THE PROPOSED PENNSYLVANIA UNIFORM TRUST ACT
AND AMENDMENTS TO THE PROBATE, ESTATES AND FIDUCIARIES CODE

NOVEMBER 2003

REPORT OF THE ADVISORY COMMITTEE ON DECEDENTS' ESTATES LAWS

General Assembly of the Commonwealth of Pennsylvania
JOINT STATE GOVERNMENT COMMISSION
108 Finance Building
Harrisburg, Pennsylvania 17120

The release of this report should not be interpreted as an endorsement by the members of the Executive Committee of the Joint State Government Commission of all the findings, recommendations or conclusions contained in this report.

Joint State Government Commission
Room 108 Finance Building
Harrisburg, PA 17120-0018

Telephone 717-787-4397
Fax 717-787-7020

E-mail: jntst02@legis.state.pa.us
Website: http://jsg.legis.state.pa.us

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GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA
JOINT STATE GOVERNMENT COMMISSION
ROOM 108 - FINANCE BUILDING
HARRISBURG 17120

717-787-4397
FAX 717-787-7020

November 2003

TO THE MEMBERS OF THE GENERAL ASSEMBLY:

The Joint State Government Commission is pleased to present this report of the Advisory Committee on Decedents' Estates Laws. This report contains proposed amendments and official comments to the Probate, Estates and Fiduciaries Code (Title 20 of the Pennsylvania Consolidated Statutes), including the Pennsylvania Uniform Trust Act. The recommendations contained in this report represent the consensus of the advisory committee gained after extensive analysis and deliberation.

On behalf of the General Assembly, I thank the members of the advisory committee for contributing their valuable time and expertise in the considerable effort to improve trust law in Pennsylvania and ensure that Title 20 remains modern and efficient. I commend the advisory committee for its commitment to develop legislation and assist in the legislative process.

Respectfully submitted,

Roger A. Madigan
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INTRODUCTION

The Advisory Committee and Task Force Process

The Joint State Government Commission Advisory Committee on Decedents' Estates Laws is a standing group of attorneys and judges from across the Commonwealth who assist the General Assembly by recommending improvements to Pennsylvania law relating to Title 20 of the Pennsylvania Consolidated Statutes, known as the Probate, Estates and Fiduciaries Code, and related statutes. Since 1945, the advisory committee has provided expertise and advice in formulating legislation aimed at modernizing Pennsylvania law to make it more efficient. After reaching consensus on its legislative recommendations, the advisory committee presents its recommendations to the Task Force on Decedents' Estates Laws, which is a bicameral and bipartisan panel of legislators. The task force then considers the recommendations and decides whether to authorize the Joint State Government Commission to publish a report containing the recommendations, which serve as a basis for legislation.

In 2001, the advisory committee decided to review Pennsylvania trust law in light of the adoption of the Uniform Trust Code (UTC).[1] Accordingly, the advisory committee established a subcommittee consisting of C. Thomas Work (chair), Judge Calvin S. Drayer, Jr., Robert L. Freedman, Richard L. Grossman, Neil E. Hendershot and Edward M. Watters, III. Over a two-year period, the subcommittee met to discuss a more comprehensive statutory framework for trusts and proposed the Pennsylvania Uniform Trust Act contained in this report. The advisory committee met on three occasions to review and discuss the subcommittee's recommendations. Throughout its deliberations, the advisory committee recognized that an organized, more comprehensive codification of trust law will facilitate the search for applicable Pennsylvania trust law, encourage better compliance with Pennsylvania law by trustees who do business in more than one state and enable beneficiaries of Pennsylvania trusts to better understand and enforce their rights. After its meeting on April 22, 2003, the advisory committee reached consensus on the provisions contained in the proposed act and the other amendments to Title 20.

[1] The National Conference of Commissioners on Uniform State Laws recommended the UTC as a comprehensive and uniform framework of statutory trust law for individual states to consider and adopt. While some states have adopted detailed statutory provisions governing trusts, other states have little or no codification of trust law. In the latter states, trust law has often developed through court decisions; however, in many instances case law and statutory law offer little guidance regarding trust law and practice. For the sake of convenience, the UTC is replicated in its entirety in this report, along with the UTC comments and notes. *Infra* pp. 143-318.

On October 20, 2003, the task force authorized both the publication of this report and the introduction of the legislation contained in this report. However, the inclusion of any recommendation in this report does not necessarily reflect the endorsement of the task force.

