA § 403(a)(2), 29 U.S.C. §
28 1103(a)(2). Commentators have explained the rationale for ERISA’s encouragement
29 of delegation:

30
31 ERISA ... invites the dissolution of unitary
32 trusteeship. ... ERISA’s fractionation of
33 traditional trusteeship reflects the
34 complexity of the modern pension trust.
35 Because millions, even billions of dollars
36 can be involved, great care is required in
37 investing and safekeeping plan assets.
38 Administering such plans – computing and
39 honoring benefit entitlements across
40 decades of employment and retirement – is
41 also a complex business ... Since, however,
42 neither the sponsor nor any other single
43 entity has a comparative advantage in
44 performing all these functions, the
45 tendency has been for pension plans to use
46 a variety of specialized providers. A
47 consulting actuary, a plan administration
48 firm, or an insurance company may oversee

1 the design of a plan and arrange for
2 processing benefit claims. Investment
3 industry professionals manage the portfolio
4 (the largest plans spread their pension
5 investments among dozens of money
6 management firms).

7
8 JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 496
9 (1990).

10
11 **The delegation rule of the 1992 Restatement.** THE RESTATEMENT (THIRD) OF
12 TRUSTS: PRUDENT INVESTOR RULE (1992) repeals the nondelegation rule of
13 RESTATEMENT (SECOND) OF TRUSTS § 171 (1959), extracted *supra*, and replaces it with
14 substitute text that reads:

15
16 § 171. Duty with Respect to Delegation. A
17 trustee has a duty personally to perform the
18 responsibilities of trusteeship except as a
19 prudent person might delegate those
20 responsibilities to others. In deciding
21 whether, to whom, and in what manner to
22 delegate fiduciary authority in the
23 administration of a trust, and thereafter in
24 supervising agents, the trustee is under a
25 duty to the beneficiaries to exercise
26 fiduciary discretion and to act as a prudent
27 person would act in similar circumstances.

28
29 RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 171 (1992). The 1992
30 Restatement integrates this delegation standard into the prudent investor rule of
31 section 227, providing that “the trustee must ... act with prudence in deciding
32 whether and how to delegate to others ...” RESTATEMENT (THIRD) OF TRUSTS:
33 PRUDENT INVESTOR RULE § 227(c) (1992).

34
35 **Protecting the beneficiary against unreasonable delegation.** There is an
36 intrinsic tension in trust law between granting trustees broad powers that facilitate
37 flexible and efficient trust administration, on the one hand, and protecting trust
38 beneficiaries from the misuse of such powers on the other hand. A broad set of
39 trustees’ powers, such as those found in most lawyer-drafted instruments and
40 exemplified in the Uniform Trustees’ Powers Act, permits the trustee to act
41 vigorously and expeditiously to maximize the interests of the beneficiaries in a
42 variety of transactions and administrative settings. Trust law relies upon the duties
43 of loyalty and prudent administration, and upon procedural safeguards such as
44 periodic accounting and the availability of judicial oversight, to prevent the misuse
45 of these powers. Delegation, which is a species of trustee power, raises the same
46 tension. If the trustee delegates effectively, then the beneficiaries obtain the
47 advantage of the agent’s specialized investment skills or whatever other attributes

1 induced the trustee to delegate. But if the trustee delegates to a knave or an
2 incompetent, the delegation can work harm upon the beneficiaries.

3
4 Section 9 of the UPIA is designed to strike the appropriate balance between
5 the advantages and the hazards of delegation. Section 9 authorizes delegation under
6 the limitations of subsections (a) and (b). Section 9(a) imposes duties of care, skill,
7 and caution on the trustee in selecting the agent, in establishing the terms of the
8 delegation, and in reviewing the agent's compliance.

9
10 The trustee's duties of care, skill, and caution in framing the terms of the
11 delegation should protect the beneficiary against overbroad delegation. For
12 example, a trustee could not prudently agree to an investment management
13 agreement containing an exculpation clause that leaves the trust without recourse
14 against reckless mismanagement. Leaving one's beneficiaries remediless against
15 willful wrongdoing is inconsistent with the duty to use care and caution in
16 formulating the terms of the delegation. This sense that it is imprudent to expose
17 beneficiaries to broad exculpation clauses underlies both federal and state legislation
18 restricting exculpation clauses, *e.g.*, ERISA §§ 404(a)(1)(D), 410(a), 29 U.S.C. §§
19 1104(a)(1)(D), 1110(a); NEW YORK EST. POWERS TRUSTS LAW § 11-1.7 (McKinney 1967).

20
21 Although Section 9(c) of the UPIA exonerates the trustee from personal
22 responsibility for the agent's conduct when the delegation satisfies the standards of
23 Subsection 9(a) of the UPIA, Section 9(b) of the UPIA makes the agent responsible to
24 the trust. The beneficiaries of the trust can, therefore, rely upon the trustee to
25 enforce the terms of the delegation. [The preceding comment is taken from the
26 Uniform Comment to Section 9 of the UPIA.]

27
28 **Section 19-3B-808. Powers to Direct.**

29 (a) While a trust is revocable, the trustee may
30 follow a direction of the settlor that is contrary to the
31 terms of the trust.

32 (b) If the terms of a trust confer upon a person
33 other than the settlor of a revocable trust power to direct
34 certain actions of the trustee, then the trustee shall act in
35 accordance with an exercise of the power unless the attempted
36 exercise is manifestly contrary to the terms of the trust or
37 the trustee knows the attempted exercise would constitute a
38 serious breach of a fiduciary duty that the person holding the
39 power owes to the beneficiaries of the trust.

1 (c) The terms of a trust may confer upon a trustee
2 or other person a power to direct the modification or
3 termination of the trust.

4 (d) A person, other than a beneficiary, who holds a
5 power to direct is presumptively a fiduciary who, as such, is
6 required to act in good faith with regard to the purposes of
7 the trust and the interests of the beneficiaries. The holder
8 of a power to direct is liable for any loss that results from
9 breach of a fiduciary duty.

10
11 *Alabama Comment*
12

13 **Comparison to Uniform Code.** Section 808 is the same as
14 Section 808 of the Uniform Trust Code (2001).

15
16 *Uniform Comment*
17

18 **Purpose and scope.** Subsection (a) is an application of Section 603(a), which
19 provides that a revocable trust is subject to the settlor's exclusive control as long as
20 the settlors has capacity.

21
22 **Reliance by trustee on written direction from settlors.** Because of the
23 settlor's degree of control, subsection (a) of this section authorizes a trustee to rely
24 on a written direction from the settlors even if it is contrary to the terms of the trust.
25 The written direction of the settlors might be regarded as an amendment of the trust.
26

27 **Limited application upon settlor's incapacity.** Subsection (a) has limited
28 application upon a settlor's incapacity. An agent, conservator, or guardian has
29 authority to give the trustee instructions contrary to the terms of the trust only if the
30 agent, conservator, or guardian succeeds to the settlor's powers with respect to
31 revocation, amendment, or distribution as provided in Section 602(e).
32

33 **Use of trust protectors and advisors.** Subsections (b) – (d) ratify the use of
34 trust protectors and advisors. Subsections (b) and (d) are based in part on
35 Restatement (Second) of Trusts § 185 (1959). Subsection (c) is similar to Restatement
36 (Third) of Trusts § 64(2) (Tentative Draft No. 3, 2001). "Advisers" have long been
37 used for certain trustee functions, such as the power to direct investments or
38 manage a closely-held business. "Trust protector," a term largely associated with
39 offshore trust practice, is more recent and usually connotes the grant of greater

1 powers, sometimes including the power to amend or terminate the trust. Subsection
2 (c) ratifies the recent trend to grant third persons such broader powers.

3
4 **Power to direct *vis-à-vis* veto power.** A power to direct must be
5 distinguished from a veto power. A power to direct involves action initiated and
6 within the control of a third party. The trustee usually has no responsibility other
7 than to carry out the direction when made. But if a third party holds a veto power,
8 the trustee is responsible for initiating the decision, subject to the third party's
9 approval. A trustee who administers a trust subject to a veto power occupies a
10 position akin to that of a co-trustee and is responsible for taking appropriate action if
11 the third party's refusal to consent would result in a serious breach of trust. *See*
12 RESTATEMENT (SECOND) OF TRUSTS § 185 cmt. g (1959); Section 703(g)(duties of co-
13 trustees).

14
15 Frequently, the person holding the power is directing the investment of the
16 holder's own beneficial interest. Such self-directed accounts are particularly
17 prevalent among trusts holding interests in employee benefit plans or individual
18 retirement accounts. *See* ERISA § 404(c) (29 U.S.C. § 1104(c)). But for the type of
19 donative trust which is the primary focus of this Code, the holder of the power to
20 direct is frequently acting on behalf of others. In that event and as provided in
21 subsection (d), the holder is presumptively acting in a fiduciary capacity with
22 respect to the powers granted and can be held liable if the holder's conduct
23 constitutes a breach of trust, whether through action or inaction. Like a trustee,
24 liability cannot be imposed if the holder has not accepted the grant of the power
25 either expressly or informally through exercise of the power. *See* Section 701.

26
27 Powers to direct are most effective when the trustee is not deterred from
28 exercising the power by fear of possible liability. On the other hand, the trustee
29 does have overall responsibility for seeing that the terms of the trust are honored.
30 For this reason, subsection (b) imposes only minimal oversight responsibility on the
31 trustee. A trustee must generally act in accordance with the direction. A trustee
32 may refuse the direction only if the attempted exercise would be manifestly contrary
33 to the terms of the trust or the trustee knows the attempted exercise would
34 constitute a serious breach of a fiduciary duty owed by the holder of the power to
35 the beneficiaries of the trust.

36
37 **Default rule.** The provisions of this section may be altered in the terms of the
38 trust. *See* Section 105. A settlors can provide that the trustee must accept the
39 decision of the power holder without question. Or a settlors could provide that the
40 holder of the power is not to be held to the standards of a fiduciary. A common
41 technique for assuring that a settlors continues to be taxed on all of the income of an
42 irrevocable trust is for the settlors to retain a nonfiduciary power of administration.
43 *See* I.R.C. § 675(4).

1 **Section 19-3B-809. Control and Protection of Trust Property.**

2 A trustee shall take reasonable steps to take
3 control of and protect the trust property.

4
5 *Alabama Comment*

6
7 **Comparison to Uniform Code.** Section 809 is the same as Section 809 of the
8 Uniform Trust Code (2001).

9
10 *Uniform Comment*

11
12 **Purpose and scope.** This section codifies the substance of Sections 175 and
13 176 of the Restatement (Second) of Trusts (1959). The duty to take control of and
14 safeguard trust property is an aspect of the trustee's duty of prudent administration
15 as provided in Section 804. *See also* Sections 816(1) (power to collect trust property),
16 816(11) (power to insure trust property), and 816(12) (power to abandon trust
17 property). The duty to take control normally means that the trustee must take
18 physical possession of tangible personal property and securities belonging to the
19 trust, and must secure payment of any choses in action. *See* RESTATEMENT (SECOND)
20 OF TRUSTS § 175 cmt. a, c and d (1959). This section, like the other sections in this
21 part, is subject to alteration by the terms of the trust. *See* Section 105. For example,
22 the settlors may provide that the spouse may occupy the settlor's former residence
23 rent free, in which event the spouse's occupancy would prevent the trustee from
24 taking possession.
25

26 **Section 19-3B-810. Recordkeeping and Identification of Trust**
27 **Property.**

28 (a) A trustee shall keep adequate records of the
29 administration of the trust.

30 (b) A trustee shall keep trust property separate
31 from the trustee's own property.

32 (c) Except as otherwise provided in subsection (d),
33 a trustee shall cause the trust property to be designated so
34 that the interest of the trust, to the extent feasible,
35 appears in records maintained by a party other than a trustee
36 or beneficiary.

1 (d) If the trustee maintains records clearly
2 indicating the respective interests, then a trustee may invest
3 as a whole the property of two or more separate trusts.

4
5 *Alabama Comment*

6
7 **Comparison to Uniform Code.** Section 810 is the same as Section 810 of the
8 Uniform Trust Code (2001).

9
10 **Standards for recordkeeping by corporate trustees.** A trustee which is a
11 regulated financial institution should maintain the records of a trust in accordance
12 with industry standards applicable to the trustee.

13
14 *Uniform Comment*

15
16 **Purpose and scope.** The duty to keep adequate records stated in subsection
17 (a) is implicit in the duty to act with prudence (Section 804) and the duty to report to
18 beneficiaries (Section 813). For an application, see *Green v. Lombard*, 343 A. 2d 905,
19 911 (Md. Ct. Spec. App. 1975). See also RESTATEMENT (SECOND) OF TRUSTS §§ 172, 174
20 (1959).

21 **Duty not to mingle.** The duty to earmark trust assets and the duty of a
22 trustee not to mingle the assets of the trust with the trustee's own are closely related.
23 Subsection (b), which addresses the duty not to mingle, is derived from Section 179
24 of the Restatement (Second) of Trusts (1959). Subsection (c) makes the requirement
25 that assets be earmarked more precise than that articulated in Restatement (Second)
26 § 179 by requiring that the interest of the trust must appear in the records of a third
27 party, such as a bank, brokerage firm, or transfer agent. Because of the serious risk
28 of mistake or misappropriation even if disclosure is made to the beneficiaries,
29 showing the interest of the trust solely in the trustee's own internal records is
30 insufficient. Section 816(7)(B), which allows a trustee to hold securities in nominee
31 form, is not inconsistent with this requirement. While securities held in nominee
32 form are not specifically registered in the name of the trustee, they are properly
33 earmarked because the trustee's holdings are indicated in the records maintained by
34 an independent party, such as in an account at a brokerage firm.

35
36 Earmarking is not practical for all types of assets. With respect to assets not
37 subject to registration, such as tangible personal property and bearer bonds,
38 arranging for the trust's ownership interest to be reflected on the records of a third-
39 party custodian would not be feasible. For this reason, subsection (c) waives
40 separate recordkeeping for these types of assets. Under subsection (b), however, the
41 duty of the trustee not to mingle these or any other trust assets with the trustee's
42 own remains absolute.

43
44 **Use of property of more than one trust to make joint investments.**
45 Subsection (d), following the lead of a number of state statutes, allows a trustee to

1 use the property of two or more trusts to make joint investments, even though under
2 traditional principles a joint investment would violate the duty to earmark. A joint
3 investment frequently is more economical than attempting to invest the funds of
4 each trust separately. Also, the risk of misappropriation or mistake is less when the
5 trust property is invested jointly with the property of another trust than when
6 pooled with the property of the trustee or other person.

7
8 **Section 19-3B-811. Enforcement and Defense of Claims.**

9 A trustee shall take reasonable steps to enforce
10 claims of the trust and to defend claims against the trust.

11 *Alabama Comment*

12
13
14 **Comparison to Uniform Code.** Section 811 is the same as Section 811 of the
15 Uniform Trust Code (2001).

16
17 *Uniform Comment*

18
19 **Purpose and scope.** This section codifies the substance of Sections 177 and
20 178 of the Restatement (Second) of Trusts (1959). It may not be reasonable to
21 enforce a claim depending upon the likelihood of recovery and the cost of suit and
22 enforcement. It might also be reasonable to settle an action or suffer a default rather
23 than to defend an action. *See also* Section 816(14) (power to pay, contest, settle, or
24 release claims).

25
26
27 **Section 19-3B-812. Collecting Trust Property.**

28 A trustee shall take reasonable steps to compel a
29 former trustee or other person to deliver trust property to
30 the trustee, and to redress a breach of trust known to the
31 trustee to have been committed by a former trustee.

32 *Alabama Comment*

33
34
35 **Comparison to Uniform Code.** Section 812 is the same as Section 812 of the
36 Uniform Trust Code (2001).

37
38 *Uniform Comment*

39
40 **Purpose and scope.** This section is a specific application of Section 811 on the
41 duty to enforce claims, which includes a claim for trust property held by a former
42 trustee or others, and a claim against a predecessor trustee for breach of trust. The

1 duty imposed by this section is not absolute. Pursuit of a claim is not required if the
2 amount of the claim, costs of suit and enforcement, and likelihood of recovery, make
3 such action uneconomic. Unlike Restatement (Second) of Trusts § 223 (1959), this
4 section only requires a successor trustee to redress breaches of trust “known” to
5 have been committed by the predecessor. For the definition of “know,” see Section
6 104. Limiting the successor’s obligation to known breaches is a common feature of
7 state trust statutes. *See, e.g.,* MO. REV. STAT. § 456.187.2.
8

9 As authorized by Section 1009, the beneficiaries may relieve the trustee from
10 potential liability for failing to pursue a claim against a predecessor trustee or other
11 person holding trust property. The obligation to pursue a successor trustee can also
12 be addressed in the terms of the trust. *See* Section 105.

13
14 **Section 19-3B-813. Duty to Inform and Report.**

15 (a) Except as otherwise provided in Section 19-3B-
16 603, the following rules apply:

17 (1) A trustee shall keep the current permissible
18 distributees of income or principal of the trust reasonably
19 informed about the administration of the trust and of the
20 material facts necessary for them to protect their interests.

21 (2) Unless unreasonable under the circumstances, a
22 trustee shall promptly respond to a qualified beneficiary's
23 request for information related to the administration of the
24 trust.

25 (b) A trustee:

26 (1) upon request of a beneficiary, shall promptly
27 furnish to the beneficiary a copy of the trust instrument;

28 (2) within 60 days after accepting a trusteeship,
29 shall notify the qualified beneficiaries of the acceptance and
30 of the trustee's name, address, and telephone number;

31 (3) within 60 days after accepting the trusteeship
32 of an irrevocable trust, or the date the trustee acquires
33 knowledge that a formerly revocable trust has become
34 irrevocable, whether by the death of the settlor or otherwise,

1 shall notify the qualified beneficiaries of the trust's
2 existence, of the identity of the settlor or settlors, of the
3 right to request a copy of the trust instrument, and of the
4 right to a trustee's most recent report as provided in
5 subsection (c), except no notice shall be required to be given
6 to any beneficiary of a split interest charitable trust whose
7 interest is not irrevocable until that beneficiary's interest
8 becomes that of a current permissible distributee; and

9 (4) shall notify the current permissible
10 distributees of income or principal of the trust in advance of
11 any change in the method or rate of the trustee's
12 compensation.