The Pennsylvania Uniform Trust Act

This report results from an extensive review of trust law in Pennsylvania and other matters governed by Title 20. It contains the proposed Pennsylvania Uniform Trust Act as Subchapters A through I of a new Chapter 77 to Title 20. The Pennsylvania Uniform Trust Act borrows heavily from the structure and content of the UTC;[2] however, where appropriate, it deviates from and replaces provisions of the UTC to preserve existing Pennsylvania law. The Pennsylvania Uniform Trust Act would improve the law governing trusts in Pennsylvania and comport with the increasing use of revocable trusts as will substitutes. Those sections that are substantially similar to the UTC sections contain a reference in the heading to the relevant UTC section number, thereby allowing the reader easily to recognize those provisions that are substantially based on the UTC. Conversely, sections that do not substantially incorporate the UTC provisions or are substantially rewritten do not contain a UTC reference in the heading. To parallel the organizational framework of the UTC, several sections, subsections and paragraphs in the Pennsylvania Uniform Trust Act are reserved.

Changes to the UTC are noted in the official Pennsylvania Comments, which follow many of the statutory provisions of the proposed act and explain the statutory provisions. Where the UTC provisions have been substantially retained, the UTC comments are applicable to the extent of the similarity. The official comments may be used in determining the intent of the General Assembly.[3] In addition, the uniform provisions are to be interpreted and construed to effect their general purpose to make uniform the laws of those states that enact them.[4]

The following summarizes the most notable aspects of the Pennsylvania Uniform Trust Act.[5]

Notices. Section 7780.3, a replacement of UTC § 813, encourages and in many contexts requires a trustee to communicate with the trust's beneficiaries. A

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[2] A table of contents for the Pennsylvania Uniform Trust Act precedes the proposed legislation and details its organizational structure. *Infra* pp. 19-26.
[3] 1 Pa.C.S. § 1939.
[4] 1 Pa.C.S. § 1927.
[5] A summary of recommendations follows this introduction and provides a more detailed list of the provisions of the Pennsylvania Uniform Trust Act, along with a list of other proposed amendments to Title 20. *Infra* pp. 14-18.

trustee must respond to a beneficiary's reasonable request for information unless the trust is a revocable trust and the settlor is alive. The exception preserves the settlor's privacy and respects the settlor's right to change the post-death provisions of the trust. The trustee must notify the trust's current beneficiaries in a variety of circumstances after the trust may no longer be amended or revoked. The contents of the notice are prescribed in the statute. Apart from the requirements of this section, a trustee may notify the beneficiaries of a trust whenever the trustee likes. A settlor may not negate the notice requirements. A two-year transitional rule will allow Pennsylvania trustees enough time to prepare for the new notice requirements.

Recognition of revocable trusts as will substitutes. Subchapter F (Revocable Trusts) essentially applies the same rules in force for wills to revocable trusts. Those provisions equate capacity to execute a revocable trust with capacity to execute a will; impose a similar period of time to contest a revocable trust as applies to wills; require notices of the trust relationship to the settlor's spouse, children and beneficiaries akin to Pennsylvania Orphans' Court Rule 5.6 applicable to will and intestate settlements; apply to revocable trusts the same rules of construction that apply to testamentary trusts; and set forth a road map for clearance of creditors' claims and interaction with parallel administration of the settlor's estate apart from the revocable trust.

Virtual representation in litigated and non-litigated trust matters. Concepts of virtual representation have been broadened, refined and detailed. For the first time in Pennsylvania, a person may represent his minor and unborn descendants unless there is a conflict of interest between the ancestor and descendant with respect to the matter at issue. These rules apply to releases, settlements and other transactions outside a judicial context as well as to matters before the court. Departing from the UTC, the Pennsylvania Uniform Trust Act requires the trustee to give written notice to a person ("A") if the trustee expects A to represent another person in a trust matter and recognizes A's right to decline the proposed representation. The UTC and existing Pennsylvania law assume that certain parties suitably represent others without any such notice or express right to opt out of representation.

Choice of law. A settlor may select the law that will govern the meaning and effect of the trust instrument unless that law contravenes one of the mandatory rules set forth in the Pennsylvania Uniform Trust Act, such as the rules requiring the trustee to communicate with the beneficiaries.

Changes of situs and venue. Section 7708 permits a trustee to change the situs of a trust to another state or county after notifying the trust's primary beneficiaries of the proposed transfer and obtaining their consent. The notice must include certain salient, practical aspects of the transfer. The right of the court to direct a

change in situs is preserved. Under the Pennsylvania Uniform Trust Act, a change in venue follows automatically from a change in situs.

Removal of trustees. In addition to a court's authority to remove a trustee for fault, there is a "no-fault" basis for the removal of a trustee if the court concludes that removal best serves the interests of the beneficiaries and is not inconsistent with a material purpose of the trust, a suitable co-trustee or successor trustee is available and all the trust's qualified beneficiaries request removal. The court is given significant discretion to preserve the settlor's intent, protect the interests of the beneficiaries and prevent abuses such as forum-shopping.

Effect of spendthrift clause. The Pennsylvania Uniform Trust Act codifies the effect of a spendthrift provision. Such a provision is valid as against any creditor except a beneficiary's child, spouse or former spouse who has a judgment or court order against the beneficiary for support or maintenance, or a judgment creditor who has provided services for the protection of the beneficiary's interest in the trust. The same rules apply whether the action is by the beneficiary against the trustee, or by a creditor of the beneficiary against the trustee to compel or enjoin a distribution from the trust. These rules are essentially consistent with existing Pennsylvania law.

Trusts presumed to be revocable. Trusts created on or after the effective date of the act are presumed to be amendable and revocable. This reverses existing Pennsylvania law.

Compensation of trustees. Intended to codify existing Pennsylvania law, § 7768 clarifies some ambiguities in and replaces 20 Pa.C.S. § 7185.

Limited codification of laches doctrine. Under § 7785, a trustee who communicates essential trust information to the beneficiaries may implement a procedure that bars claims by a beneficiary after the passage of a specific period of time. To do so the trustee must provide written reports of trust assets and transactions to the beneficiary for a period of at least five years and notify the beneficiary of the time by which challenges to trust transactions must be asserted. A claim with respect to a transaction that occurred in the first of those five years is barred six months after the beneficiary has received all such information for the five-year period unless the claim is presented to the trustee in writing before the end of that period.

Mandatory rules. Following the UTC, the Pennsylvania Uniform Trust Act sets forth a series of mandatory rules that may not be countermanded in the trust instrument. These include the notice requirements, the duty to inform and report, the requirements for creation of a trust and the authority of the court in various trust matters.

Oral trusts. Under the Pennsylvania Uniform Trust Act, trusts must be in writing; oral trusts will no longer be recognized.

Applicability. The Pennsylvania Uniform Trust Act will apply to trusts created both before and after the enactment, with appropriate transitional rules where needed for existing trusts.

Other Amendments to Title 20

The proposed legislation moves several existing statutory provisions not being replaced by the Pennsylvania Uniform Trust Act to Subchapter J of Chapter 77. It does so by repealing these provisions and re-enacting them. The official comments following each provision in Subchapter J supply the repealed section on which the provision is based.

This report also contains other proposed amendments to Title 20, including a new provision regarding the cost of distribution of tangible personal property and amendments to Chapter 75 (limitations on the exercise of trustee powers and powers of beneficiaries to appoint trustees) and Chapter 81 (the Pennsylvania Uniform Principal and Income Act). Conforming amendments and transitional provisions to implement the legislation follow the recommendations.

SUMMARY OF RECOMMENDATIONS

The proposed legislation in this report contains the following recommendations.

(1) Enact the Pennsylvania Uniform Trust Act as Subchapters A through I of 20 Pa.C.S. Chapter 77, which is summarized below.

(2) Repeal 20 Pa.C.S. §§ 723, 724, 725, 6102, 6110 and 6112 and Chapter 71.

(3) Repeal the act of December 9, 2002 (P.L.1379, No.168), known as the Pooled Trust Act, and re-enact it as 20 Pa.C.S. § 7799.3.

(4) Re-enact, with the necessary technical amendments, 20 Pa.C.S. §§ 7132, 7133, 7136, 7143, 7144, 7145, 7181, 7182, 7183, 7186, 7187 and 7188 as 20 Pa.C.S. §§ 7791 through 7799.2.

(5) Amend 20 Pa.C.S. § 908 to clarify that parties in interest may challenge or amend a will that has already been probated by the register.