13 (c) A trustee shall send to the distributees or
14 permissible distributees of trust income or principal, and to
15 other qualified or nonqualified beneficiaries who request it,
16 at least annually, a report of the trust property,
17 liabilities, receipts, and disbursements, including the source
18 and amount of the trustee's compensation, a listing of the
19 trust assets and, if feasible, their respective market values,
20 and, upon termination of the trust, a final report commencing
21 with the date of the most recent annual report through the
22 last transaction of the trust. Upon a vacancy in a
23 trusteeship, unless a co-trustee remains in office, a report
24 must be sent to the qualified beneficiaries by the former
25 trustee. A personal representative, conservator, or guardian
26 may send the qualified beneficiaries a report on behalf of a
27 deceased or incapacitated trustee.

28 (d) A beneficiary may waive the right to a trustee's
29 report or other information otherwise required to be furnished

1 under this section. A beneficiary, with respect to future
2 reports and other information, may withdraw a waiver
3 previously given.

4 (e) Subsection (b)(2) and subsection (b)(3) shall
5 apply only to trustees who accept a trusteeship on or after
6 the effective date of this Code, to irrevocable trusts created
7 on or after the effective date of this Code, and to revocable
8 trusts which become irrevocable on or after the effective date
9 of this Code.

10 *Alabama Comment*

11
12 **Comparison to Uniform Code.** Alabama adds the introductory clause
13 "Except as otherwise provided in Section 603, the following rules apply:" to this
14 Section. Section 603 addresses the powers of the settlors while a trust is revocable.
15 The language in Section 813 has been changed from that in Section 813 of the
16 Uniform Trust Code (2001) with respect to the use of the term "qualified
17 beneficiaries" in subsection (a) and paragraph (b)(4). This term has been replaced
18 with the words "current permissible distributees of income or principal of the trust."
19

20 Alabama adds a clause at the end of subsection (b)(3), "except no notice shall
21 be required to be given to any beneficiary of a split interest charitable remainder
22 trust whose interest is not irrevocable until that beneficiary's interest becomes that
23 of a current permissible distributee."
24

25 Subsection (c) is substantially the same as subsection (c) of the Uniform Trust
26 Code, but is slightly re-worded to provide clarity to the standards for the providing
27 of reports upon the termination of a trust.
28

29 **Standard for sending information.** Section 109(b) provides that documents
30 required to be sent under the Uniform Code need not be provided to a person whose
31 identity or location is unknown to and not reasonably ascertainable by the trustee.
32

33 **Waiver of notice by persons to be notified.** To facilitate administration,
34 Section 109(c) allows waiver of the Section 813(c) notice requirement.
35

36 **Information contained in a prospectus.** The disclosure standards for many
37 securities are regulated by the U.S. Securities and Exchange Commission and other
38 federal and state regulatory agencies. For purposes of this section, a prospectus that
39 has been filed with a federal or state regulatory body is adequate to satisfy the duty
40 to report informational matters with respect to a federally or state regulated
41 security.
42

1
2 *Uniform Comment*
3

4 **Purpose and scope.** The duty to keep the beneficiaries reasonably informed
5 of the administration of the trust is a fundamental duty of a trustee. For the
6 common law duty to keep the beneficiaries informed, *see* RESTATEMENT (SECOND) OF
7 TRUSTS § 173 (1959). This section makes the duty to keep the beneficiaries informed
8 more precise by limiting it to the qualified beneficiaries. For the definition of
9 qualified beneficiary, *see* Section 103(12). The result of this limitation is that the
10 information need not be furnished to beneficiaries with remote remainder interests
11 unless they have filed a specific request with the trustee. *See* Section 110(a) (request
12 for notice).
13

14 For the extent to which a settlors may waive the requirements of this section
15 in the terms of the trust, *see* Section 105(b)(8).
16

17 **Duty to communicate.** The trustee is under a duty to communicate to a
18 qualified beneficiary information about the administration of the trust that is
19 reasonably necessary to enable the beneficiary to enforce the beneficiary's rights and
20 to prevent or redress a breach of trust. *See* RESTATEMENT (SECOND) OF TRUSTS § 173
21 cmt. c (1959). Ordinarily, the trustee is not under a duty to furnish information to a
22 beneficiary in the absence of a specific request for the information. *See* RESTATEMENT
23 (SECOND) OF TRUSTS § 173 cmt. d (1959). Thus, the duty articulated in subsection (a)
24 is ordinarily satisfied by providing the beneficiary with a copy of the annual report
25 mandated by subsection (c). However, special circumstances may require that the
26 trustee provide additional information. For example, if the trustee is dealing with
27 the beneficiary on the trustee's own account, the trustee must communicate material
28 facts relating to the transaction that the trustee knows or should know. *See*
29 RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. d (1959). Furthermore, to enable the
30 beneficiaries to take action to protect their interests, the trustee may be required to
31 provide advance notice of transactions involving real estate, closely-held business
32 interests, and other assets that are difficult to value or to replace. *See In re Green*
33 *Charitable Trust*, 431 N.W. 2d 492 (Mich. Ct. App. 1988); *Allard v. Pacific National*
34 *Bank*, 663 P.2d 104 (Wash. 1983). The trustee is justified in not providing such
35 advance disclosure if disclosure is forbidden by other law, as under federal
36 securities laws, or if disclosure would be seriously detrimental to the interests of the
37 beneficiaries, for example, when disclosure would cause the loss of the only serious
38 buyer.
39

40 **Request for information by a beneficiary.** Subsection (a) provides a
41 different standard if a beneficiary, whether qualified or not, makes a request for
42 information. In that event, the trustee must promptly comply with the beneficiary's
43 request unless unreasonable under the circumstances. Further supporting the
44 principle that a beneficiary should be allowed to make an independent assessment
45 of what information is relevant to protecting the beneficiary's interest, subsection
46 (b)(1) requires the trustee on request to furnish a beneficiary with a complete copy of
47 the trust instrument and not merely with those portions the trustee deems relevant
48 to the beneficiary's interest. For a case reaching the same result, *see Fletcher v.*

1
2 *Fletcher*, 480 S.E. 2d 488 (Va. Ct. App. 1997). Subsection (b)(1) is contrary to Section
3 7-303(b) of the Uniform Probate Code, which provides that “[u]pon reasonable
4 request, the trustee shall provide the beneficiary with a copy of the terms of the trust
5 which describe or affect his interest ...”
6

7 **Claim of attorney-client privilege by trustee.** The drafters of this Code
8 decided to leave open for further consideration by the courts the extent to which a
9 trustee may claim attorney-client privilege against a beneficiary seeking discovery of
10 attorney-client communications between the trustee and the trustee’s attorney. The
11 courts are split because of the important values that are in tension on this question.
12 “The [attorney-client] privilege recognizes that sound legal advice or advocacy
13 serves public ends and that such advice or advocacy depends upon the lawyer’s
14 being fully informed by the client.” *Upjohn Co. v. United States*, 449 U.S. 383 (1981).
15 On the other hand, subsection (a) of this section requires that a trustee keep the
16 qualified beneficiaries reasonably informed about the administration of the trust and
17 of the material facts necessary for them to protect their interests, which could
18 include facts that the trustee has revealed only to the trustee’s attorney. There is
19 authority for the view that the trustee is estopped from pleading attorney-client
20 privilege in such circumstances. In the leading case, *Riggs National Bank v. Zimmer*,
21 355 A.2d 709, 713 (Del. Ch. 1976), the court reasoned that the beneficiary, not the
22 trustee, is the attorney’s client: “As a representative for the beneficiaries of the trust
23 which he is administering, the trustee is not the real client ...” This beneficiary-as-
24 client theory has been criticized on the ground that it conflicts with the trustee’s
25 fiduciary duty to implement the intentions of the settlors, which are sometimes in
26 tension with the wishes of one or more beneficiaries. See Louis H. Hamel, Jr.,
27 *Trustee’s Privileged Counsel: A Rebuttal*, 21 ACTEC Notes 156 (1995); Charles F. Gibbs
28 & Cindy D. Hanson, *The Fiduciary Exception to a Trustee’s Attorney/Client Privilege*, 21
29 ACTEC Notes 236 (1995). Prominent decisions in California and Texas have refused
30 to follow Delaware in recognizing an exception for the beneficiary against the
31 trustee’s attorney-client privilege. *Wells Fargo Bank v. Superior Court (Boltwood)*, 990
32 P.2d 591 (Cal. 2000); *Huie v. De Shazo*, 922 S.W. 2d 920 (Tex. 1996). The beneficiary-
33 as-client theory continues to be applied to ERISA trusts. See, e.g., *United States v.*
34 *Mett*, 178 F.3d 1058, 1062-64 (9th Cir. 1999). However, in a pension trust the
35 beneficiaries are the settlors of their own trust because the trust is funded with their
36 own earnings. Accordingly, in ERISA attorney-client cases “[t]here are no
37 competing interests such as other stockholders or the intentions of the Settlor.”
38 Gibbs & Hanson, 21 ACTEC Notes at 238. For further discussion of the attorney-
39 client privilege and whether there is a duty to disclose to the beneficiaries, see
40 ACTEC Commentaries on the Model Rules of Professional Conduct, Commentary
41 on MRPC 1.2 (3d ed. 1999); Rust E. Reid et al., *Privilege and Confidentiality Issues*
42 *When a Lawyer Represents a Fiduciary*, 30 REAL PROP. PROB. & TR. J. 541 (1996).
43

44 **Notice to beneficiaries of trustee’s acceptance of office.** To enable
45 beneficiaries to protect their interests effectively, it is essential that they know the
46 identity of the trustee. Subsection (b)(2) requires that a trustee inform the qualified
47 beneficiaries within 60 days of the trustee’s acceptance of office and of the trustee’s
48 name, address and telephone number. Similar to the obligation imposed on a

1 personal representative following admission of the will to probate, subsection (b)(3)
2 requires the trustee of a revocable trust to inform the qualified beneficiaries of the
3 trust's existence within 60 days after the settlor's death. These two duties can
4 overlap. If the death of the settlors happens also to be the occasion for the
5 appointment of a successor trustee, then the new trustee of the formerly revocable
6 trust would need to inform the qualified beneficiaries both of the trustee's
7 acceptance and of the trust's existence.
8

9 **Notice to beneficiaries of changes in trustee's compensation.** Subsection
10 (b)(4) deals with the sensitive issue of changes, usually increases, in trustee
11 compensation. Changes can include changes in a periodic base fee, rate of
12 percentage compensation, hourly rate, termination fee, or transaction charge.
13 Regarding the standard for setting trustee compensation, see Section 708 and
14 Comment.
15

16 **Requirement to furnish beneficiaries annual report.** Subsection (c) requires
17 the trustee to furnish the current beneficiaries and other beneficiaries who request it
18 with a copy of a trustee's report at least annually and upon termination of the trust.
19 Unless a co-trustee remains in office, the former trustee also must provide a report to
20 all of the qualified beneficiaries upon the trustee's resignation or removal. If the
21 vacancy occurred because of the former trustee's death or adjudication of incapacity,
22 then a report may, but need not be provided by the former trustee's personal
23 representative, conservator, or guardian.
24

25 The Uniform Trust Code employs the term "report" instead of "accounting"
26 in order to negate any inference that the report must be prepared in any particular
27 format or with a high degree of formality. The reporting requirement might even be
28 satisfied by providing the beneficiaries with copies of the trust's income tax returns
29 and monthly brokerage account statements if the information on those returns and
30 statements is complete and sufficiently clear. The key factor is not the format chosen
31 but whether the report provides the beneficiaries with the information necessary to
32 protect their interests. For model account forms, together with practical advice on
33 how to prepare reports, *see* Robert Whitman, *Fiduciary Accounting Guide* (2d ed.
34 1998).
35

36 **Waiver of right to trustee's report by beneficiary.** Subsection (d) allows
37 trustee reports and other required information to be waived by a beneficiary. A
38 beneficiary may also withdraw a consent. However, a waiver of a trustee's report or
39 other information does not relieve the trustee from accountability and potential
40 liability for matters that the report or other information would have disclosed.
41

42 **Effective date of notice provisions.** Subsection (b)(2) and (b)(3) require that
43 certain notices be sent by the trustee to the qualified beneficiaries within 60 days of
44 the trustee's acceptance of office, or within 60 days after the creation of an
45 irrevocable trust or the date a revocable trust becomes irrevocable. The drafting
46 committee added subsection (e) in 2004 to make clear the drafting committee's
47 intent that these requirements are not to be retroactively applied to trustee

1 acceptances and to trusts which have become irrevocable prior to the effective date
2 of the Code.

3
4 **Section 19-3B-814. Discretionary Powers; Tax Savings.**

5 (a) Notwithstanding the breadth of discretion
6 granted to a trustee in the terms of the trust, including the
7 use of such terms as "absolute," "sole," or "uncontrolled,"
8 the trustee shall exercise a discretionary power in good faith
9 and in accordance with the terms and purposes of the trust and
10 the interests of the beneficiaries.

11 (b) Subject to subsection (d), and unless the terms
12 of the trust expressly indicate that a rule in this subsection
13 does not apply:

14 (1) a person other than a settlor who is a
15 beneficiary and trustee of a trust that confers on the trustee
16 a power to make discretionary distributions to or for the
17 trustee's personal benefit may exercise the power only in
18 accordance with an ascertainable standard; and

19 (2) a trustee may not exercise a power to make
20 discretionary distributions to satisfy a legal obligation of
21 support that the trustee personally owes another person.

22 (c) A power whose exercise is limited or prohibited
23 by subsection (b) may be exercised by a majority of the
24 remaining trustees whose exercise of the power is not so
25 limited or prohibited. If the power of all trustees is so
26 limited or prohibited, then the court may appoint a special
27 fiduciary with authority to exercise the power.

28 (d) Subsection (b) does not apply to:

29 (1) a power held by the settlor's spouse who is the
30 trustee of a trust for which a marital deduction, as defined

1 in Section 2056(b)(5) or 2523(e) of the Internal Revenue Code
2 of 1986, as in effect on January 1, 2006, or as later amended,
3 was previously allowed;

4 (2) any trust during any period that the trust may
5 be revoked or amended by its settlor; or

6 (3) a trust if contributions to the trust qualify
7 for the annual exclusion under Section 2503(c) of the Internal
8 Revenue Code of 1986, as in effect on January 1, 2006, or as
9 later amended.

10 *Alabama Comment*

11
12 **Comparison to Uniform Code.** Section 814 is the same as Section 814 of the
13 Uniform Trust Code (2001). Notwithstanding any other provision of the Alabama
14 Trust Code, it is intended that the provisions of Section 814(b) be consistent with IRS
15 Rev. Proc. 94-44, 1994-2 C.B. 683.

16 *Uniform Comment*

17
18
19 **Purpose and scope.** Despite the breadth of discretion purportedly granted by
20 the wording of a trust, no grant of discretion to a trustee, whether with respect to
21 management or distribution, is ever absolute. A grant of discretion establishes a
22 range within which the trustee may act. The greater the grant of discretion, the
23 broader the range. Pursuant to subsection (a), a trustee's action must always be in
24 good faith, with regard to the purposes of the trust, and in accordance with the
25 trustee's other duties, including the obligation to exercise reasonable skill, care and
26 caution. *See* Sections 801 (duty to administer trust) and 804 (duty to act with
27 prudence). The standard stated in subsection (a) applies only to powers which are
28 to be exercised in a fiduciary as opposed to a nonfiduciary capacity. Regarding the
29 standards for exercising discretion and construing particular language of discretion,
30 *see* RESTATEMENT (THIRD) OF TRUSTS § 50 (Tentative Draft No. 2, approved 1999);
31 RESTATEMENT (SECOND) OF TRUSTS § 187 (1959). *See also* Edward C. Halbach, Jr.,
32 *Problems of Discretion in Discretionary Trusts*, 61 COLUM. L. REV. 1425 (1961). An
33 abuse by the trustee of the discretion granted in the terms of the trust is a breach of
34 trust that can result in surcharge. *See* Section 1001(b) (remedies for breach of trust).

35
36 Subsections (b) through (d) rewrite the terms of a trust that might otherwise
37 result in adverse estate and gift tax consequences to a beneficiary-trustee. This
38 Code does not generally address the subject of tax curative provisions. These are
39 provisions that automatically rewrite the terms of trusts that might otherwise fail to
40 qualify for probable intended tax benefits. Such provisions, because they apply to
41 all trusts using or failing to use specified language, are often overbroad, applying
42 not only to trusts intended to qualify for tax benefits but also to smaller trust

1 situations where taxes are not a concern. Enacting tax-curative provisions also
2 requires special diligence by state legislatures to make certain that these provisions
3 are periodically amended to account for the frequent changes in federal tax law.
4 Furthermore, many failures to draft with sufficient care may be correctable by
5 including a tax savings clause in the terms of the trust or by seeking modification of
6 the trust using one or more of the methods authorized by Sections 411 - 417.
7 Notwithstanding these reasons, the unintended inclusion of the trust in the
8 beneficiary-trustee's gross estate is a frequent enough occurrence that the drafters
9 concluded that it is a topic that this Code should address. It is also a topic on which
10 numerous states have enacted corrective statutes.

11
12 A tax curative provision differs from a statute such as Section 416 of this
13 Code, which allows a court to modify a trust to achieve an intended tax benefit.
14 Absent Congressional or regulatory authority authorizing the specific modification,
15 a lower court decree in state court modifying a trust is controlling for federal estate
16 tax purposes only if the decree was issued before the taxing event, which in the case
17 of the estate tax would be the decedent's death. *See* Rev. Rul. 73-142, 1973-1 C.B.
18 405. There is specific federal authority authorizing modification of trusts for a
19 number of reasons (*see* Comment to Section 416) but not on the specific issues
20 addressed in this section. Subsections (b) through (d), by interpreting the original
21 language of the trust instrument in a way that qualifies for intended tax benefits,
22 obviates the need to seek a later modification of the trust.

23
24 **General rule.** Subsection (b)(1) states the main rule. Unless the terms of the
25 trust expressly indicate that the rule in this subsection is not to apply, the power to
26 make discretionary distributions to a beneficiary-trustee is automatically limited by
27 the requisite ascertainable standard necessary to avoid inclusion of the trust in the
28 trustee's gross estate or result in a taxable gift upon the trustee's release or exercise
29 of the power. Trusts of which the trustee-beneficiary is also a settlors are not subject
30 to this subsection. In such a case, limiting the discretion of a settlors-trustee to an
31 ascertainable standard would not be sufficient to avoid inclusion of the trust in the
32 settlor's gross estate. *See generally* JOHN J. REGAN, REBECCA C. MORGAN & DAVID M.
33 ENGLISH, TAX, ESTATE AND FINANCIAL PLANNING FOR THE ELDERLY § 17.07[2][h].
34 Furthermore, the inadvertent inclusion of a trust in a settlors-trustee's gross estate is
35 a far less frequent and better understood occurrence than is the inadvertent
36 inclusion of the trust in the estate of a nonsettlor trustee-beneficiary.