(6) Enact 20 Pa.C.S. § 3534.1 to provide that, unless the terms of the will directs otherwise, the personal representative shall pay as an expense of administration the reasonable expenses associated with the distribution of tangible personal property to a beneficiary.

(7) Amend 20 Pa.C.S. § 3543 to replace the references to “interest” with “income.”

(8) Amend 20 Pa.C.S. §§ 7503, 7504 and 7506 for technical purposes.

(9) Amend 20 Pa.C.S. § 8102 to provide that Chapter 81 (Pennsylvania Uniform Principal and Income Act), including the power to adjust under § 8104, is applicable to perpetual charitable trusts.

(10) Amend 20 Pa.C.S. § 8102 to clarify that under § 8105 a parent does not represent a minor for purposes of determining whether a court proceeding is required to convert a trust to a unitrust.

(11) Amend 20 Pa.C.S. § 8105 to provide that the trustee must give written notice of the intention to release the power to adjust and convert the trust into a unitrust and to provide how the unitrust will operate to secondary life tenants in cases where the trust contains succeeding life estates.

The Pennsylvania Uniform Trust Act, based on the Uniform Trust Code, contains the following statutory provisions.

- Apply a more comprehensive statute to express trusts and trusts to be administered in the manner of an express trust (§ 7702)

- Provide certain mandatory rules for trusts that a trust instrument may not override (§ 7705)

- Expressly allow common law and principles of equity to supplement but not override the provisions of Chapter 77 (§ 7706)

- Except for the mandated statutory rules, allow a settlor to designate a jurisdiction to govern the trust (§ 7707)

- Provide a statutory framework governing the situs of a trust and provide a procedure to transfer a trust's situs (§ 7708)

- Facilitate resolution of disputes by generally allowing nonjudicial settlement agreements (§ 7710.1)

- Extend applicable rules of construction for testamentary trusts to inter vivos trusts (§ 7710.2)

- Permit the court to intervene in the administration of trusts but not require judicial supervision thereof unless so ordered (§ 7711)

- Provide for the personal jurisdiction over trustees and beneficiaries by the courts in Pennsylvania (§ 7712)

- Provide for venue for a judicial proceeding involving a trust (§ 7714)

- More completely address representation of beneficiaries for judicial and nonjudicial proceedings affecting a trust (Subchapter C, §§ 7721 through 7726)

- Require a settlor to sign a writing to validly create a trust (§§ 7731 and 7732)

- Allow a living settlor, the Attorney General, the trust's beneficiaries or other persons who have standing to enforce a charitable trust (§ 7735)

- Refuse to enforce oral trusts created in Pennsylvania (§ 7737)

- Provide for the creation, termination and enforcement of a trust for the care of an animal (§ 7738)

- Provide for the creation and enforcement of a noncharitable trust without an ascertainable beneficiary (§ 7739)

- Specify how a trust terminates and who has standing to seek to terminate, modify, divide or combine trusts (§ 7740)

- Specify how to modify or terminate a noncharitable trust by consent (§ 7740.1)

- Presume that a spendthrift provision in a trust constitutes a material purpose of the trust (§ 7740.1(c))

- Allow a court to modify administrative or dispositive provisions of a noncharitable irrevocable trust, make an allowance from the principal of the trust or terminate it to further its purposes (§ 7740.2)

- Specify what happens if a trust's particular charitable purpose becomes unlawful, impracticable or wasteful (§ 7740.3(a) and (b))

- Permit a court to modify an administrative provision of a charitable trust to preserve the trust (§ 7740.3(c))

- Permit the administrative termination of small charitable trusts (§ 7740.3(d))

- Permit the judicial termination of charitable trusts under certain circumstances (§ 7740.3(e))

- Outline the authority of a trustee and a court to modify or terminate a noncharitable trust (§ 7740.4)

- Permit judicial reformation of a trust instrument to conform to the probable intention of the settlor and correct mistakes of fact or law (§ 7740.5)

- Provide for the division and combination of trusts (§§ 7740.7 and 7740.8)

- Specify the rights of a beneficiary's creditor or assignee (§ 7741), permit a settlor to restrain the transfer of a beneficiary's interest (§ 7742) and specify exceptions to such restraint (§ 7743)

- Address one's ability to reach a beneficiary's discretionary trust interest (§ 7744)

- Subject the property of a revocable trust to a creditor's claim against a living settlor and equate a power of withdrawal with that of revocation when considering a creditor's claim against a settlor (§ 7745)

- Require a settlor to have the same capacity as a testator (§ 7751)

- Provide a statutory framework for how to revoke or amend a revocable trust (§ 7752)

- Specify how to contest the validity of a revocable trust and declare that the grounds for such contest are the same as those for contesting the validity of a will (§ 7754)

- Provide a statutory framework for claims and distribution after the death of a settlor (§ 7755)

- Direct what constitutes acceptance of a trusteeship (§ 7761)

- Outline the standard of performance required by a cotrustee and clarify when a cotrustee may be liable for the action or inaction of another cotrustee (§ 7763)

- Specify how to fill a vacancy in a trusteeship and permit qualified beneficiaries to fill the vacancy if the trust did not designate a successor trustee (§ 7764)

- Specify how a trustee may resign (§ 7765)

- Authorize removal of trustees on various grounds (§ 7766)

- Provide a statutory framework for the compensation of a trustee, whether or not specified in the trust instrument, and identify factors impacting the reasonableness of the compensation (§ 7768)

- Entitle a trustee to reimbursement of expenses (§ 7769)

- Immunize a succeeding trustee from the liability of his predecessor (§ 7770)

- Address the fundamental powers and duties of a trustee, including prudent administration, loyalty, use of skills and expertise and delegation (Subchapter H, §§ 7771 through 7780.7)

- Specify the duty of a trustee to inform and report, including the types and timing of notices to designated persons (§ 7780.3)

- Describe what constitutes a breach of trust by a trustee and specify the remedies for such breach (§ 7781)

- Specify the damages for a breach of trust by a trustee (§ 7782)

- Address damages in the absence of a breach of trust by a trustee (§ 7783)

- Impose an absolute statute of limitations and one that is triggered if a trustee annually reports to the beneficiary (§ 7785)

- Determine the enforceability and validity of a trust's exculpatory provision (§ 7788)

- Immunize persons dealing with a trustee (§ 7790.2)

PENNSYLVANIA UNIFORM TRUST ACT: DETAILED TABLE OF CONTENTS

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PENNSYLVANIA UNIFORM TRUST ACT

CHAPTER 77

TRUSTS

Pennsylvania Prefatory Comment

This chapter is based upon the Uniform Trust Code (UTC), approved and recommended by the National Conference of Commissioners on Uniform State Laws. Although the organization of the UTC is retained throughout this chapter, several provisions of the UTC are substantially rewritten, and others are not adopted. The sections of this chapter that are substantially similar to the UTC sections contain a reference in the heading to the relevant UTC section number. Sections that do not substantially incorporate the UTC provisions, but which may contain a similar subject matter, do not contain a reference in the heading to the UTC section. Several sections from the UTC are omitted and their substance is either substantially changed or included elsewhere in this act or title. To parallel the organizational framework of the UTC, several sections, subsections and paragraphs are reserved in this chapter. Changes to the UTC are explained in the Pennsylvania Comments. Where the UTC provisions have been substantially retained in this chapter, the UTC comments are applicable to the extent of the similarity. The uniform provisions are to be construed as directed by 1 Pa.C.S. § 1927. Almost all of Subchapter J is comprised of various sections of 20 Pa.C.S. Chapter 71 that were moved into Chapter 77.

Subchapter

A. General Provisions
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C. Representation
D. Creation, Validity, Modification and Termination of Trust
E. Creditor's Claims; Spendthrift and Discretionary Trusts
F. Revocable Trusts
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SUBCHAPTER A

GENERAL PROVISIONS

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§ 7701. Short title - UTC 101.

Subchapters A (relating to general provisions) through I (relating to liability of trustees and rights of persons dealing with trustees) shall be known and may be cited as the Pennsylvania Uniform Trust Act.

§ 7702. Scope - UTC 102.

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

§ 7703. Definitions - UTC 103.

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Action." With respect to an act of a trustee, includes a failure to act.

"Beneficiary." A person that:

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

(2) in a capacity other than that of trustee or protector, holds a power of appointment over trust property.

"Charitable trust." A trust, or portion of a trust, created for a charitable purpose described in section 7735(a) (relating to charitable purposes; enforcement - UTC 405).