37
38 **Distributions in satisfaction of trustee's legal obligation of support.**
39 Subsection (b)(2) addresses a common trap, the trustee who is not a beneficiary but
40 who has power to make discretionary distributions to those to whom the trustee
41 owes a legal obligation of support. Discretion to make distributions to those to
42 whom the trustee owes a legal obligation of support, such as to the trustee's minor
43 children, results in inclusion of the trust in the trustee's gross estate even if the
44 power is limited by an ascertainable standard. The applicable regulation provides
45 that the ascertainable standard exception applies only to distributions for the benefit
46 of the decedent, not to distributions to those to whom the decedent owes a legal
47 obligation of support. *See* Treas. Reg. § 20.2041-1(c)(2).
48

1 **Co-trustees.** Subsection (c) deals with co-trustees and adopts the common
2 planning technique of granting the broader discretion only to the independent
3 trustee. Co-trustees who are beneficiaries of the trust or who have a legal obligation
4 to support a beneficiary may exercise the power only as limited by subsection (b). If
5 all trustees are so limited, then the court may appoint a special fiduciary to make a
6 decision as to whether a broader exercise is appropriate.

7
8 **Exclusion for trusts qualifying for federal estate and gift tax marital**
9 **deduction.** Subsection (d) excludes certain trusts from the operation of this section.
10 Trusts qualifying for the marital deduction will be includable in the surviving
11 spouse's gross estate regardless of whether this section applies. Consequently, if the
12 spouse is acting as trustee, there is no need to limit the power of the spouse-trustee
13 to make discretionary distributions for the spouse's benefit. Similar reasoning
14 applies to the revocable trust, which, because of the settlor's power to revoke, is
15 automatically includable in the settlor's gross estate even if the settlors is not named
16 as a beneficiary.

17
18 QTIP marital trusts are subject to this section, however. QTIP trusts qualify
19 for the marital deduction only if so elected on the federal estate tax return.
20 Excluding a QTIP for which an election has been made from the operation of this
21 section would allow the terms of the trust to be modified after the settlor's death. By
22 not making the QTIP election, an otherwise unascertainable standard would be
23 limited. By making the QTIP election, the trustee's discretion would not be
24 curtailed. This ability to modify a trust depending on elections made on the federal
25 estate tax return could itself constitute a taxable power of appointment resulting in
26 inclusion of the trust in the surviving spouse's gross estate.

27
28 **Exclusion for Section 2503(c) minors trust.** The exclusion of the Section
29 2503(c) minors trust is necessary to avoid loss of gift tax benefits. While preventing
30 a trustee from distributing trust funds in discharge of a legal obligation of support
31 would keep the trust out of the trustee's gross estate, such a restriction might result
32 in loss of the gift tax annual exclusion for contributions to the trust, even if the
33 trustee were otherwise granted unlimited discretion. *See* Rev. Rul. 69-345, 1969-1
34 C.B. 226.

35
36 Section 19-3B-815. General Powers of Trustee.

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

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

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

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

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

7 (C) any other powers conferred by this chapter.

8 (b) The exercise of a power is subject to the
9 fiduciary duties prescribed by this article.

10
11 *Alabama Comment*

12
13 **Comparison to Uniform Code.** Section 815 is the same as Section 815 of the
14 Uniform Trust Code (2001).

15
16 *Uniform Comment*

17
18 **Purpose and scope.** This section is intended to grant trustees the broadest
19 possible powers, but to be exercised always in accordance with the duties of the
20 trustee and any limitations stated in the terms of the trust. This broad authority is
21 denoted by granting the trustee the powers of an unmarried competent owner of
22 individually owned property, unlimited by restrictions that might be placed on it by
23 marriage, disability, or cotenancy.

24
25 The powers conferred elsewhere in this Code that are subsumed under this
26 section include all of the specific powers listed in Section 816 as well as other powers
27 described elsewhere in this Code. *See* Sections 108(c) (transfer of principal place of
28 administration), 414(a) (termination of uneconomic trust with value less than
29 \$50,000), 417 (combination and division of trusts), 703(e) (delegation to co-trustee),
30 802(h) (exception to duty of loyalty), 807 (delegation to agent of powers and duties),
31 810(d) (joint investments), and Article 9 (Uniform Prudent Investor Act). The powers
32 conferred by this Code may be exercised without court approval. If court approval
33 of the exercise of a power is desired, then a petition for court approval should be
34 filed.

35
36 **Power *vis-à-vis* duty.** A duty imposes an obligation or a mandatory
37 prohibition. A power, on the other hand, is a discretion, the exercise of which is not
38 obligatory. The existence of a power, however created or granted, does not speak to
39 the question of whether it is prudent under the circumstances to exercise the power.

1 **Section 19-3B-816. Specific Powers of Trustee.**

2 (a) Without limiting the authority conferred by
3 Section 19-3B-815, a trustee may:

4 (1) collect trust property and accept or reject
5 additions to the trust property from a settlor or any other
6 person, including, but not being limited to, the authority to
7 receive, collect, hold, and retain common or preferred stock
8 or other interests in the trustee or any related party;

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

11 (3) exchange, partition, or otherwise change the
12 character of trust property;

13 (4) deposit trust money in an account in a regulated
14 financial-service institution;

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

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

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

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

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

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

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

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

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

24 (10) grant an option involving a sale, lease, or
25 other disposition of trust property or acquire an option for
26 the acquisition of property, including an option exercisable
27 beyond the duration of the trust, and exercise an option so
28 acquired;

1 (11) insure the property of the trust against damage
2 or loss and insure the trustee, the trustee's agents, and
3 beneficiaries against liability arising from the
4 administration of the trust;

5 (12) abandon or decline to administer property of no
6 value or of insufficient value to justify its collection or
7 continued administration;

8 (13) with respect to environmental law, exercise
9 those powers granted a fiduciary by applicable law;

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

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

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

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

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

1 (19) pledge trust property to guarantee loans made
2 by others to the beneficiary;

3 (20) appoint a trustee to act in another
4 jurisdiction with respect to trust property located in the
5 other jurisdiction, confer upon the appointed trustee all of
6 the powers and duties of the appointing trustee, require that
7 the appointed trustee furnish security, and remove any trustee
8 so appointed;

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

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

17 (B) paying it to the beneficiary's custodian under
18 the Uniform Transfers to Minors Act or custodial trustee under
19 the Uniform Custodial Trust Act, and, for that purpose,
20 creating a custodianship or custodial trust;

21 (C) if the trustee does not know of a conservator,
22 guardian, custodian, or custodial trustee, paying it to an
23 adult relative or other person having legal or physical care
24 or custody of the beneficiary, to be expended on the
25 beneficiary's behalf; or

26 (D) managing it as a separate fund on the
27 beneficiary's behalf, subject to the beneficiary's continuing
28 right to withdraw the distribution and the trustee shall not
29 be under any duty to see to the application of the payment so

1 made if the trustee acted as a prudent person in the selection
2 of the person, including the minor or incompetent, to whom the
3 payments were made; and the receipt of the person shall be
4 full acquittance to the trustee;

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

11 (23) resolve a dispute concerning the interpretation
12 of the trust or its administration by mediation, arbitration,
13 or other procedure for alternative dispute resolution and to
14 employ counsel, expert witnesses, or other agents;

15 (24) prosecute or defend an action, claim, or
16 judicial proceeding in any jurisdiction to protect trust
17 property and the trustee in the performance of the trustee's
18 duties and to employ counsel, expert witnesses, or other
19 agents;

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

23 (26) on termination of the trust, exercise the
24 powers appropriate to wind up the administration of the trust
25 and distribute the trust property to the persons entitled to
26 it;

27 (27) create or join in the creation of a joint
28 venture, partnership, limited liability company, business
29 trust, corporation, or other form of business or enterprise,

1 continue the business or other enterprise and take any action
2 that may be taken by shareholders, members, or property
3 owners, including merging, dissolving, or otherwise changing
4 the form of business organization or contributing additional
5 capital;

6 (28) employ and compensate persons deemed by the
7 trustee needful to advise or assist in the proper management
8 and administration of the trust, including, but not limited
9 to, agents, auditors, including public accountants, certified
10 public accountants or internal auditors, brokers, attorneys-
11 at-law, attorneys-in-fact, investment bankers, investment
12 advisors, rental agents, realtors, appraisers, and tax
13 specialists, including any related party, so long as the
14 relationship and the fees charged are reasonable and disclosed
15 in any reasonable manner to the current beneficiaries; and to
16 do so without liability for any neglect, omission, misconduct,
17 or default of the agent or representative, provided the
18 trustee acted as a prudent person in selecting and monitoring
19 the agent or representative. For purposes of the immediately
20 preceding sentence, compensation charged by or paid to an
21 affiliated business entity shall be presumed to be reasonable
22 if the compensation is consistent with the published fee
23 schedule maintained by the affiliated business entity in the
24 ordinary course of business;

25 (29) pay any and all expenses reasonably necessary
26 for the administration of the trust including interest, taxes,
27 insurance premiums, assessments, agents' fees or compensation,
28 trustees' fees or compensation, including additional fees for
29 extraordinary services and fees to related parties, and other

1 expenses incurred in the collection, care, administration, and
2 protection of the trust estate; and

3 (30) in addition to the investments authorized by
4 the document or any provision of law for the investment of
5 funds held by a trustee, the trustee may invest in and hold
6 (i) interests, however evidenced, in any common trust fund or
7 other collective investment fund maintained by any national or
8 state chartered bank or trust company having trust powers or
9 (ii) securities of or other interests in any open-end or
10 closed-end management type investment company or investment
11 trust so long as the portfolio of such common trust fund,
12 collective investment fund, or investment company or
13 investment trust consists of investments authorized with
14 respect to the trustee.

15 (b) Nothing contained in this section, insofar as
16 such authorization may be prohibited by the Constitution of
17 Alabama of 1901, shall authorize the investment of trust
18 assets in the stock of any private corporation.

19
20 *Alabama Comment*

21
22 **Comparison to Uniform Code.** Section 816(a) is substantially the same as
23 Section 816 of the Uniform Trust Code (2001). Alabama includes the specific powers
24 in subsection (a), and adds a new subsection (b), which is explained in the
25 succeeding paragraph.

26
27 Alabama adds the clause “including but not being limited to the authority to
28 receive, collect, hold and retain common or preferred stock or other interests in the
29 trustee or any related party” to subsection 816(a)(1), consistent with current law.

30
31 Alabama adds language to subsection (a)(21), which provides that the trustee
32 shall not be under any duty to see to the application of payments to beneficiaries
33 under a legal disability or who the trustee believes to be incapacitated, so long as the
34 trustee acted as a prudent person in the selection of the person to whom the
35 payments were made.

1 While many of the powers listed in this section are similar to the powers
2 listed in Section 3 of the Uniform Trustees' Powers Act (1964), Alabama incorporates
3 additional powers from former ALA. CODE § 19-3-322, which is repealed by this
4 Code. See subsections
5 (a)(27) through (a)(30).
6

7 Alabama adds subsection (b), because at the time of enactment of this Code, §
8 74 of the Constitution of Alabama of 1901 prohibits the legislature from enacting any
9 law which "authorize[s] the investment of any trust fund by executors,
10 administrators, guardians, or other trustees in the stock of any private corporation
11 ...". At such time as the Constitution is amended to eliminate this prohibition,
12 subsection (b) will have no further effect. The language in subsection (b) is derived
13 from the last sentence of former Ala. Code § 19-3-322(3).
14

15 **Environmental laws – fiduciary's powers.** Alabama substantially re-writes
16 subsection (a)(13), which grants specific powers to the trustee in dealing with
17 violations of federal and state environmental laws. ALA. CODE § 19-3-11 contains
18 similar provisions, which are applicable to fiduciaries, and the drafters of the
19 Alabama Trust Code did not want to include parallel provisions, which could lead
20 to confusion, in Section 816(a)(13).

21 **Participation in business entities.** Alabama adds subsection (a)(27), which
22 provides that a trustee may create or join in the creation of a number of business
23 relationships. See also ALA. CODE §§ 19-3-150, *et seq.*

24 *Uniform Comment*

25
26
27 **Purpose and scope.** This section enumerates specific powers commonly
28 included in trust instruments and in trustee powers legislation. All the powers
29 listed are subject to alteration in the terms of the trust. *See* Section 105. The powers
30 listed are also subsumed under the general authority granted in Section 815(a)(2) to
31 exercise all powers over the trust property which an unmarried competent owner
32 has over individually owned property, and any other powers appropriate to achieve
33 the proper management, investment, and distribution of the trust property. The
34 powers listed add little of substance not already granted by Section 815 and powers
35 conferred elsewhere in the Code, which are listed in the Comment to Section 815.
36 While the Committee drafting this Code discussed dropping the list of specific
37 powers, it concluded that the demand of third parties to see language expressly
38 authorizing specific transactions justified retention of a detailed list.

39 As provided in Section 815(b), the exercise of a power is subject to fiduciary
40 duties except as modified in the terms of the trust. The fact that the trustee has a
41 power does not imply a duty that the power must be exercised.
42

43 Many of the powers listed in this section are similar to the powers listed in
44 Section 3 of the Uniform Trustees' Powers Act (1964). Several are new, however,
45 and other powers drawn from that Act have been updated. The powers enumerated
46 in this section may be divided into categories. Certain powers, such as the powers
47 to acquire or sell property, borrow money, and deal with real estate, securities, and

1 business interests, are powers that any individual can exercise. Other powers, such
2 as the power to collect trust property, are by their very nature only applicable to
3 trustees. Other specific powers, particularly those listed in other sections of the
4 Uniform Trust Code, modify a trustee duty that would otherwise apply. *See, e.g.,*
5 Sections 802(h) (exceptions to duty of loyalty) and 810(d) (joint investments as
6 exception to earmarking requirement).

7
8 **Power to collect trust property.** Paragraph (1) authorizes a trustee to collect
9 trust property and collect or decline additions to the trust property. The power to
10 collect trust property is an incident of the trustee's duty to administer the trust as
11 provided in Section 801. The trustee has a duty to enforce claims as provided in
12 Section 811, the successful prosecution of which can result in collection of trust
13 property. Pursuant to Section 812, the trustee also has a duty to collect trust
14 property from a former trustee or other person holding trust property. For an
15 application of the power to reject additions to the trust property, see Section 816(13)
16 (power to decline property with possible environmental liability).

17
18 **Power to sell trust property.** Paragraph (2) authorizes a trustee to sell trust
19 property, for cash or on credit, at public or private sale. Under the Restatement, a
20 power of sale is implied unless limited in the terms of the trust. RESTATEMENT
21 (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 190 (1992). In arranging a sale, a
22 trustee must comply with the duty to act prudently as provided in Section 804. This
23 duty may dictate that the sale be made with security.

24
25 **Power to deposit funds.** Paragraph (4) authorizes a trustee to deposit funds
26 in an account in a regulated financial-service institution. This includes the right of a
27 financial institution trustee to deposit funds in its own banking department as
28 authorized by Section 802(h)(4).

29
30 **Power to borrow money.** Paragraph (5) authorizes a trustee to borrow
31 money. Under the Restatement, the sole limitation on such borrowing is the general
32 obligation to invest prudently. *See* RESTATEMENT (THIRD) OF TRUSTS: PRUDENT
33 INVESTOR RULE § 191 (1992). Language clarifying that the loan may extend beyond
34 the duration of the trust was added to negate an older view that the trustee only had
35 power to encumber the trust property for the period that the trust was in existence.

36
37 **Power to continue or change form of business.** Paragraph (6) authorizes the
38 trustee to continue, contribute additional capital to, or change the form of a business.
39 Any such decision by the trustee must be made in light of the standards of prudent
40 investment stated in Article 9.

41
42 **Powers with respect to securities.** Paragraph (7), regarding powers with
43 respect to securities, codifies and amplifies the principles of Restatement (Second) of
44 Trusts § 193 (1959).

45
46 **Power to lease property.** Paragraph (9), authorizing the leasing of property,
47 negates the older view, reflected in Restatement (Second) of Trusts § 189 cmt. c
48 (1959), that a trustee could not lease property beyond the duration of the trust.

1 Whether a longer term lease is appropriate is judged by the standards of prudence
2 applicable to all investments.

3
4 **Power to grant options.** Paragraph (10), authorizing a trustee to grant options
5 with respect to sales, leases or other dispositions of property, negates the older view,
6 reflected in Restatement (Second) of Trusts § 190 cmt. k (1959), that a trustee could
7 not grant another person an option to purchase trust property. Like any other
8 investment decision, whether the granting of an option is appropriate is a question
9 of prudence under the standards of Article 9.

10
11 **Power to purchase insurance.** Paragraph (11), authorizing a trustee to
12 purchase insurance, empowers a trustee to implement the duty to protect trust
13 property. *See* Section 809. The trustee may also insure beneficiaries, agents, and the
14 trustee against liability, including liability for breach of trust.

15
16 **Environmental law violations.** Paragraph (13) is one of several provisions in
17 the Uniform Trust Code designed to address trustee concerns about possible
18 liability for violations of environmental law. This paragraph collects all the powers
19 relating to environmental concerns in one place even though some of the powers,
20 such as the powers to pay expenses, compromise claims, and decline property,
21 overlap with other paragraphs of this section (decline property, paragraph (1);
22 compromise claims, paragraph (14); pay expenses, paragraph (15)). Numerous
23 states have legislated on the subject of environmental liability of fiduciaries. For a
24 representative state statute, *see* TEX. PROP. CODE ANN. § 113.025. *See also* Sections
25 701(c)(2) (designated trustee may inspect property to determine potential violation
26 of environmental or other law or for any purpose) and 1010(b) (trustee not
27 personally liable for violation of environmental law arising from ownership or
28 control of trust property).

29 **Power to pay, contest or settle claims.** Paragraph (14) authorizes a trustee to
30 pay, contest, settle, or release claims. Section 811 requires that a trustee need take
31 only “reasonable” steps to enforce claims, meaning that a trustee may release a claim
32 not only when it is uncollectible, but also when collection would be uneconomic. *See*
33 RESTATEMENT (SECOND) OF TRUSTS § 192 (1959) (power to compromise, arbitrate and
34 abandon claims).