"Current beneficiary." A person 18 years of age or older to or for whom income or principal of a trust must be distributed currently or a person 25 years of age or older to or for whom income or principal of a trust may, in the trustee's discretion, be distributed currently.

"Guardian." A person other than a guardian ad litem who is appointed by the court to make decisions regarding the property of an individual.

"Interests of the beneficiaries." The beneficial interests provided in the trust instrument.

"Jurisdiction." With reference to a geographic area, a country, state or county.

"Power of withdrawal." The unrestricted power to transfer to oneself the entire legal and beneficial interest in the whole or a portion of property.

"Property." Anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein.

"Qualified beneficiary." Assuming nonexercise of all testamentary powers of appointment, a beneficiary who on the date the beneficiary's qualification is determined:

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

(2) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in paragraph (1) terminated on that date; or

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

"Revocable trust." A trust is revocable to the extent the settlor, immediately before the time as of which the determination is made, had the power, acting without the consent of the trustee or any person holding an interest adverse to revocation, to prevent the transfer of the trust property at the settlor's death by revocation or amendment of or withdrawal of property from the trust. The term does not include a trust that terminates to the settlor's personal representative or estate as a result of the settlor's death.

"Settlor." A person, including a testator, who creates or contributes property to a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.

"Spendthrift provision." A provision in a trust instrument that restrains both voluntary and involuntary transfer of a beneficiary's interest.

"Trust instrument." A will or other written instrument executed by the settlor that contains trust provisions, including any amendments thereto.

"Trustee." Includes an original, additional and successor trustee and a cotrustee.

Pennsylvania Comment

> **The term "conservator" as used in the UTC is omitted because the term is not used in Pennsylvania. The term "guardian," defined in the UTC to mean a guardian of the person, is redefined to mean a guardian of the property. The UTC uses the term "conservator" to define the latter function. Because § 7714 determines venue by a trust's situs and situs may be changed from one county to another, the term "jurisdiction," as it appears in the UTC, is expanded to include counties. The definitions of "person" and "state" in the UTC are omitted because the terms are defined in 1 Pa.C.S. § 1991. The term "revocable trust" is defined in order to streamline Subchapter F and because it is central to the provisions of § 7780.3. The phrase "terms of a trust" in the UTC is omitted from this chapter because it implies that there may be terms outside the instrument governing the trust, which is undesirable and inconsistent with the approach of this chapter to refuse enforcement of oral trusts. The phrase is not used in the Pennsylvania Uniform Principal and Income Act or the Pennsylvania Prudent Investor Rule.**

§ 7704. Knowledge - UTC 104.

(a) When person has knowledge.--For the purposes of this chapter and subject to subsection (b), a person has knowledge of a fact involving a trust if the person has:

(1) actual knowledge of it;

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

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

(b) Employees.--For the purposes of this chapter, an organization that conducts activities through employees has notice or knowledge of a fact involving a trust only from the time the information was received by an employee having responsibility to act for the trust, or would have been brought to the employee's attention if the organization had exercised reasonable diligence. An organization exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the employee having responsibility to act for the trust and there is reasonable compliance with the routines. Reasonable diligence does not require an employee of the organization to communicate information unless the communication is part of the individual's regular duties or the individual knows a matter involving the trust would be materially affected by the information.

§ 7705. Trust instrument controls; mandatory rules - UTC 105.

(a) Trust instrument controls.--Except as provided in subsection (b), the provisions of a trust instrument prevail over any contrary provisions of this chapter.

(b) Mandatory rules.--Notwithstanding a contrary provision in the trust instrument, the following rules apply:

(1) The requirements for creating a trust set forth in section 7732 (relating to requirements for creation - UTC 402).

(2) The duty of a trustee to act in good faith and in accordance with the purposes of the trust as set forth in section 7771 (relating to duty to administer trust - UTC 801).

(3) The requirement in section 7734 (relating to trust purposes - UTC 404) that a trust's purpose be lawful and not contrary to public policy.

(4) The power of the court to modify or terminate a trust under sections 7740 (relating to termination of trusts; proceedings for termination or modification of trusts - UTC 410) through 7740.6 (relating to modification to achieve settlor's tax objectives - UTC 416).

(5) The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Subchapter E (relating to creditor's claims; spendthrift and discretionary trusts).

(6) The power of the court under section 7762 (relating to trustee's bond - UTC 702).