35
36 **Power to compensate agents without prior approval.** Paragraph (15), among
37 other things, authorizes a trustee to pay compensation to the trustee and agents
38 without prior approval of court. Regarding the standard for setting trustee
39 compensation, *see* Section 708. *See also* Section 709 (repayment of trustee
40 expenditures). While prior court approval is not required, Section 813(b)(4) requires
41 the trustee to inform the qualified beneficiaries in advance of a change in the method
42 or rate of compensation.

43
44 **Power to make tax elections.** Paragraph (16) authorizes a trustee to make
45 elections with respect to taxes. The Uniform Trust Code leaves to other law the
46 issue of whether the trustee, in making such elections, must make compensating
47 adjustments in the beneficiaries’ interests.

1 **Power with respect to employee benefit or retirement plans.** Paragraph (17)
2 authorizes a trustee to take action with respect to employee benefit or retirement
3 plans, or annuities or life insurance payable to the trustee. Typically, these will be
4 beneficiary designations which the settlors has made payable to the trustee, but this
5 Code also allows the trustee to acquire ownership of annuities or life insurance.
6

7 **Power to make loans out of trust property.** Paragraphs (18) and (19) allow a
8 trustee to make loans to a beneficiary or to guarantee loans of a beneficiary upon
9 such terms and conditions as the trustee considers fair and reasonable. The
10 determination of what is fair and reasonable must be made in light of the fiduciary
11 duties of the trustee and the purposes of the trust. Frequently, a trustee will make
12 loans to a beneficiary which might be considered less than prudent in an ordinary
13 commercial sense although of great benefit to the beneficiary and which help carry
14 out the trust purposes. If the trustee requires security for the loan to the beneficiary,
15 then adequate security under this paragraph may consist of a charge on the
16 beneficiary's interest in the trust. *See* RESTATEMENT (SECOND) OF TRUSTS § 255 (1959).
17 However, the interest of a beneficiary subject to a spendthrift restraint may not be
18 pledged as security for a loan. *See* Section 502.
19

20 **Power to appoint ancillary trustee.** Paragraph (20) authorizes the
21 appointment of ancillary trustees in jurisdictions in which the regularly appointed
22 trustee is unable or unwilling to act. Normally, an ancillary trustee will be
23 appointed only when there is a need to manage real estate located in another
24 jurisdiction. This paragraph allows the regularly appointed trustee to select the
25 ancillary trustee and to confer on the ancillary trustee such powers and duties as
26 may be necessary. The appointment of ancillary trustees is a topic which a settlors
27 may wish to address in the terms of the trust.
28

29 **Power to make distributions for beneficiary under legal disability.**
30 Paragraph (21) authorizes a trustee to make payments to another person for the use
31 or benefit of a beneficiary who is under a legal disability or who the trustee
32 reasonably believes is incapacitated. Although an adult relative or other person
33 receiving funds is required to spend it on the beneficiary's behalf, it is preferable
34 that the trustee make the distribution to a person having more formal fiduciary
35 responsibilities. For this reason, payment may be made to an adult relative only if
36 the trustee does not know of a conservator, guardian, custodian, or custodial trustee
37 capable of acting for the beneficiary.

38 **Power to make non *pro-rata* distributions.** Paragraph (22) authorizes a
39 trustee to make non *pro-rata* distributions and allocate particular assets in
40 proportionate or disproportionate shares. This power provides needed flexibility
41 and lessens the risk that a non-*pro-rata* distribution will be treated as a taxable sale.
42

43 **Power to resolve disputes through alternate dispute resolution.** Paragraph
44 (23) authorizes a trustee to resolve disputes through mediation or arbitration. The
45 drafters of this Code encourage the use of such alternate methods for resolving
46 disputes. Arbitration is a form of nonjudicial settlement agreement authorized by
47 Section 111. In representing beneficiaries and others in connection with arbitration
48 or mediation, the representation principles of Article 3 may be applied. Settlers

1 wishing to encourage use of alternate dispute resolution may draft to provide it. For
2 sample language, *see* American Arbitration Association, *Arbitration Rules for Wills*
3 *and Trusts* (1995).

4
5 **Power to prosecute or defend action.** Paragraph (24) authorizes a trustee to
6 prosecute or defend an action. As to the propriety of reimbursement for attorney's
7 fees and other expenses of an action or judicial proceeding, *see* Section 709 and
8 Comment. *See also* Section 811 (duty to defend actions).

9
10 **Exercise of powers after in connection with termination of trust.** Paragraph
11 (26), which is similar to Section 344 of the Restatement (Second) of Trusts (1959),
12 clarifies that even though the trust has terminated, the trustee retains the powers
13 needed to wind up the administration of the trust and distribute the remaining trust
14 property.

15
16 **Section 19-3B-817. Distribution Upon Termination.**

17 (a) Upon termination or partial termination of a
18 trust, the trustee may send to the beneficiaries a proposal
19 for distribution. The right of any beneficiary to object to
20 the proposed distribution terminates if the beneficiary does
21 not notify the trustee of an objection within 30 days after
22 the proposal was sent but only if the proposal informed the
23 beneficiary of the right to object and of the time allowed for
24 objection.

25 (b) Upon the occurrence of an event terminating or
26 partially terminating a trust, the trustee shall proceed
27 expeditiously to distribute the trust property to the persons
28 entitled to it, subject to the right of the trustee to retain
29 a reasonable reserve for the payment of debts, expenses, and
30 taxes.

31 (c) A release by a beneficiary of a trustee from
32 liability for breach of trust is invalid to the extent:

33 (1) it was induced by improper conduct of the
34 trustee; or

1 (2) the beneficiary, at the time of the release, did
2 not know of the material facts relating to the alleged breach
3 and the trustee had actual knowledge of the facts relating to
4 the alleged breach.

5
6 *Alabama Comment*
7

8 **Comparison to Uniform Code.** Section 817 is the same as Section 817 of the
9 Uniform Trust Code (2001). Alabama does, however, change the language in
10 subsection (c)(2) – the Uniform Code draft read as follows : "... the beneficiary, at
11 the time of the release, did not know of the beneficiary's rights or of the material
12 facts relating to the breach." The Alabama drafting committee felt that in order to
13 have a valid release, the trustee should not be placed in the position of legal counsel
14 to the beneficiary – the release should be subject to the requirement that the trustee
15 disclose only those material facts to which the trustee had actual knowledge. (See
16 also similar change to the Uniform Code at Section 1009(2).)
17

18 *Uniform Comment*
19

20 **Purpose and scope.** This section contains several provisions governing
21 distribution upon termination. Other provisions of the Uniform Trust Code relevant
22 to distribution upon termination include Section 816(26) (powers upon termination
23 to windup administration and distribution), and 1005 (limitation of action against
24 trustee).
25

26 **Proposal for distribution and right of beneficiary to object.** Subsection (a) is
27 based on Section 3-906(b) of the Uniform Probate Code. It addresses the dilemma
28 that sometimes arises when the trustee is reluctant to make distribution until the
29 beneficiary approves but the beneficiary is reluctant to approve until the assets are
30 in hand. The procedure made available under subsection (a) facilitates the making
31 of non-pro-rata distributions. However, whenever practicable it is normally better
32 practice to obtain the advance written consent of the beneficiaries to a proposed plan
33 of distribution.
34

35 **Right of trustee to retain a reasonable reserve upon termination.** Subsection
36 (b) recognizes that upon an event terminating or partially terminating a trust,
37 expeditious distribution should be encouraged to the extent reasonable under the
38 circumstances. However, a trustee is entitled to retain a reasonable reserve for
39 payment of debts, expenses, and taxes. Sometimes these reserves must be quite
40 large, for example, upon the death of the beneficiary of a QTIP trust that is subject to
41 federal estate tax in the beneficiary's estate. Not infrequently, a substantial reserve
42 must be retained until the estate tax audit is concluded several years after the
43 beneficiary's death.
44

1 ARTICLE 9

2 PRUDENT INVESTOR RULE

3
4 **Section 19-3B-901. Prudent Investor Rule.**

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

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

14 *Alabama Comment*

15
16
17 **Comparison to Uniform Code.** Section 901 is substantially the same as
18 Section 1 of the Uniform Prudent Investor Act (1994). In subsection (b), the words
19 “provisions of a trust” are replaced with the words “terms of a trust” in order to
20 conform the language in the Uniform Act with the definition under Section 104(17)
21 of the Uniform Code. The prudent investor rule is intended to establish a standard
22 of care for trustees, and not a rule of law *per se*.

23
24 *Uniform Comment*

25
26 **Purpose and scope.** This section imposes the obligation of prudence in the
27 conduct of investment functions and identifies further sections of the UPIA that
28 specify the attributes of prudent conduct.

29
30 **Origins.** The prudence standard for trust investing traces back to *Harvard*
31 *College v. Amory*, 26 Mass. (9 Pick.) 446 (1830). Trustees should “observe how men of
32 prudence, discretion and intelligence manage their own affairs, not in regard to
33 speculation, but in regard to the permanent disposition of their funds, considering
34 the probable income, as well as the probable safety of the capital to be invested.” *Id.*
35 at 461.

36
37 **Prior legislation.** The Model Prudent Man Rule Statute (1942), sponsored by
38 the American Bankers Association, undertook to codify the language of the *Amory*
39 case. See Mayo A. Shattuck, *The Development of the Prudent Man Rule for Fiduciary*

1 *Investment in the United States in the Twentieth Century*, 12 OHIO STATE L.J. 491, at 501
2 (1951); for the text of the model act, which inspired many state statutes, *see id.* at 508-
3 09. Another prominent codification of the *Amory* standard is UNIFORM PROBATE
4 CODE § 7-302 (1969), which provides that “the trustee shall observe the standards in
5 dealing with the trust assets that would be observed by a prudent man dealing with
6 the property of another ...”

7
8 Congress has imposed a comparable prudence standard for the
9 administration of pension and employee benefit trusts in the Employee Retirement
10 Income Security Act (ERISA), enacted in 1974. ERISA § 404(a)(1)(B), 29 U.S.C. §
11 1104(a), provides that “a fiduciary shall discharge his duties with respect to a plan
12 solely in the interest of the participants and beneficiaries and ... with the care, skill,
13 prudence, and diligence under the circumstances then prevailing that a prudent
14 man acting in a like capacity and familiar with such matters would use in the
15 conduct of an enterprise of like character and with like aims ...”

16
17 **Prior Restatement.** The RESTATEMENT (SECOND) OF TRUSTS (1959) also tracked
18 the language of the *Amory* case: “In making investments of trust funds the trustee is
19 under a duty to the beneficiary ... to make such investments and only such
20 investments as a prudent man would make of his own property having in view the
21 preservation of the estate and the amount and regularity of the income to be derived
22 ...” RESTATEMENT (SECOND) OF TRUSTS § 227 (1959).

23
24 **Objective standard.** The concept of prudence in the judicial opinions and
25 legislation is essentially relational or comparative. It resembles in this respect the
26 “reasonable person” rule of tort law. A prudent trustee behaves as other trustees
27 similarly situated would behave. The standard is, therefore, objective rather than
28 subjective. Sections 2 through 9 of the UPIA identify the main factors that bear on
29 prudent investment behavior.

30
31 **Variation.** Almost all of the rules of trust law are default rules, that is, rules
32 that the settlors may alter or abrogate. Subsection (b) carries forward this traditional
33 attribute of trust law. Traditional trust law also allows the beneficiaries of the trust
34 to excuse its performance, when they are all capable and not misinformed.
35 RESTATEMENT (SECOND) OF TRUSTS § 216 (1959).

36
37 **Section 19-3B-902. Standard of Care; Portfolio Strategy; Risk**
38 **and Return Objectives.**

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

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

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

9 (1) general economic conditions;

10 (2) the possible effect of inflation or deflation;

11 (3) the expected tax consequences of investment
12 decisions or strategies;

13 (4) the role that each investment or course of
14 action plays within the overall trust portfolio, which may
15 include financial assets, interests in closely held
16 enterprises, tangible and intangible personal property, and
17 real property;

18 (5) the expected total return from income and the
19 appreciation of capital;

20 (6) other resources of the beneficiaries;

21 (7) needs for liquidity, regularity of income, and
22 preservation or appreciation of capital;

23 (8) an asset's special relationship or special
24 value, if any, to the purposes of the trust or to one or more
25 of the beneficiaries;

26 (9) the size of the portfolio; and

27 (10) the purposes and estimated duration of the
28 trust.

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

4 (e) A trustee may invest in any kind of property or
5 type of investment consistent with the standards of this
6 chapter. Nothing contained in this section, insofar as such
7 authorization may be prohibited by the Constitution of Alabama
8 of 1901, shall authorize the investment of trust assets in the
9 stock of any private corporation.

10 *Alabama Comment*

11
12
13 **Comparison to Uniform Code.** Section 902 is substantially the same as
14 Section 2 of the Uniform Prudent Investor Act (1994). Alabama changes the word
15 “shall” to “may” in subsection 902(c) to make clear that the failure to expressly
16 consider all of the ten listed factors is not a breach of duty *per se* in the exercise of the
17 trustee’s investment responsibilities. In some circumstances, one factor may bear
18 greater consideration than other factors. Alabama also adds Section 902(c)(9), “the
19 anticipated duration of the trust,” which derives its origin from former ALA. CODE §
20 19-3-120.2(a). Finally, Alabama adds a sentence to subsection 902(e) to make clear
21 that the Code is not intended to authorize types of investments that are prohibited
22 by the Alabama Constitution of 1901. Finally, subsection 2(f) of the UPIA is deleted,
23 because it is addressed in Section 806 of the Uniform Code.

24 *Uniform Comment*

25
26
27 **Purpose and scope.** Section 2 is the heart of the UPIA. Subsections (a), (b),
28 and (c) are patterned loosely on the language of the RESTATEMENT (THIRD) OF TRUSTS:
29 PRUDENT INVESTOR RULE § 227 (1992), and on the 1991 Illinois statute, 760 § ILCS
30 5/5a (1992). Subsection (f) is derived from UNIFORM PROBATE CODE § 7-302 (1969).

31
32 **Objective standard.** Section 2(a) of the UPIA carries forward the relational
33 and objective standard made familiar in the *Amory* case, in earlier prudent investor
34 legislation, and in the Restatements. Early formulations of the prudent person rule
35 were sometimes troubled by the effort to distinguish between the standard of a
36 prudent person investing for another and investing on his or her own account. The
37 language of § 2(a), by relating the trustee’s duty to “the purposes, terms, distribution
38 requirements, and other circumstances of the trust,” should put such questions to
39 rest. The standard is the standard of the prudent investor similarly situated.

40
41 **Portfolio standard.** Section 2(b) of the UPIA emphasizes the consolidated
42 portfolio standard for evaluating investment decisions. An investment that might

1 be imprudent standing alone can become prudent if undertaken in sensible relation
2 to other trust assets, or to other nontrust assets. In the trust setting, the term
3 “portfolio” embraces the entire trust estate.
4

5 **Risk and return.** Section 2(b) of the UPIA also sounds the main theme of
6 modern investment practice: sensitivity to the risk/return curve. *See generally* the
7 works cited in the Prefatory Note to the UPIA, under “Literature.” Returns correlate
8 strongly with risk, but tolerance for risk varies greatly with the financial and other
9 circumstances of the investor, or in the case of a trust, with the purposes of the trust
10 and the relevant circumstances of the beneficiaries. A trust whose main purpose is
11 to support an elderly widow of modest means will have a lower risk tolerance than
12 a trust to accumulate for a young scion of great wealth.
13

14 Section 2(b) of the UPIA follows RESTATEMENT (THIRD) OF TRUSTS: PRUDENT
15 INVESTOR RULE § 227(a), which provides that the standard of prudent investing
16 “requires the exercise of reasonable care, skill, and caution, and is to be applied to
17 investments not in isolation but in the context of the trust portfolio and as a part of
18 an overall investment strategy, which should incorporate risk and return objectives
19 reasonably suitable to the trust.”
20

21 **Factors affecting investment.** Section 2(c) of the UPIA points to certain of the
22 factors that commonly bear on risk/return preferences in fiduciary investing. This
23 listing is nonexclusive. Tax considerations, such as preserving the stepped up basis
24 on death under Internal Revenue Code § 1014 for low basis assets, have traditionally
25 been exceptionally important in estate planning for affluent persons. Under the
26 present recognition rules of the federal income tax, taxable investors, including trust
27 beneficiaries, are in general best served by an investment strategy that minimizes the
28 taxation incident to portfolio turnover. *See generally* Robert H. Jeffrey & Robert D.
29 Arnott, *Is Your Alpha Big Enough to Cover Its Taxes?*, JOURNAL OF PORTFOLIO
30 MANAGEMENT 15 (Spring 1993).
31

32 Another familiar example of how tax considerations bear upon trust
33 investing: In a regime of pass-through taxation, it may be prudent for the trust to
34 buy lower yielding tax-exempt securities for high-bracket taxpayers, whereas it
35 would ordinarily be imprudent for the trustees of a charitable trust, whose income is
36 tax exempt, to accept the lowered yields associated with tax-exempt securities.
37

38 When tax considerations affect beneficiaries differently, the trustee’s duty of
39 impartiality requires attention to the competing interests of each of them.
40

41 Section 2(c)(8) of the UPIA, allowing the trustee to take into account any
42 preferences of the beneficiaries respecting heirlooms or other prized assets, derives
43 from the Illinois act, 760 ILCS § 5/5(a)(4) (1992).
44

45 **Duty to monitor.** Sections 2(a) through 2(d) of the UPIA apply both to
46 investing and managing trust assets. “Managing” embraces monitoring, that is, the
47 trustee’s continuing responsibility for oversight of the suitability of investments
48 already made as well as the trustee’s decisions respecting new investments.

1
2 **Duty to investigate.** Section 2(d) of the UPIA carries forward the traditional
3 responsibility of the fiduciary investor to examine information likely to bear
4 importantly on the value or the security of an investment – for example, audit
5 reports or records of title. *E.g.*, Estate of Collins, 72 Cal. App. 3d 663, 139 Cal. Rptr.
6 644 (1977) (trustees lent on a junior mortgage on unimproved real estate, failed to
7 have land appraised, and accepted an unaudited financial statement; held liable for
8 losses).