(7) The power of the court under section 7768(b) (relating to compensation of trustee - UTC 708) to adjust a trustee's compensation specified in the trust instrument.

(8) The duty of a trustee under section 7780.3 (relating to duty to inform and report).

(9) (Reserved).

(10) The effect of an exculpatory term under section 7788 (relating to exculpation of trustee - UTC 1008).

(11) The rights under sections 7790 (relating to limitation on personal liability of trustee - UTC 1010) through 7790.3 (relating to certification of trust - UTC 1013) of a person other than a trustee or beneficiary.

(12) Periods of limitation for commencing a judicial proceeding.

(13) The power of the court to take action and exercise jurisdiction as may be necessary in the interests of justice.

(14) The subject matter jurisdiction of the court described in Chapter 7 (relating to orphans' court divisions) and venue for commencing a proceeding as provided in section 7714 (relating to venue - UTC 204).

Pennsylvania Comment

The requirements of the UTC that a trust must be for the benefit of its beneficiaries and have purposes possible to achieve are omitted from this chapter because they are likely to provoke unnecessary litigation. The comments to the UTC relating to § 813 are generally irrelevant because § 813 has been completely rewritten as § 7780.3.

§ 7706. Common law of trusts; principles of equity - UTC 106.

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

§ 7707. Governing law - UTC 107.

The meaning and effect of the provisions of a trust instrument shall be determined by:

(1) the law of the jurisdiction designated in the trust instrument, but the mandatory rules of section 7705(b) (relating to trust instrument controls; mandatory rules - UTC 105) shall govern if different from the law of the jurisdiction designated in the trust instrument; or

(2) in the absence of an effective designation in the trust instrument, the law of the jurisdiction in which the settlor is domiciled when the trust becomes irrevocable.

Pennsylvania Comment

These provisions facilitate a more certain choice of law than the UTC. A strong public policy, to which the UTC alludes, not expressed in § 7705(b), such as the policy expressed in the rule against perpetuities, may nevertheless undermine a settlor's choice of law. A trust becomes irrevocable for the purpose of paragraph (2) when the power to revoke the trust is released or at the settlor's death, but not upon an adjudication of the settlor's incapacity.

§ 7708. Situs of trust.

(a) Specified in trust instrument.--Without precluding other means for establishing a sufficient connection with the designated jurisdiction, provisions of a trust instrument designating the situs of the trust are valid and controlling if:

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

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

(3) one or more of the beneficiaries resides in the designated jurisdiction.

(b) Unspecified in trust instrument.--If the trust instrument does not specify a situs:

(1) The situs of a testamentary trust shall be:

(i) in the county where letters were granted to the personal representative;

(ii) if letters under subparagraph (i) have not been granted, in a county where the letters might have been granted; or

(iii) if letters under subparagraph (i) have not been granted and are not subject to being granted, in a county in which any trustee resides or has a place of business.

(2) The situs of an inter vivos trust whose settlor is domiciled in this Commonwealth when the trust becomes irrevocable or, in the case of a revocable trust, when the first application is made to a court concerning the trust shall be:

(i) during the settlor's lifetime, either in the county of the settlor's principal residence or in the county in which any of the trustees resides or has a place of business; and

(ii) after the settlor's death:

(A) in the county in which letters have been granted to the settlor's personal representative;

(B) in a county in which letters might have been granted;

(C) in a county which is the principal place of the trust's administration; or

(D) in a county in which any trustee resides or has a place of business.

(3) The situs of an inter vivos trust, whose settlor either is living and not domiciled in this Commonwealth at the time when the first application is made to a court concerning the trust or was not domiciled in this Commonwealth at the settlor's death after which the first application to a court concerning the trust is made thereafter, shall be in a county where:

(i) a trustee's principal place of business is located or a trustee is a resident;

(ii) all or part of the trust administration occurs; or

(iii) one or more of the beneficiaries resides.

(c) Transfer.--By complying with subsections (d) and (e), the trustee may transfer the trust's situs to another jurisdiction if either immediately before or immediately after the proposed transfer:

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

(2) all or part of the trust administration occurs in the proposed jurisdiction; or

(3) one or more of the beneficiaries resides in the proposed jurisdiction.

(d) Notice of transfer.--The trustee shall notify the qualified beneficiaries of a proposed transfer of a trust's situs at least 60 days before the date as of which the trustee intends to change the situs. The notice of proposed transfer must include the following:

(1) The name of the jurisdiction to which the situs is to be transferred.