9
10 **Abrogating categoric restrictions.** Section 2(e) of the UPIA clarifies that no
11 particular kind of property or type of investment is inherently imprudent.
12 Traditional trust law was encumbered with a variety of categoric exclusions, such as
13 prohibitions on junior mortgages or new ventures. In some states, legislation
14 created so-called “legal lists” of approved trust investments. The universe of
15 investment products changes incessantly. Investments that were at one time
16 thought too risky, such as equities, or more recently, futures, are now used in
17 fiduciary portfolios. By contrast, the investment that was at one time thought ideal
18 for trusts, the long-term bond, has been discovered to import a level of risk and
19 volatility – in this case, inflation risk – that had not been anticipated. Accordingly,
20 section 2(e) of the UPIA follows RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR
21 RULE (1992) in abrogating categoric restrictions. The Restatement says: “Specific
22 investments or techniques are not *per se* prudent or imprudent. The riskiness of a
23 specific property, and thus the propriety of its inclusion in the trust estate, is not
24 judged in the abstract but in terms of its anticipated effect on the particular trust’s
25 portfolio.” RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 227, cmt. f, at
26 24 (1992). The premise of subsection 2(e) is that trust beneficiaries are better
27 protected by the UPIA’s emphasis on close attention to risk/return objectives as
28 prescribed in Section 2(b) of the UPIA than in attempts to identify categories of
29 investment that are *per se* prudent or imprudent.

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

35
36 The abolition of categoric restrictions against types of investment in no way
37 alters the trustee’s conventional duty of loyalty, which is reiterated for the purposes
38 of the UPIA in Section 5. For example, were the trustee to invest in a second
39 mortgage on a piece of real property owned by the trustee, the investment would be
40 wrongful on account of the trustee’s breach of the duty to abstain from self-dealing,
41 even though the investment would no longer automatically offend the former
42 categoric restriction against fiduciary investments in junior mortgages.

43
44 **Matters of proof.** Although virtually all express trusts are created by written
45 instrument, oral trusts are known, and accordingly, the UPIA presupposes no
46 formal requirement that trust terms be in writing. When there is a written trust
47 instrument, modern authority strongly favors allowing evidence extrinsic to the
48 instrument to be consulted for the purpose of ascertaining the settlor’s intent. See

3
4 **Section 19-3B-903. Diversification.**

5 (a) A trustee shall diversify the investments of the
6 trust unless the trustee reasonably determines that, because
7 of special circumstances, the purposes of the trust are better
8 served without diversifying.

9 (b) In the absence of an express provision to the
10 contrary in the terms of the trust, a trustee without
11 liability, may continue to hold property received into the
12 trust at its inception or subsequently added to it or acquired
13 pursuant to proper authority if and so long as the trustee, in
14 the exercise of good faith and of reasonable prudence,
15 considers the retention to be in the best interest of the
16 trust or in furtherance of the purposes of the trust. The
17 property shall include any successor-in-interest to the
18 original property. The property may also include, among other
19 things, stock in the trustee if a corporation and stock in any
20 corporation controlling, controlled by, or under common
21 control with the trustee.

22
23 *Alabama Comment*

24
25 **Comparison to Uniform Code.** Subsection (a) is the same as Section 3 of the
26 Uniform Prudent Investor Act (1994). Alabama adds subsection (b), which is derived
27 from former ALA. CODE § 19-3-120.2(d), in order to allow the trustee to give some
28 consideration to the settlor's investments at the time of the inception of the trust
29 when determining the goals and purposes of the trust.

30
31 When making investment decisions with regard to diversifying the
32 investments, diversification can be achieved through certain entities, such as family
33 limited partnerships and limited liability companies, by the trustee taking a "look
34 through" approach, in much the same manner that the trustee would with regard to
35 common trust funds and mutual funds.

1 While the mere existence of a family business, home or land as a significant
2 portion of a trust may constitute special circumstances that arguably override the
3 duty to diversify, it is the better practice to specifically override the duty to diversify
4 or to direct the retention of specific assets in the terms of the trust when the retention
5 of assets is contemplated or desired by the settlors. Absent a specific provision, the
6 subjective standards of “special circumstances” and “better served” can subject the
7 trustee to the risk of breach of trust and could cause the sale of an asset that the
8 settlors or the beneficiaries would have preferred to retain.

9
10 **Life insurance policies held by the trustee.** Section 818 addresses the
11 various issues with respect to life insurance, among them the issue concerning
12 trustee liability to a beneficiary for lack of diversification.

13 *Uniform Comment*

14
15
16 **Purpose and scope.** The language of this section derives from RESTATEMENT
17 (SECOND) OF TRUSTS § 228 (1959). ERISA insists upon a comparable rule for pension
18 trusts. ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C). Case law overwhelmingly
19 supports the duty to diversify. *See* Annotation, *Duty of Trustee to Diversify*
20 *Investments, and Liability for Failure to Do So*, 24 A.L.R. 3d 730 (1969) & 1992 Supp. at
21 78-79.

22
23 The 1992 Restatement of Trusts takes the significant step of integrating the
24 diversification requirement into the concept of prudent investing. Section 227(b) of
25 the 1992 Restatement treats diversification as one of the fundamental elements of
26 prudent investing, replacing the separate section 228 of the Restatement (Second) of
27 Trusts. The message of the 1992 Restatement, carried forward in Section 3 of the
28 UPIA, is that prudent investing ordinarily requires diversification.

29
30 Circumstances can, however, overcome the duty to diversify. For example, if
31 a tax-sensitive trust owns an under diversified block of low-basis securities, the tax
32 costs of recognizing the gain may outweigh the advantages of diversifying the
33 holding. The wish to retain a family business is another situation in which the
34 purposes of the trust sometimes override the conventional duty to diversify.

35
36 **Rationale for diversification.** “Diversification reduces risk ... [because] stock
37 price movements are not uniform. They are imperfectly correlated. This means that
38 if one holds a well diversified portfolio, the gains in one investment will cancel out
39 the losses in another.” JONATHAN R. MACEY, AN INTRODUCTION TO MODERN
40 FINANCIAL THEORY 20 (American College of Trust and Estate Counsel Foundation,
41 1991). For example, during the Arab oil embargo of 1973, international oil stocks
42 suffered declines, but the shares of domestic oil producers and coal companies
43 benefitted. Holding a broad enough portfolio allowed the investor to set off, to
44 some extent, the losses associated with the embargo.

45
46 Modern portfolio theory divides risk into the categories of “compensated”
47 and “uncompensated” risk. The risk of owning shares in a mature and well-
48 managed company in a settled industry is less than the risk of owning shares in a

1 start-up high-technology venture. The investor requires a higher expected return to
2 induce the investor to bear the greater risk of disappointment associated with the
3 start-up firm. This is compensated risk – the firm pays the investor for bearing the
4 risk. By contrast, nobody pays the investor for owning too few stocks. The investor
5 who owned only international oils in 1973 was running a risk that could have been
6 reduced by having configured the portfolio differently – to include investments in
7 different industries. This is uncompensated risk – nobody pays the investor for
8 owning shares in too few industries and too few companies. Risk that can be
9 eliminated by adding different stocks (or bonds) is uncompensated risk. The object
10 of diversification is to minimize this uncompensated risk of having too few
11 investments. “As long as stock prices do not move exactly together, the risk of a
12 diversified portfolio will be less than the average risk of the separate holdings.”
13 R.A. BREALEY, AN INTRODUCTION TO RISK AND RETURN FROM COMMON STOCKS 103 (2d
14 ed. 1983).

15
16 There is no automatic rule for identifying how much diversification is
17 enough. The 1992 Restatement says: “Significant diversification advantages can be
18 achieved with a small number of well-selected securities representing different
19 industries ... Broader diversification is usually to be preferred in trust investing,”
20 and pooled investment vehicles “make thorough diversification practical for most
21 trustees.” RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 227, General
22 Note on cmts. e-h, at 77 (1992). *See also* Macey, *supra*, at 23-24; Brealey, *supra*, at 111-
23 13.

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

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

44
45 **Fiduciary investing in mutual funds.** Trusts can also achieve diversification
46 by investing in mutual funds. *See* RESTATEMENT (THIRD) OF TRUSTS: PRUDENT
47 INVESTOR RULE, § 227, cmt. m, at 99-100 (1992) (endorsing trust investment in mutual
48 funds). ERISA § 401(b)(1), 29 U.S.C. § 1101(b)(1), expressly authorizes pension trusts

1 to invest in mutual funds, identified as securities “issued by an investment company
2 registered under the Investment Company Act of 1940 ...”
3

4 **Section 19-3B-904. Duties at Inception of Trusteeship.**

5 Within a reasonable time after accepting a
6 trusteeship or receiving trust assets, a trustee shall review
7 the trust assets and make and implement decisions concerning
8 the retention and disposition of assets, in order to bring the
9 trust portfolio into compliance with the purposes, terms,
10 distribution requirements, and other circumstances of the
11 trust, and with the requirements of this chapter.

12
13 *Alabama Comment*
14

15 **Comparison to Uniform Code.** Section 904 is the same as
16 Section 4 of the Uniform Prudent Investor Act (1994).

17
18 *Uniform Comment*
19

20 **Purpose and scope.** Section 904, requiring the trustee to dispose of
21 unsuitable assets within a reasonable time, is old law, codified in RESTATEMENT
22 (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 229 (1992), lightly revising
23 RESTATEMENT (SECOND) OF TRUSTS § 230 (1959). The duty extends as well to
24 investments that were proper when purchased but subsequently become improper.
25 RESTATEMENT (SECOND) OF TRUSTS § 231 (1959). The same standards apply to
26 successor trustees, *see* RESTATEMENT (SECOND) OF TRUSTS § 196 (1959).
27

28 The question of what period of time is reasonable turns on the totality of
29 factors affecting the asset and the trust. The 1959 Restatement took the view that
30 “[o]rdinarily any time within a year is reasonable, but under some circumstances a
31 year may be too long a time and under other circumstances a trustee is not liable
32 although he fails to effect the conversion for more than a year.” RESTATEMENT
33 (SECOND) OF TRUSTS § 230, cmt. b (1959). The 1992 Restatement retreated from this
34 rule of thumb, saying, “No positive rule can be stated with respect to what
35 constitutes a reasonable time for the sale or exchange of securities.” RESTATEMENT
36 (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 229, cmt. b (1992).
37

38 The criteria and circumstances identified in Section 2 of the UPIA as bearing
39 upon the prudence of decisions to invest and manage trust assets also pertain to the
40 prudence of decisions to retain or dispose of inception assets under this section.

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Section 19-3B-905. Reviewing Compliance.

Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight. The prudent investor rule does not guarantee a specific outcome or performance, but is a standard of conduct.

Alabama Comment

Comparison to Uniform Code. The first Sentence of Section 905(a) is the same as Section 8 of the Uniform Prudent Investor Act (1994). Alabama added the second sentence to Section 905(a) to make it clear that the prudent investor rule expresses a standard of conduct, not outcome.

Uniform Comment

Purpose and scope. This section derives from the 1991 Illinois act, 760 ILCS 5/5(a)(2) (1992), which draws upon RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 227, cmt. b, at 11 (1992). Trustees are not insurers. Not every investment or management decision will turn out in the light of hindsight to have been successful. Hindsight is not the relevant standard. In the language of law and economics, the standard is *ex ante*, not *ex post*.

Section 19-3B-906. Language Invoking Standard of Prudent Investor Rule.

The following terms or comparable language in the terms of a trust, unless otherwise limited or modified, authorizes any investment or strategy permitted under this chapter: "investments permissible by law for investment of trust funds," "legal investments," "authorized investments," "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent

1 disposition of their funds, considering the probable income as
2 well as the probable safety of their capital," "prudent man
3 rule," "prudent trustee rule," "prudent person rule," and
4 "prudent investor rule."

5
6 *Alabama Comment*
7

8 **Comparison to Uniform Code.** Section 906 is the same as
9 Section 10 of the Uniform Prudent Investor Act (1994). The words "provisions of a
10 trust" are replaced with the words "terms of a trust" in order to conform the
11 language in the Uniform Act with the definition under Section 104(17) of the
12 Uniform Code.
13

14 *Uniform Comment*
15

16 **Purpose and scope.** This provision is taken from the Illinois act, 760 ILCS §
17 5/5(d) (1992), and is meant to facilitate incorporation of the Act by means of the
18 formulaic language commonly used in trust instruments.
19
20

21 **ARTICLE 10**

22 **LIABILITY AND RIGHTS OF TRUSTEES AND PERSONS DEALING WITH**
23 **TRUSTEES**
24

25 **Section 19-3B-1001. Remedies for Breach of Trust.**

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

28 (b) To remedy a breach of trust that has occurred or
29 may occur, the court may:

30 (1) compel the trustee to perform the trustee's
31 duties;

32 (2) enjoin the trustee from committing a breach of
33 trust;

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

- 1 (4) order a trustee to account;
- 2 (5) appoint a special fiduciary to take possession
- 3 of the trust property and administer the trust;
- 4 (6) suspend the trustee;
- 5 (7) remove the trustee as provided in Section 19-3B-
- 6 706;
- 7 (8) reduce or deny compensation to the trustee;
- 8 (9) subject to Section 19-3B-1012, void an act of
- 9 the trustee, impose a lien or a constructive trust on trust
- 10 property, or trace trust property wrongfully disposed of and
- 11 recover the property or its proceeds; or
- 12 (10) order any other appropriate relief.

13
14 *Alabama Comment*

15
16 **Comparison to Uniform Code.** Section 1001 is the same as Section 1001 of
17 the Uniform Trust Code (2001).

18 *Uniform Comment*

19
20 **Purpose and scope.** This section codifies the remedies available to rectify or
21 to prevent a breach of trust for violation of a duty owed to a beneficiary. The duties
22 that a trust might breach include those contained in Article 8 in addition to those
23 specified elsewhere in the Code.

24
25 **Available remedies.** This section identifies the available remedies but does
26 not attempt to cover the refinements and exceptions developed in case law. The
27 availability of a remedy in a particular circumstance will be determined not only by
28 this Code but also by the common law of trusts and principles of equity. *See* Section
29 106.

30
31 Beneficiaries and co-trustees have standing to bring a petition to remedy a
32 breach of trust. Following a successor trustee's acceptance of office, a successor
33 trustee has standing to sue a predecessor for breach of trust. *See* RESTATEMENT
34 (SECOND) OF TRUSTS § 200 (1959). A person who may represent a beneficiary's
35 interest under Article 3 would have standing to bring a petition on behalf of the
36 person represented. In the case of a charitable trust, those with standing include the
37 state attorney general, a charitable organization expressly entitled to receive benefits
38 under the terms of the trust, and other persons with a special interest. *See* Section
39 110 & RESTATEMENT (SECOND) OF TRUSTS § 391 (1959). A person appointed to enforce

1 a trust for an animal or a trust for a noncharitable purpose would have standing to
2 sue for a breach of trust. *See* Sections 110(b), 408, 409.

3
4 Traditionally, remedies for breach of trust at law were limited to suits to
5 enforce unconditional obligations to pay money or deliver chattels. *See*
6 RESTATEMENT (SECOND) OF TRUSTS § 198 (1959). Otherwise, remedies for breach of
7 trust were exclusively equitable, and as such, punitive damages were not available
8 and findings of fact were made by the judge and not a jury. *See* RESTATEMENT
9 (SECOND) OF TRUSTS § 197 (1959).

10
11 The remedies identified in this section are derived from Restatement (Second)
12 of Trusts § 199 (1959). The reference to payment of money in subsection (b)(3)
13 includes liability that might be characterized as damages, restitution, or surcharge.
14 For the measure of liability, see Section 1002. Subsection (b)(5) makes explicit the
15 court's authority to appoint a special fiduciary, also sometimes referred to as a
16 receiver. *See* RESTATEMENT (SECOND) OF TRUSTS § 199(d) (1959). The authority of the
17 court to appoint a special fiduciary is not limited to actions alleging breach of trust
18 but is available whenever the court, exercising its equitable jurisdiction, concludes
19 that an appointment would promote administration of the trust. *See* Section 704(d)
20 (special fiduciary may be appointed whenever court considers such appointment
21 necessary for administration).

22
23 **Ability of court to reduce or deny compensation.** Subsection (b)(8), which
24 allows the court to reduce or deny compensation, is in accord with Restatement
25 (Second) of Trusts § 243 (1959). For the factors to consider in setting a trustee's
26 compensation absent breach of trust, see Section 708 and Comment. In deciding
27 whether to reduce or deny a trustee compensation, the court may wish to consider
28 (1) whether the trustee acted in good faith; (2) whether the breach of trust was
29 intentional; (3) the nature of the breach and the extent of the loss; (4) whether the
30 trustee has restored the loss; and (5) the value of the trustee's services to the trust.
31 *See* RESTATEMENT (SECOND) OF TRUSTS § 243 cmt. c (1959).

32
33 **Voiding acts of the trustee.** The authority under subsection (b)(9) to set aside
34 wrongful acts of the trustee is a corollary of the power to enjoin a threatened breach
35 as provided in subsection (b)(2). However, in setting aside the wrongful acts of the
36 trustee the court may not impair the rights of bona fide purchasers protected under
37 Section 1012. *See* RESTATEMENT (SECOND) OF TRUSTS § 284 (1959).

38
39 **Section 19-3B-1002. Damages for Breach of Trust.**

40 (a) A trustee who commits a breach of trust is
41 liable to the beneficiaries affected for:

42 (1) the greater of:

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

4 (ii) the profit the trustee made by reason of the
5 breach;

6 (2) Any measure of damage otherwise provided by law.

7 (b) Except as otherwise provided in this subsection,
8 if more than one trustee is liable to the beneficiaries for a
9 breach of trust, a trustee is entitled to contribution from
10 the other trustee or trustees. A trustee is not entitled to
11 contribution if the trustee was substantially more at fault
12 than another trustee or if the trustee committed the breach of
13 trust in bad faith or with reckless indifference to the
14 purposes of the trust or the interests of the beneficiaries. A
15 trustee who received a benefit from the breach of trust is not
16 entitled to contribution from another trustee to the extent of
17 the benefit received.

18
19 *Alabama Comment*

20
21 **Comparison to Uniform Code.** Alabama adds a paragraph (2) to subsection
22 (a) of the Uniform Trust Code (2001). It is not the intent of the Committee to alter
23 the current state of Alabama law regarding the potential availability of punitive
24 damages for breach of trust in certain circumstances. This is a matter to be dealt
25 with by the Alabama Supreme Court. *See Fairhope v. Retzner*, 527 So.2d 1232 (Ala.
26 1987); BOGERT, THE LAW OF TRUSTS AND TRUSTEES, § 862.

27
28 Also, subsection (b) is contrary to the traditional common law rule that still
29 prevails in Alabama - that, generally, there is no right of contribution among joint
30 tortfeasors. Subsection (b) enacts a limited form of contribution that applies to
31 liability for breach of trust. The damages provided in this section are intended to be
32 the exclusive measure for damages available for a claim of breach of trust.
33 However, again, the Committee does not intend to change the current state of
34 Alabama law regarding the measure of damages that may be available pursuant to
35 other potential claims brought against the trustee.

1
2
3 *Uniform Comment*
4

5 **Purpose and scope.** Subsection (a) is based on Restatement (Third) of Trusts:
6 Prudent Investor Rule § 205 (1992). If a trustee commits a breach of trust, then the
7 beneficiaries may either affirm the transaction or, if a loss has occurred, hold the
8 trustee liable for the amount necessary to compensate fully for the consequences of
9 the breach. This may include recovery of lost income, capital gain, or appreciation
10 that would have resulted from proper administration. Even if a loss has not
11 occurred, the trustee may not benefit from the improper action and is accountable
12 for any profit the trustee made by reason of the breach.
13

14 **Trustee surcharges.** For extensive commentary on the determination of
15 damages, traditionally known as trustee surcharge, with numerous specific
16 applications, *see* RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE §§ 205-213
17 (1992). For the use of benchmark portfolios to determine damages, *see* RESTATEMENT
18 (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE Reporter's Notes to §§ 205 and 208-211
19 (1992). On the authority of a court of equity to reduce or excuse damages for breach
20 of trust, *see* Restatement (Second) of Trusts § 205 cmt. g (1959).
21

22 For purposes of this section and Section 1003, "profit" does not include the
23 trustee's compensation. A trustee who has committed a breach of trust is entitled to
24 reasonable compensation for administering the trust unless the court reduces or
25 denies the trustee compensation pursuant to Section 1001(b)(8).
26

27 **Liability among co-trustees.** Subsection (b) is based on Restatement
28 (Second) of Trusts § 258 (1959). Co-trustees are jointly and severally liable for a
29 breach of trust if there was joint participation in the breach. Joint and several
30 liability also is imposed on a nonparticipating co-trustee who, as provided in Section
31 703(g), failed to exercise reasonable care (1) to prevent a co-trustee from committing
32 a serious breach of trust, or (2) to compel a co-trustee to redress a serious breach of
33 trust. Joint and several liability normally carries with it a right in any trustee to seek
34 contribution from a co-trustee to the extent the trustee has paid more than the
35 trustee's proportionate share of the liability. Subsection (b), consistent with
36 Restatement (Second) of Trusts § 258 (1959), creates an exception. A trustee who
37 was substantially more at fault or committed the breach of trust in bad faith or with
38 reckless indifference to the purposes of the trust or the interests of the beneficiaries
39 is not entitled to contribution from the other trustees.
40

41 **Comparative fault.** Determining degrees of comparative fault is a question of
42 fact. The fact that one trustee was more culpable or more active than another does
43 not necessarily establish that this trustee was substantially more at fault. Nor is a
44 trustee substantially less at fault because the trustee did not actively participate in
45 the breach. *See* RESTATEMENT (SECOND) OF TRUSTS § 258 cmt. e (195). Among the
46 factors to consider: (1) Did the trustee fraudulently induce the other trustee to join in

1 the breach? (2) Did the trustee commit the breach intentionally while the other
2 trustee was at most negligent? (3) Did the trustee, because of greater experience or
3 expertise, control the actions of the other trustee? (4) Did the trustee alone commit
4 the breach with liability imposed on the other trustee only because of an improper
5 delegation or failure to properly monitor the actions of the co-trustee? *See*
6 RESTATEMENT (SECOND) OF TRUSTS § 258 cmt. d (1959).

7
8 **Section 19-3B-1003. Damages in Absence of Breach.**

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

13 (b) Absent a breach of trust, a trustee is not
14 liable to a beneficiary for a loss or depreciation in the
15 value of trust property or for not having made a profit.

16
17 *Alabama Comment*

18
19 **Comparison to Uniform Code.** Section 1003 is the same as Section 1003 of
20 the Uniform Trust Code (2001). Note that Section 802(f) sets forth the types of
21 investments that an institutional or professional trustee can make without raising a
22 presumption of self-interest.

23
24 *Uniform Comment*

25
26 **Purpose and scope.** The principle on which a trustee's duty of loyalty is
27 premised is that a trustee should not be allowed to use the trust as a means for
28 personal profit other than for routine compensation earned. While most instances of
29 personal profit involve situations where the trustee has breached the duty of loyalty,
30 not all cases of personal profit involve a breach of trust. Subsection (a), which holds
31 a trustee accountable for any profit made, even absent a breach of trust, is based on
32 Restatement (Second) of Trusts § 203 (1959). ...

33
34 **A trustee is not an insurer.** Similar to Restatement (Second) of Trusts § 204
35 (1959), subsection (b) provides that absent a breach of trust a trustee is not liable for
36 a loss or depreciation in the value of the trust property or for failure to make a profit.

1 **Section 19-3B-1004. Attorney's Fees and Costs.**

2 In a judicial proceeding involving the
3 administration of a trust, the court, as justice and equity
4 may require, may award costs and expenses, including
5 reasonable attorney's fees, to any party, to be paid by
6 another party or from the trust that is the subject of the
7 controversy.

8 *Alabama Comment*

9
10 **Comparison to Uniform Code.** Section 1004 is the same as Section 1004 of
11 the Uniform Trust Code (2001). In addition to this section, ALA. CODE § 34-3-60
12 allows attorney fees to be paid from a trust in appropriate circumstances. This
13 section is not intended to create any new or additional authorization for the shifting
14 of attorney's fees to opposing parties. It is expected that courts will shift attorney's
15 fees to opposing parties only under rare circumstances, such "as in the case when
16 the opposing party has acted in bad faith." *Ex parte Cowgill*, 587 So.2d 1002, 1003
17 (Ala. 1991) (citing *Reynolds v. First Alabama Bank of Montgomery, N.A.*, 471 So.2d 1238
18 (Ala. 1985)). *See also* ALA. CODE § 35-4-60 and ALA. R. CIV. P. 11.

19
20 *Uniform Comment*

21
22 **Purpose and scope.** This section, which is based on Massachusetts General
23 Laws chapter 215, § 45, codifies the court's historic authority to award costs and fees,
24 including reasonable attorney's fees, in judicial proceedings grounded in equity.
25 The court may award a party its own fees and costs from the trust. The court may
26 also charge a party's costs and fees against another party to the litigation. Generally,
27 litigation expenses were at common law chargeable against another party only in the
28 case of egregious conduct such as bad faith or fraud. With respect to a party's own
29 fees, Section 709 authorizes a trustee to recover expenditures properly incurred in
30 the administration of the trust. The court may award a beneficiary litigation costs if
31 the litigation is deemed beneficial to the trust. Sometimes, litigation brought by a
32 beneficiary involves an allegation that the trustee has committed a breach of trust.
33 On other occasions, the suit by the beneficiary is brought because of the trustee's
34 failure to take action against a third party, such as to recover property properly
35 belonging to the trust. For the authority of a beneficiary to bring an action when the
36 trustee fails to take action against a third party, *see* RESTATEMENT (SECOND) OF TRUSTS
37 §§ 281-282 (1959). For the case law on the award of attorney's fees and other
38 litigation costs, *see* 3 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS §§
39 188.4 (4th ed. 1988).

1 wrongdoing ... or estoppel by reason of unfulfilled promises of the defendant in
2 exchange for the plaintiff's agreement to postpone commencement of an action ... "

3
4 **Information contained in a prospectus.** The delivery of a prospectus issued
5 pursuant to the regulations promulgated by the U.S. Securities and Exchange
6 Commission and other federal and state regulatory agencies is presumed to be an
7 adequate disclosure with respect to the information contained therein. (*See also*
8 Alabama comment to Section 813.)

9
10 *Uniform Comment*

11
12 **Purpose and scope.** The two-year limitations periods under this section are
13 not the only means for barring an action by a beneficiary. A beneficiary may be
14 foreclosed by consent, release, or ratification as provided in Section 1009. Claims
15 may also be barred by principles such as estoppel and laches arising in equity under
16 the common law of trusts. *See* Section 106.

17
18 The representative referred to in subsection (a) is the person who may
19 represent and bind a beneficiary as provided in Article 3. During the time that a
20 trust is revocable and the settlor has capacity, the person holding the power to
21 revoke is the one who must receive the report. *See* Section 603(a) (rights of settlors
22 of revocable trust).

23
24 **Running of statute of limitations.** This section addresses only the issue of
25 when the clock will start to run for purposes of the statute of limitations. If the
26 trustee wishes to foreclose possible claims immediately, then a consent to the report
27 or other information may be obtained pursuant to Section 1009. For the provisions
28 relating to the duty to report to beneficiaries, see Section 813.

29
30 Subsection (a) applies only if the trustee has furnished a report. The two-year
31 statute of limitations does not begin to run against a beneficiary who has waived the
32 furnishing of a report as provided in Section 813(d).

33
34 Subsection (c) is intended to provide some ultimate repose for actions against
35 a trustee. It applies to cases in which the trustee has failed to report to the
36 beneficiaries or the report did not meet the disclosure requirements of subsection
37 (b). It also applies to beneficiaries who did not receive notice of the report, whether
38 personally or through representation. While the two-year limitations period will
39 normally begin to run on termination of the trust, it can also begin earlier. If a
40 trustee leaves office prior to the termination of the trust, then the limitations period
41 for actions against that particular trustee begins to run on the date the trustee leaves
42 office. If a beneficiary receives a final distribution prior to the date the trust
43 terminates, then the limitations period for actions by that particular beneficiary
44 begins to run on the date of final distribution.

45
46 **Claims against estate of trustee for breach.** If a trusteeship terminates by
47 reason of death, a claim against the trustee's estate for breach of fiduciary duty

1 would, like other claims against the trustee's estate, be barred by a probate creditor's
2 claim statute even though the statutory period prescribed by this section has not yet
3 expired.

4
5 **Section 19-3B-1006. Reliance on Trust Instrument.**

6 A trustee who acts in reasonable reliance on the
7 terms of the trust as expressed in the trust instrument is not
8 liable to a beneficiary for a breach of trust to the extent
9 the breach resulted from the reliance.

10
11 *Alabama Comment*

12
13 **Comparison to Uniform Code.** Section 1006 is the same as Section 1006 of
14 the Uniform Trust Code (2001).

15
16 *Uniform Comment*

17
18 **Purpose and scope.** It sometimes happens that the intended terms of the
19 trust differ from the apparent meaning of the trust instrument. This can occur
20 because the court, in determining the terms of the trust, is allowed to consider
21 evidence extrinsic to the trust instrument. *See* Section 103(17) (definition of "terms
22 of a trust"). Furthermore, if a trust is reformed on account of mistake of fact or law,
23 as authorized by Section 415, provisions of a trust instrument can be deleted or
24 contradicted and provisions not in the trust instrument may be added. The concept
25 of the "terms of a trust," both as defined in this Code and as used in the doctrine of
26 reformation, is intended to effectuate the principle that a trust should be
27 administered and distributed in accordance with the settlor's intent. However, a
28 trustee should also be able to administer a trust with some dispatch and without
29 concern that a reasonable reliance on the terms of the trust instrument is misplaced.
30 This section protects a trustee who so relies on a trust instrument but only to the
31 extent the breach of trust resulted from such reliance. This section is similar to
32 Section 1(b) of the Uniform Prudent Investor Act, which protects a trustee from
33 liability to the extent that the trustee acted in reasonable reliance on the provisions
34 of the trust.

35
36 This section protects a trustee only if the trustee's reliance is reasonable. For
37 example, a trustee's reliance on the trust instrument would not be justified if the
38 trustee is aware of a prior court decree or binding nonjudicial settlement agreement
39 clarifying or changing the terms of the trust.
40

1 **Section 19-3B-1007. Event Affecting Administration or**
2 **Distribution.**

3 If the happening of an event, including marriage,
4 divorce, performance of educational requirements, or death,
5 affects the administration or distribution of a trust, then a
6 trustee who has exercised reasonable care to ascertain the
7 happening of the event is not liable for a loss resulting from
8 the trustee's lack of knowledge.

9
10 *Alabama Comment*

11
12 **Comparison to Uniform Code.** Section 1007 is the same as Section 1007 of
13 the Uniform Trust Code (2001).

14
15 *Uniform Comment*

16
17 **Purpose and scope.** This section, which is based on WASH. REV. CODE §
18 11.98.100, is designed to encourage trustees to administer trusts expeditiously and
19 without undue concern about liability for failure to ascertain external facts, often of a
20 personal nature, that might affect administration or distribution of the trust. The
21 common law, contrary to this section, imposed absolute liability against a trustee for
22 misdelivery regardless of the trustee's level of care. *See* RESTATEMENT (SECOND) OF
23 TRUSTS § 226 (1959). The events listed in this section are not exclusive. A trustee
24 who has exercised reasonable care to ascertain the occurrence of other events, such
25 as the attainment by a beneficiary of a certain age, is also protected from liability.

26
27 **Section 19-3B-1008. Exculpation of Trustee.**

28 (a) A term of a trust relieving a trustee of
29 liability for breach of trust is unenforceable to the extent
30 that it:

31 (1) relieves the trustee of liability for breach of
32 trust committed in bad faith or with reckless indifference to
33 the purposes of the trust or the interests of the
34 beneficiaries; or

1 (2) was inserted as the result of an abuse by the
2 trustee of a fiduciary or confidential relationship to the
3 settlor.

4 (b) Except for terms intended to provide protection
5 for carrying out a stated trust purpose, an exculpatory term
6 drafted or caused to be drafted by the trustee is invalid as
7 an abuse of a fiduciary or confidential relationship unless
8 the trustee proves that the exculpatory term is fair under the
9 circumstances and that its existence and contents were
10 adequately communicated to the settlor.

11 *Alabama Comment*

12
13
14 **Comparison to Uniform Code.** Alabama amended subsection (b) by adding
15 the introductory clause. If a trust is designed to hold closely held stock or some
16 other unique asset or corpus that might otherwise give rise to liability, then a trustee
17 should be able to have protection in the trust instrument. In such an instance, the
18 trustee is carrying out the settlor's wishes, but at the trustee's peril. It does not
19 appear improper or inequitable for the trustee to have the trust instrument drafted
20 to take cognizance of the foreseeable issues that may arise. The remaining provisions
21 of Section 1008 are the same as Section 1008 of the Uniform Trust Code (2001).

22 *Uniform Comment*

23
24
25 **Purpose and scope.** Even if the terms of the trust attempt to completely
26 exculpate a trustee for the trustee's acts, the trustee must always comply with a
27 certain minimum standard. As provided in subsection (a), a trustee must always act
28 in good faith with regard to the purposes of the trust and the interests of the
29 beneficiaries. Subsection (a) is consistent with the standards expressed in Sections
30 105 and 814(a), which, similar to this section, place limits on the power of a settlors
31 to negate trustee duties. This section is also similar to Section 222 of the Restatement
32 (Second) of Trusts (1959), except that this Code, unlike the Restatement, allows a
33 settlors to exculpate a trustee for a profit that the trustee made from the trust.

34
35 Subsection (b) disapproves of cases such as *Marsman v. Nasca*, 573 N.E.2d
36 1025 (Mass. App. Ct. 1991), which held that an exculpatory clause in a trust
37 instrument drafted by the trustee was valid because the beneficiary could not prove
38 that the clause was inserted as a result of an abuse of a fiduciary relationship. For a
39 later case where sufficient proof of abuse was present, see *Rutanan v. Ballard*, 678
40 N.E.2d 133 (Mass. 1997). Subsection (b) responds to the danger that the insertion of

1 such a clause by the fiduciary or its agent may have been undisclosed or
2 inadequately understood by the settlors. To overcome the presumption of abuse in
3 subsection (b), the trustee must establish that the clause was fair and that its
4 existence and contents were adequately communicated to the settlors. In
5 determining whether the clause was fair, the court may wish to examine: (1) the
6 extent of the prior relationship between the settlors and trustee; (2) whether the
7 settlors received independent advice; (3) the sophistication of the settlors with
8 respect to business and fiduciary matters; (4) the trustee's reasons for inserting the
9 clause; and (5) the scope of the particular provision inserted. See RESTATEMENT
10 (SECOND) OF TRUSTS § 222 cmt. d (1959).

11
12 The requirements of subsection (b) are satisfied if the settlors was represented
13 by independent counsel. If the settlors was represented by independent counsel,
14 then the settlor's attorney is considered the drafter of the instrument even if the
15 attorney used the trustee's form. Because the settlor's attorney is an agent of the
16 settlors, disclosure of an exculpatory term to the settlor's attorney is disclosure to the
17 settlors.

18
19 **Section 19-3B-1009. Beneficiary's Consent, Release or**
20 **Ratification.**

21 A trustee is not liable to a beneficiary for breach
22 of trust if the beneficiary consented to the conduct
23 constituting the breach, released the trustee from liability
24 for the breach, or ratified the transaction constituting the
25 breach, unless:

26 (1) the consent, release, or ratification of the
27 beneficiary was induced by improper conduct of the trustee; or

28 (2) at the time of the consent, release, or
29 ratification, the beneficiary did not know of the material
30 facts relating to the alleged breach and the trustee had
31 actual knowledge of the facts relating to the alleged breach.

32
33 *Alabama Comment*

34
35 **Comparison to Uniform Code.** Section 1009 is substantially the same as
36 Section 1009 of the Uniform Trust Code (2001). Alabama does, however, change the
37 language in paragraph (2) - the Uniform Code draft read as follows: "... at the time
38 of the consent, release, or ratification, the beneficiary did not know of the

1 beneficiary's rights or of the material facts relating to the breach." The Alabama
2 drafting committee felt that the Uniform Code language had the impact of placing
3 the trustee in the position of legal counsel to the beneficiary - an inappropriate
4 conflict. (See also a similar change to the Uniform Code at Section 817(c)(2).)

5
6 *Uniform Comment*
7

8 **Purpose and scope.** This section is based on Sections 216 through 218 of the
9 Restatement (Second) of Trusts (1959). A consent, release, or affirmance under this
10 section may occur either before or after the approved conduct. This section requires
11 an affirmative act by the beneficiary. A failure to object is not sufficient. *See*
12 RESTATEMENT (SECOND) OF TRUSTS § 216 cmt. a (1959). A consent is binding on a
13 consenting beneficiary although other beneficiaries have not consented. *See*
14 RESTATEMENT (SECOND) OF TRUSTS § 216 cmt. g (1959). To constitute a valid consent,
15 the beneficiary must know of the beneficiary's rights and of the material facts
16 relating to the breach. *See* RESTATEMENT (SECOND) OF TRUSTS § 216 cmt. k (1959). If
17 the beneficiary's approval involves a self-dealing transaction, then the approval is
18 binding only if the transaction was fair and reasonable. *See* RESTATEMENT (SECOND)
19 OF TRUSTS §§ 170(2), 216(3) and cmt. n (1959).
20

21 An approval by the settlors of a revocable trust or by the holder of a presently
22 exercisable power of withdrawal binds all the beneficiaries. *See* Section 603. A
23 beneficiary is also bound to the extent an approval is given by a person authorized
24 to represent the beneficiary as provided in Article 3.
25

26 **Section 19-3B-1010. Limitation on Personal Liability of**
27 **Trustee.**

28 (a) Except as otherwise provided in the contract, a
29 trustee is not personally liable on a contract properly
30 entered into in the trustee's fiduciary capacity in the course
31 of administering the trust if the trustee in the contract
32 disclosed the fiduciary capacity.

33 (b) A trustee is personally liable for torts
34 committed in the course of administering a trust, or for
35 obligations arising from ownership or control of trust
36 property, including liability for violation of environmental
37 law, but only if the trustee, the trustee's employee, or the
38 trustee's agent is personally at fault.

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

8
9 *Alabama Comment*

10
11 **Comparison to Uniform Code.** Section 1010 is the same as Section 1010 of
12 the Uniform Trust Code (2001), with one exception. In subsection 1010(b) Alabama
13 clarifies the Uniform Code in its retention of traditional *respondeat superior* liability.
14 Liability in such situations is imposed on the trustee personally only if the trustee,
15 the trustee's employee or agent was personally at fault, either intentionally or
16 negligently. This is consistent with to Restatement (Second) of Trusts § 264 (1959),
17 which imposes liability on a trustee, including liability for acts of agents under
18 *respondeat superior*. Consistent with traditional principles, outside professional
19 engaged by the trustee, such as lawyers, stockbrokers, investment counselors,
20 investment companies and investment trusts, would normally be categorized as
21 independent contractors (for whose acts *respondeat superior* liability would not
22 attach). Subsection (b) is also intended to protect a trustee from personal liability
23 for violations of environmental law, unless the trustee, the trustee's employee or
24 agent was personally at fault.

25
26 *Uniform Comment*

27
28 **Purpose and scope.** This section is based on Section 7-306 of the Uniform
29 Probate Code. However, unlike the Uniform Probate Code, which requires that the
30 contract both disclose the representative capacity and identify the trust, subsection
31 (a) protects a trustee who reveals the fiduciary relationship either by indicating a
32 signature as trustee or by simply referring to the trust. The protection afforded the
33 trustee by this section applies only to contracts that are properly entered into in the
34 trustee's fiduciary capacity, meaning that the trustee is exercising an available
35 power and is not violating a duty. This section does not excuse any liability the
36 trustee may have for breach of trust.

37
38 **Liability arising from ownership of trust property and for torts.** Subsection
39 (b) addresses trustee liability arising from ownership or control of trust property
40 and for torts occurring incident to the administration of the trust. Liability in such
41 situations is imposed on the trustee personally only if the trustee was personally at
42 fault, either intentionally or negligently. This is contrary to Restatement (Second) of

1 Trusts § 264 (1959), which imposes liability on a trustee regardless of fault, including
2 liability for acts of agents under *respondeat superior*. Responding to a particular
3 concern of trustees, subsection (b) specifically protects a trustee from personal
4 liability for violations of environmental law such as CERCLA (42 U.S.C. § 9607) or
5 its state law counterparts, unless the trustee was personally at fault. *See also* Sections
6 701(c)(2) (nominated trustee may investigate trust property to determine potential
7 violation of environmental law without having accepted trusteeship) and 816(13)
8 (trustee powers with respect to possible liability for violation of environmental law).

9
10 Subsection (c) alters the common law rule that a trustee could not be sued in a
11 representative capacity if the trust estate was not liable.

12
13 **Section 19-3B-1011. Interest as General Partner.**

14 (a) Except as otherwise provided in subsection (c)
15 or unless personal liability is imposed in the contract, a
16 trustee who holds an interest as a general partner in a
17 general or limited partnership is not personally liable on a
18 contract entered into by the partnership after the trust's
19 acquisition of the interest if the fiduciary capacity was
20 disclosed in the contract or in a statement previously filed
21 pursuant to Chapter 8A or Chapter 9B of Title 10.

22 (b) Except as otherwise provided in subsection (c),
23 a trustee who holds an interest as a general partner is not
24 personally liable for torts committed by the partnership or
25 for obligations arising from ownership or control of the
26 interest unless the trustee is personally at fault.

27 (c) The immunity provided by this section does not
28 apply if an interest in the partnership is held by the trustee
29 in a capacity other than that of trustee or is held by the
30 trustee's spouse or one or more of the trustee's descendants,
31 siblings, or parents, or the spouse of any of them.

32 (d) If the trustee of a revocable trust holds an
33 interest as a general partner, then the settlor is personally

1 liable for contracts and other obligations of the partnership
2 as if the settlor were a general partner.

3
4 *Alabama Comment*

5
6 **Comparison to Uniform Code.** Section 1010 is the same as Section 1010 of
7 the Uniform Trust Code (2001). This section adopts the provisions of former Ala.
8 Code §§ 19-3-150 through 152, which are repealed by this Code.

9
10 *Uniform Comment*

11
12 **Purpose and scope.** Section 1010 protects a trustee from personal liability on
13 contracts that the trustee enters into on behalf of the trust. Section 1010 also
14 absolves a trustee from liability for torts committed in administering the trust unless
15 the trustee was personally at fault. It does not protect a trustee from personal
16 liability for contracts entered into or torts committed by a general or limited
17 partnership of which the trustee was a general partner. That is the purpose of this
18 section, which is modeled after OHIO REV. CODE § 1339.65. Subsection (a) protects
19 the trustee from personal liability for such partnership obligations whether the
20 trustee signed the contract or it was signed by another general partner. Subsection
21 (b) protects a trustee from personal liability for torts committed by the partnership
22 unless the trustee was personally at fault. Protection from the partnership's
23 contractual obligations is available under subsection (a) only if the other party is on
24 notice of the fiduciary relationship, either in the contract itself or in the partnership
25 certificate on file.

26
27 Special protection is not needed for other business interests that the trustee
28 may own, such as an interest as a limited partner, a membership interest in an LLC,
29 or an interest as a corporate shareholder. In these cases the nature of the entity or
30 the interest owned by the trustee carries with it its own limitation on liability.

31
32 **Certain exceptions apply.** The section is not intended to be used as a device
33 for individuals or their families to shield assets from creditor claims. Consequently,
34 subsection (c) excludes from the protections provided by this section trustees who
35 own an interest in the partnership in another capacity or if an interest is owned by
36 the trustee's spouse or the trustee's descendants, siblings, parents, or the spouse of
37 any of them.

38
39 Nor can a revocable trust be used as a device for avoiding claims against the
40 partnership. Subsection (d) imposes personal liability on the settlors for partnership
41 contracts and other obligations of the partnership the same as if the settlors were a
42 general partner.

1 **Section 19-3B-1012. Protection of Person Dealing with Trustee.**

2
3 (a) A person other than a beneficiary who in good
4 faith assists a trustee, or who in good faith and for value
5 deals with a trustee, without knowledge that the trustee is
6 exceeding or improperly exercising the trustee's powers is
7 protected from liability as if the trustee properly exercised
8 the power.

9 (b) A person other than a beneficiary who in good
10 faith deals with a trustee is not required to inquire into the
11 extent of the trustee's powers or the propriety of their
12 exercise.

13 (c) A person who in good faith delivers assets to a
14 trustee need not ensure their proper application.

15 (d) A person other than a beneficiary who in good
16 faith assists a former trustee, or who in good faith and for
17 value deals with a former trustee, without knowledge that the
18 trusteeship has terminated is protected from liability as if
19 the former trustee were still a trustee.

20 (e) Comparable protective provisions of other laws
21 relating to commercial transactions or transfer of securities
22 by fiduciaries prevail over the protection provided by this
23 section.

24 *Alabama Comment*

25
26 **Comparison to Uniform Code.** Section 1012 is the same as Section 1012 of
27 the Uniform Trust Code (2001).

28
29 *Uniform Comment*

30
31 **Purpose and scope.** This section is derived from Section 7 of the Uniform
32 Trustee Powers Act.
33

1 Subsection (a) protects two different classes; persons other than beneficiaries
2 who assist a trustee with a transaction, and persons other than beneficiaries who
3 deal with the trustee for value. As long as the assistance was provided or the
4 transaction was entered into in good faith and without knowledge, third persons in
5 either category are protected in the transaction even if the trustee was exceeding or
6 improperly exercising the power. For the definition of “know,” see Section 104.
7 This Code does not define “good faith” for purposes of this and the next section.
8 Defining good faith with reference to the definition used in the state’s commercial
9 statutes would be consistent with the purpose of this section, which is to treat
10 commercial transactions with trustees similar to other commercial transactions.

11
12 Subsection (b) confirms that a third party who is acting in good faith is not
13 charged with a duty to inquire into the extent of a trustee’s powers or the propriety
14 of their exercise. The third party may assume that the trustee has the necessary
15 power. Consequently, there is no need to request or examine a copy of the trust
16 instrument. A third party who wishes assurance that the trustee has the necessary
17 authority instead should request a certification of trust as provided in Section 1013.
18 Subsection (b), and the comparable provisions enacted in numerous states, are
19 intended to negate the rule, followed by some courts, that a third party is charged
20 with constructive notice of the trust instrument and its contents. The cases are
21 collected in GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND
22 TRUSTEES § 897 (Rev. 2d ed. 1995); and 4 AUSTIN W. SCOTT & WILLIAM F. FRATCHER,
23 THE LAW OF TRUSTS § 297 (4th ed. 1989).

24
25 Subsection (c) protects any person, including a beneficiary, who in good faith
26 delivers property to a trustee. The standard of protection in the Restatement is
27 phrased differently although the result is similar. Under Restatement (Second) of
28 Trusts § 321 (1959), the person delivering property to a trustee is liable if at the time
29 of the delivery the person had notice that the trustee was misapplying or intending
30 to misapply the property.

31
32 Subsection (d) extends the protections afforded by the section to assistance
33 provided to or dealings for value with a former trustee. The third party is protected
34 the same as if the former trustee still held the office.

35
36 Subsection (e) clarifies that a statute relating to commercial transactions
37 controls whenever both it and this section could apply to a transaction.
38 Consequently, the protections provided by this section are superseded by
39 comparable protective provisions of these other laws. The principal statutes in
40 question are the various articles of the Uniform Commercial Code, including Article
41 8 on the transfer of securities, as well as the Uniform Simplification of Fiduciary
42 Securities Transfer Act.

1 **Section 19-3B-1013. Certification of Trust.**

2 (a) Instead of furnishing a copy of the trust
3 instrument to a person other than a beneficiary, the trustee
4 may furnish to the person a certification of trust containing
5 the following information:

6 (1) that the trust exists and the date the trust
7 instrument was executed;

8 (2) the identity of the settlor;

9 (3) the identity and address of the currently acting
10 trustee;

11 (4) the powers of the trustee in a pending
12 transaction or relevant to the request;

13 (5) the revocability or irrevocability of the trust
14 and the identity of any person holding a power to revoke the
15 trust;

16 (6) the authority of co-trustees to sign or
17 otherwise authenticate and whether all or less than all are
18 required in order to exercise powers of the trustee;

19 (7) the trust's taxpayer identification number; and

20 (8) the name in which title to trust property may be
21 taken.

22 (b) A certification of trust may be signed or
23 otherwise authenticated by any trustee.

24 (c) A certification of trust must state that the
25 trust has not been revoked, modified, or amended in any manner
26 that would cause the representations contained in the
27 certification of trust to be incorrect.

28 (d) A certification of trust need not contain the
29 dispositive terms of a trust.

1 (e) A recipient of a certification of trust may
2 require the trustee to furnish copies of those excerpts from
3 the original trust instrument and later amendments which
4 designate the trustee and confer upon the trustee the power to
5 act in the pending transaction.

6 (f) A person who acts in reliance upon a
7 certification of trust without knowledge that the
8 representations contained therein are incorrect is not liable
9 to any person for so acting and may assume without inquiry the
10 existence of the facts contained in the certification.
11 Knowledge of the terms of the trust may not be inferred solely
12 from the fact that a copy of all or part of the trust
13 instrument is held by the person relying upon the
14 certification.

15 (g) A person who in good faith enters into a
16 transaction in reliance upon a certification of trust may
17 enforce the transaction against the trust property as if the
18 representations contained in the certification were correct.

19 (h) A person making a demand for the trust
20 instrument in addition to a certification of trust or excerpts
21 is liable for damages if the court determines that the person
22 did not act in good faith in demanding the trust instrument.

23 (i) This section does not limit the right of a
24 person to obtain a copy of the trust instrument in a judicial
25 proceeding concerning the trust.

26
27 *Alabama Comment*
28

29 **Comparison to Uniform Code.** Section 1013 is substantially the same as
30 Section 1013 of the Uniform Trust Code (2001). Alabama amends the language in
31 paragraph (a)(4), because the powers of the trustee could span a variety of
32 transactions and issues, and it is therefore proper to limit this item of trust

1 certification to require disclosure only of those powers that authorize the specific
2 transaction pending between the third party and the trust.

3
4 Paragraph (a)(8) of the Uniform Code requires the trust certification to
5 provide information regarding the “manner” in which title to trust property may be
6 taken. Although this requirement is likely to be satisfied by simply setting forth the
7 name of the trust and the name of the trustee rather than more substantive
8 requirements regarding titling, the use of the word “manner” may be unclear and
9 Alabama deletes the words “manner of taking title to trust property” and substitutes
10 the words “the name in which title to trust property may be taken.”

11 12 *Uniform Comment*

13
14 **Purpose and scope.** This section, derived from CAL. PROBATE CODE § 18100.5,
15 is designed to protect the privacy of a trust instrument by discouraging requests
16 from persons other than beneficiaries for complete copies of the instrument in order
17 to verify a trustee’s authority. Even absent this section, such requests are usually
18 unnecessary. Pursuant to Section 1012(b), a third person proceeding in good faith is
19 not required to inquire into the extent of the trustee’s powers or the propriety of
20 their exercise. This section adds another layer of protection.

21
22 Third persons frequently insist on receiving a copy of the complete trust
23 instrument solely to verify a specific and narrow authority of the trustee to engage
24 in a particular transaction. While a testamentary trust, because it is created under a
25 will, is a matter of public record, an *inter vivos* trust instrument is private. Such
26 privacy is compromised, however, if the trust instrument must be distributed to
27 third persons. A certification of trust is a document signed by a currently acting
28 trustee that may include excerpts from the trust instrument necessary to facilitate
29 the particular transaction. A certification provides the third party with an assurance
30 of authority without having to disclose the trust’s dispositive provisions. Nor is
31 there a need for third persons who may already have a copy of the instrument to pry
32 into its provisions. Persons acting in reliance on a certification may assume the truth
33 of the certification even if they have a complete copy of the trust instrument in their
34 possession.

35
36 Subsections (a) through (c) specify the required contents of a certification.
37 Subsection (d) clarifies that the certification need not include the trust’s dispositive
38 terms. A certification, however, normally will contain the administrative terms of
39 the trust relevant to the transaction. Subsection (e) provides that the third party may
40 make this a condition of acceptance. Subsections (f) and (g) protect a third party
41 who relies on the certification. The third party may assume that the certification is
42 true, and is not charged with constructive knowledge of the terms of the trust
43 instrument even if the third party has a copy.

44
45 To encourage compliance with this section, a person demanding a trust
46 instrument after already being offered a certification may be liable under subsection
47 (h) for damages if the refusal to accept the certification is determined not to have

1 been in good faith. A person acting in good faith would include a person required
2 to examine a complete copy of the trust instrument pursuant to due diligence
3 standards or as required by other law. Examples of such due diligence and legal
4 requirements include (1) in connection with transactions to be executed in the capital
5 markets where documentary standards have been established in connection with
6 underwriting concerns; (2) to satisfy documentary requirements established by state
7 or local government or regulatory agency; (3) to satisfy documentary requirements
8 established by a state or local government or regulatory agency; and (4) where the
9 insurance rates or premiums or other expenses of the party would be higher absent
10 the availability of the documentation.

11
12 The Uniform Trust Code leaves to other law the issue of how damages for a
13 bad faith refusal are to be computed and whether attorney's fees might be
14 recoverable. For a discussion of the meaning of "good faith," see Section 1012
15 Comment.
16

17 **ARTICLE 11**

18 **SPECIAL NEEDS TRUST**

19 20 **Section 19-3B-1101. Protection of Special Needs Trusts and** 21 **Other Similar Trusts for Disabled Persons.**

22 Notwithstanding the provisions of the Alabama
23 Uniform Trust Code that may otherwise be applicable to a
24 trust, no provision thereof shall apply to any special needs
25 trust, supplemental needs trust, or other similar trust
26 established for a person with a disability as a beneficiary,
27 including without limitation, any trust established pursuant
28 to the provisions of 42 U.S.C. § 1396(p) (d) (4)A or C, as
29 amended from time to time, or other similar federal or state
30 statute, to the extent that such provision would disqualify
31 such trust beneficiary at any time from eligibility for public
32 needs-based assistance benefits for which the beneficiary
33 would otherwise qualify.
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MISCELLANEOUS PROVISIONS

Section 19-3B-1201. 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.

Alabama Comment

This section has been added to make clear that no provision of the Alabama Uniform Trust Code is intended to disqualify a disabled person from receiving federal or other governmental needs-based benefits to which such person would otherwise be entitled, such as Medicaid or Supplemental Security Income (SSI) assistance.

Section 19-3B-1202. Electronic Records and Signatures.

The provisions of this chapter governing the legal effect, validity, or enforceability of electronic records or electronic signatures, and of contracts formed or performed with the use of such records or signatures, conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7002) and supersede, modify, and limit the requirements of the Electronic Signatures in Global and National Commerce Act.

Comment

This section, which is being inserted in all Uniform Acts approved in 2000 or later, preempts the federal Electronic Signatures in Global and National Commerce Act. Section 102(a)(2)(B) of that Act provides that the federal law can be preempted by a later statute of the state that specifically refers to the federal law. The effect of this section, when enacted as part of this Code, is to leave to state law the procedures for obtaining and validating an electronic signature. The Uniform Trust

1 Code does not require that any document be in paper form, allowing all documents
2 under this Code to be transmitted in electronic form. A properly directed electronic
3 message is a valid method of notice under the Code as long as it is reasonably
4 suitable under the circumstances and likely to result in receipt of the notice or
5 document. *See* Section 109(a).

6
7 **Section 19-3B-1203. Severability Clause.**

8 If any provision of this chapter or its application
9 to any person or circumstances is held invalid, then the
10 invalidity does not affect other provisions or applications of
11 this chapter which can be given effect without the invalid
12 provision or application, and to this end the provisions of
13 this chapter are severable.

14
15 **Section 19-3B-1204. Application to Existing Relationships.**

16 (a) Except as otherwise provided in this chapter, on
17 January 1, ~~2006~~ 2007:

18 (1) this chapter applies to all trusts created
19 before, on, or after January 1, ~~2006~~ 2007;

20 (2) this chapter applies to all judicial proceedings
21 concerning trusts commenced on or after January 1, ~~2006~~ 2007;

22 (3) this chapter applies to judicial proceedings
23 concerning trusts commenced before January 1, ~~2006~~ 2007,
24 unless the court finds that application of a particular
25 provision of this chapter would substantially interfere with
26 the effective conduct of the judicial proceedings or prejudice
27 the rights of the parties, in which case the particular
28 provision of this chapter does not apply and the superseded
29 law applies;

30 (4) any rule of construction or presumption provided
31 in this chapter applies to trust instruments executed before

1 January 1, ~~2006~~ 2007, unless there is a clear indication of a
2 contrary intent in the terms of the trust; and

3 (5) an act done before January 1, ~~2006~~ 2007, is not
4 affected by this chapter.

5 (b) If a right is acquired, extinguished, or barred
6 upon the expiration of a prescribed period that has commenced
7 to run under any other statute before January 1, ~~2006~~ 2007,
8 then that statute continues to apply to the right even if it
9 has been repealed or superseded.

10 Section 2. Sections 35-4-255, 35-4-256, 35-4-258,
11 35-4-259, and 35-4-260 of the Code of Alabama 1975, are
12 amended as follows so as to place such sections in the Alabama
13 Uniform Trust Code as provided in Section 1, as Article 13,
14 Pre-existing Alabama Trust Statutes:

15
16 **ARTICLE 13**

17 **PRE-EXISTING ALABAMA TRUST STATUTES**

18
19 **"Section ~~35-4-255~~ 19-3B-1301. Trust Concerning Lands Required**
20 **to be in Writing.**

21 "No trust concerning lands, except such as results
22 by implication or construction of law, or which may be
23 transferred or extinguished by operation of law, can be
24 created, unless by instrument in writing, signed by the party
25 creating or declaring the same, or his or her agent or
26 attorney lawfully authorized thereto in writing.

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"Section ~~35-4-256~~ 19-3B-1302. Trust void as to creditors or purchasers without notice.

"No such trusts, whether implied by law or created or declared by the parties, can defeat the title of creditors or purchasers for a valuable consideration without notice.

"Section ~~35-4-258~~ 19-3B-1303. Trust Estate not Descendible Upon Death of Trustee.

"Upon the death of a sole or surviving trustee of an express trust, the trust estate does not descend to his or her heirs or pass to his or her personal representatives.

"Section ~~35-4-259~~ 19-3B-1304. Trusts for Employees or Self-employed Persons.

"(a) A trust of real or personal property or real and personal property combined:

"(1) Which is created by an employer as part of a stock bonus plan, pension plan, disability or death benefit plan, or profit-sharing plan, for the exclusive benefit of some or all his or her employees, to which contributions are made by such employer or employees, or both, for the purpose of distribution to such employees the earnings of the principal, or both earnings and principal of the fund so held in trust; or

"(2) Which is created by a self-employed person or group of self-employed persons and:

1 "a. Which is part of a retirement, disability, or
2 death benefit plan for such self-employed person or persons;
3 and

4 "b. Contributions to which are deductible, in whole
5 or in part, from gross income for federal income tax purposes
6 under the internal revenue laws of the United States; or

7 "(3) Which is created for the collective investment
8 of the funds of trusts which fall within the coverage of
9 subdivisions (1) or (2) ~~above~~ shall not be deemed to be
10 invalid as violating any existing laws against perpetuities or
11 against suspension of the power of alienation of title to
12 property or against trusts for the purpose of the accumulation
13 of income; but such a trust may continue for such a time as
14 may be necessary to accomplish the purpose for which it was
15 created.

16 "(b) This section shall apply to all trusts of the
17 nature specified in subsection (a) ~~of this section~~ whether now
18 in existence or hereafter created.

19 "(c) Any employee who has the power to benefit
20 others under the terms of any trust, including a pension or
21 profit-sharing trust or any trust which has been created as a
22 part of a stock bonus plan, pension plan, disability or death
23 benefit plan, or profit-sharing plan, which has been created
24 for the direct or indirect benefit of any class or classes or
25 employees of one or more employers, may designate any person
26 as a primary, contingent, alternate, joint, or other
27 beneficiary in accordance with the terms of the instrument
28 governing such trust. Such designation, in the form, if any,
29 required by the terms of the instrument governing such trust,

1 shall be effective to give to such designated beneficiary the
2 benefits provided under the terms of the instrument governing
3 such trust, notwithstanding any law which would otherwise make
4 ineffective such designation, including, but without
5 limitation to, any rule against perpetuities or law respecting
6 testamentary dispositions; provided, that any such designation
7 must be in writing.

8 "(d) Any trustee or other person, including any
9 person, corporation or national banking association, ~~is~~
10 ~~authorized to~~ may make payment to any person, or his or her
11 legal representative, designated as provided in subsection (c)
12 ~~of this section~~, and no trustee or other person shall be
13 liable in any way to any person for making payment to a
14 person, or his or her legal representative, so designated.

15 "(e) This section shall not be construed to indicate
16 any invalidity of designations such as are provided in
17 subsection (c) ~~of this section~~ made prior to September 9,
18 1961. This section shall not be construed to impose liability
19 for the payment by a trustee or other person, in accordance
20 with the terms of a trust instrument, to a person or his legal
21 representative, not designated as provided herein.

22
23 **"Section ~~35-4-260~~ 19-3B-1305. Trusts Consisting of Insurance**
24 **Policies or Proceeds.**

25 "Trusts consisting solely of policies of life,
26 health, accident, or disability insurance, or of the proceeds
27 or avails thereof, shall for the purpose of determining
28 whether any law against perpetuities or suspension of the
29 power of alienation of title to property is applicable thereto

1 be regarded as created when the liability of the insurer
2 accrues by reason of the occurrence of the event insured
3 against, whether or not a power to revoke the trust as to the
4 policies was reserved during the life of the insured and
5 whether or not any beneficial interest in the policies is
6 alienable by the beneficiaries and whether or not the
7 beneficiary or beneficiaries were in being at the time of the
8 creation of the trust."

9 Section 3. Sections 19-3-120, 19-3-120.1, and 19-3-
10 120.2 of the Code of Alabama 1975, are amended to read as
11 follows:

12 **"§19-3-120.**

13 "(a) Unless otherwise authorized or directed by the
14 court having jurisdiction thereof, or by the will, trust
15 agreement or other document which is the source of authority,
16 a trustee, executor, administrator, guardian or one acting in
17 any other fiduciary capacity, other than as a trustee governed
18 by the Alabama Uniform Trust Code, ~~may,~~ with the exercise of
19 reasonable business prudence, in addition to any other
20 investments now permitted by law, may invest funds in
21 securities or investments which, at the time of the making or
22 purchase thereof, are included in one or more of the following
23 classes:

24 "(1) Bonds or other interest-bearing obligations of
25 the United States of America, or payment of which the United
26 States of America has guaranteed as to both principal and
27 interest.

28 "(2) Bonds issued by the federal land bank, under
29 the act of congress of the United States of America,

1 designated as "the Federal Farm Loan Act," and acts amendatory
2 thereof.

3 "(3) Bonds or other interest-bearing obligations of
4 any state of the United States of America.

5 "(4) General obligation bonds pledging the full
6 faith and credit, of any county of the State of Alabama which
7 county for a period of five years next preceding the purchase
8 of ~~said~~ the bonds shall not have made default in the payment
9 of principal or interest on any of its funded obligations.

10 "(5) Interest-bearing general obligations pledging
11 the full faith and credit, including interest-bearing
12 warrants, of any board of education of any county or
13 municipality of the state of Alabama secured by pledge of the
14 three-mill school tax.

15 "(6) Promissory notes, bonds, or other evidences of
16 indebtedness secured directly or collaterally by mortgage or
17 trust deed which is a first lien on improved real estate in
18 this or any other state of the United States of America;
19 provided, that:

20 "a. No interest or participation in any note, bond,
21 or other evidence of indebtedness secured by mortgage shall
22 hereafter be purchased for any fiduciary account unless the
23 entire principal indebtedness secured by the mortgage shall at
24 the time be controlled by the fiduciary, that:

25 "b. No such interest or participation less than the
26 entire indebtedness shall at any time be sold by the fiduciary
27 to any person, estate, trust, or other entity, not controlled
28 by the fiduciary, and that:

1 "c. No fiduciary shall hereafter purchase from any
2 trust or estate under its control or from itself for any trust
3 or estate any such loan, bond, or other evidence of
4 indebtedness secured by mortgage, or interest therein, unless
5 the items so acquired shall in good faith and with due
6 diligence have originally been made or acquired by the
7 fiduciary for trust investment; and provided further, that
8 this section shall not, insofar as the same is prohibited by
9 the Constitution of this state, authorize the investment of
10 such funds in the stocks or bonds of private corporations.

11 "(7) As a deposit in the savings department of any
12 bank which is a member of the Federal Deposit Insurance
13 Corporation. In the event the fiduciary is such a bank, such
14 deposit may be made in its own savings department, and in such
15 event, it shall only be liable for interest thereon at the
16 same rates, and subject to the same regulations as other
17 savings deposits therein; provided, that any such deposit in
18 ~~said~~ the savings account shall not exceed the amount
19 authorized to be insured by the Federal Deposit Insurance
20 Corporation.

21 "(8) Bonds, the issuance of which has been
22 authorized by the director of the Alabama ~~securities~~
23 ~~commission~~ Securities Commission and which are secured
24 directly or collaterally by mortgages or trust deeds which are
25 first liens on improved real estate in this or any other state
26 of the United States of America; provided, that the value by
27 appraisal of the realty must be not less than one and one-half
28 times the amount of any mortgage secured by ~~said~~ the realty;
29 except:

1 "a. Mortgages guaranteed or insured in whole or in
2 part by the Federal Housing Administrator, or

3 "b. Mortgages guaranteed or insured in whole or in
4 part by the Administrator of Veterans' Affairs of the United
5 States. Nothing in this subdivision shall prohibit the bonds
6 from being secured by more than one first lien. In the event
7 that any, or all of the first liens securing the bond issue
8 are satisfied, other securities authorized by law for the
9 investment of trust funds may be substituted therefor.

10 "(9) Obligations of the African Development Bank.

11 "(b) The power herein given is in addition to and
12 not in derogation of any power of investment given under
13 existing law, but to the extent that any statute now in force
14 is in conflict herewith, the same is hereby repealed.

15 Effective January 1, ~~2006~~ 2007, the classes of investments
16 that may be made by trustees shall be governed by Chapter 3B
17 instead of this section.

18 **"§19-3-120.1.**

19 "In addition to the investments authorized by
20 Section 19-3-120, by any other provision of law for the
21 investment of funds held by a trustee, executor,
22 administrator, guardian, conservator or other fiduciary, or by
23 the will, trust agreement or other document which is the
24 source of authority, such fiduciary, other than a trustee
25 governed by the Alabama Uniform Trust Code, may invest in and
26 hold (1) interests, however evidenced, in any common trust
27 fund or other collective investment fund maintained by any
28 national or state chartered bank, trust company or savings and
29 loan association having trust powers, or (2) securities of or

1 other interests in any open-end or closed-end management type
2 investment company or investment trust registered under the
3 Investment Company Act of 1940, as from time to time amended,
4 so long as the portfolio of such common trust fund, collective
5 investment fund or investment company or investment trust
6 consists of investments authorized with respect to such
7 fiduciary by Section 19-3-120, by any other provision of law,
8 or by the will, trust agreement or other document which is the
9 source of authority. The fact that such fiduciary or any
10 affiliate thereof is providing services to the investment
11 company or investment trust as an investment advisor, sponsor,
12 distributor, custodian, transfer agent, registrar, or
13 otherwise, and is receiving reasonable remuneration for such
14 services, shall not preclude such fiduciary from investing in
15 the securities of such investment company or investment trust;
16 provided, however, that with respect to any fiduciary account
17 to which fees are charged for such services, the fiduciary
18 shall disclose (by prospectus, account statement or otherwise)
19 to the current income beneficiaries of such account or to any
20 third party directing investments the basis (expressed as a
21 percentage of asset value or otherwise) upon which the fee is
22 calculated. This section shall not, insofar as such
23 authorization may be prohibited by the Constitution of this
24 state, authorize the investment of trust funds in the stock of
25 any private corporations. Effective January 1, 2006 2007,
26 investments by trustees in common trusts, collective
27 investment funds, and interests of investment companies and
28 trusts, shall be governed by Chapter 3B instead of this
29 section.

1 **"§19-3-120.2.**

2 "(a) When investing, reinvesting, purchasing,
3 acquiring, exchanging, selling and managing property for the
4 benefit of another, a trustee, executor, administrator,
5 guardian, conservator or other fiduciary, other than a trustee
6 governed by the Alabama Uniform Trust Code, shall act with the
7 care, skill, prudence, and diligence under the circumstances
8 then prevailing that a prudent person acting in a like
9 capacity and familiar with such matters would use to attain
10 the purposes of the account. In making investment decisions, a
11 fiduciary shall consider the role that the investment plays
12 within the account's overall portfolio of assets and may
13 consider the general economic conditions, the anticipated tax
14 consequences of the investment, the anticipated duration of
15 the account and the needs of the beneficiaries of the account.

16 "(b) The propriety of an investment decision is to
17 be determined by what a fiduciary knew or should have known at
18 the time of the decision about the inherent nature and
19 expected performance of the investment, the attributes of the
20 account portfolio, the general economy, and the needs and
21 objectives of the beneficiaries of the account as they existed
22 at the time of the investment decision.

23 "(c) Any fiduciary acting under a governing
24 instrument shall not be liable to anyone whose interests arise
25 from such instrument for the fiduciary's good faith reliance
26 on the express provisions of such instrument. The standards
27 set forth in this section may be expanded, restricted, or
28 eliminated by express provisions in a governing instrument.

1 "(d) In the absence of an express provision to the
2 contrary in a governing instrument, a fiduciary may without
3 liability continue to hold property received into an account
4 at its inception or subsequently added to it or acquired
5 pursuant to proper authority if and as long as the fiduciary,
6 in the exercise of good faith and of reasonable prudence, may
7 consider that retention to be in the best interest of the
8 account or in furtherance of the goals of the governing
9 instrument. Such property may include, among other things,
10 stock in the fiduciary if a corporation, and stock in any
11 corporation controlling, controlled by or under common control
12 with the fiduciary.

13 "(e) Nothing in this section shall abrogate or
14 restrict the power of the appropriate court in a proper case
15 to direct or permit a fiduciary to deviate from the terms of a
16 governing instrument regarding the acquisition, investment,
17 reinvestment, exchange, retention, sale or management of
18 property.

19 "(f) The provisions of this section shall apply to
20 all fiduciary relations, other than trustee relations covered
21 by the Alabama Uniform Trust Code, now existing or hereafter
22 created, but only to the fiduciary actions or inactions
23 occurring after the effective date hereof. Effective January
24 1, ~~2006~~ 2007, the standards for fiduciary investment and
25 management for trustees shall be governed by Chapter 3B
26 instead of this section."

27 Section 4. Section 19-3A-606 is added to the Code of
28 Alabama 1975, to provide as follows:

1 Section 19-3A-606. Applicability to Tenant and
2 Remainder Interests.

3 This chapter shall govern the ascertainment of
4 income and principal, and the apportionment of receipts and
5 disbursements between tenant and remainderman, in all cases
6 where a principal has been established with or, unless
7 otherwise stated in this chapter, without the interposition of
8 a trust; except that in the establishment of the principal,
9 provision may be made touching all matters covered by this
10 chapter, and the person establishing the principal may direct
11 the manner of ascertainment of income and principal and the
12 apportionment of receipts and disbursements or grant
13 discretion to the trustee or other person to do so, and such
14 provision and direction, where not otherwise contrary to law,
15 shall control notwithstanding this chapter. This section is
16 intended to be declarative of the law of Alabama from the time
17 of enactment of the Alabama Principal and Income Act pursuant
18 to this chapter.

19 Section 5. The following sections of the Code of
20 Alabama 1975, are repealed: 19-3-1, 19-3-2, 19-3-3, 19-3-4,
21 19-3-5, 19-3-6, 19-3-7, 19-3-8, 19-3-10, 19-3-100, 19-3-101,
22 19-3-102, 19-3-103, 19-3-104, 19-3-105, 19-3-106, 19-3-107, ~~9-~~
23 ~~3-129~~ 19-3-129, 19-3-130, 19-3-131, 19-3-132, 19-3-171, 19-3-
24 172, 19-3-173, 19-3-190, 19-3-191, 19-3-192, 19-3-210, 19-3-
25 211, 19-3-212, 19-3-230, 19-3-231, 19-3-232, 19-3-233, 19-3-
26 234, 19-3-250, 19-3-251, 19-3-252, 19-3-253, 19-3-320, 19-3-
27 321, 19-3-322, 19-3-323, 19-3-324, 19-3-325, 19-3-326, 19-3-
28 327, 19-3-328, 35-4-251, 35-4-252, 35-4-253, and 35-4-254.

29 Section 6. This act shall become effective January
30 1, ~~2006~~ 2007, following its passage and approval by the
31 Governor, or its otherwise becoming law.