(2) The address and telephone number at the new location at which the trustee can be contacted.

(3) The reasons for the proposed transfer.

(4) The date on which the proposed transfer is anticipated to occur.

(5) A statement that if the situs is changed as the trustee proposes, venue will thereafter be in the county of the new situs consistent with section 7714 (relating to venue - UTC 204).

(6) The name and address of the court before which judicial actions involving the trust will be heard after the situs is changed as the trustee proposes.

(7) A statement that the change in situs will occur only if all qualified beneficiaries of the trust consent in writing to the change.

(e) Consent to transfer.--A trustee may transfer a trust's situs under this section without court approval if all the qualified beneficiaries of the trust consent in writing to the change.

(f) Successor trustee.--In connection with a transfer of the trust's situs, the trustee may transfer some or all of the trust property to a successor trustee

designated in the trust instrument or appointed pursuant to section 7764 (relating to vacancy in trusteeship; appointment of successor - UTC 704).

(g) Court-directed change in situs.--A court having jurisdiction of a testamentary or inter vivos trust, on application of a trustee or any party in interest, after such notice as it shall direct and aided if necessary by the report of a master, and after such accounting as the court shall require, may direct, notwithstanding any other provision of this chapter, that the situs of the trust shall be changed to any other place within or without this Commonwealth if the court shall find the change necessary or desirable for the proper administration of the trust.

(h) Claims not discharged.--A change in situs under this section does not discharge any claim against the trustee.

Pennsylvania Comment

Although this section addresses the same subject matter as UTC § 108, it differs substantially from the UTC provision. Not appearing in the UTC, subsections (a)(3) and (c)(3) add to the list of jurisdictions in which a trust may have its situs the jurisdiction in which at least one of the trust's beneficiaries resides. UTC § 108(b) is omitted to avoid the implication of a duty that the trustee consider the laws of all conceivable jurisdictions to which the situs of a trust may be moved and establish and re-establish situs accordingly. Subsection (b) retains existing Pennsylvania law, previously reflected in former 20 Pa.C.S. §§ 723 and 724. A trustee's allocation of ministerial functions, such as the preparation of tax returns and production of periodic statements and reports, among jurisdictions does not alone constitute a change in situs to any such jurisdiction. UTC § 108(e) prohibits the trustee from changing situs without court approval if one of the trust's qualified beneficiaries objects. Tightening that approach, subsection (e) requires the affirmative written consent by or on

behalf of all the trust's qualified beneficiaries to change the trust's situs without court approval. The principles of representation set forth in Subchapter C apply. The notice required by subsection (d) is intended to draw to each qualified beneficiary's attention the more significant practical implications of the proposed change in situs, including the automatic change in venue of proceedings with respect to the trust. This section and § 7714 anticipate that situs and venue may be changed from one county to another. Subsection (g) reflects former 20 Pa.C.S. § 725.

§ 7709. Methods and waiver of notice - UTC 109.

(a) Notice generally.--Notice to a person under this chapter or the sending of a document to a person under this chapter must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document include, first-class mail, personal delivery, delivery to the person's last known place of residence or place of business and a properly directed electronic message.

(b) Unknown identity or location.--Notice otherwise required under this chapter or a document otherwise required to be sent under this chapter need not be provided to a person whose identity or location is unknown to and not reasonably ascertainable by the trustee, but the trustee shall create and maintain indefinitely a written record of the steps the trustee took to identify or locate the person.

(c) Waiver.--Notice under this chapter or the sending of a document under this chapter may be waived in writing by the person to be notified or sent the document.

(d) Notice of judicial proceeding.--Notice of a judicial proceeding must be given as provided in the applicable rules of court.

Pennsylvania Comment

The requirement in subsection (c) that a waiver of notice be in writing is added to promote certainty.

§ 7710. Notice; others treated as qualified beneficiaries - UTC 110.

(a) Notice.--Whenever notice to qualified or current beneficiaries of a trust is required under this chapter, the trustee must also give notice to any other beneficiary who has sent the trustee a written request for notice.

(b) Charitable organization and others.--A charitable organization expressly mandated to receive distributions under the provisions of a charitable trust instrument or a person appointed to enforce a trust created for the care of an animal or another noncharitable purpose as provided in section 7738 (relating to trust for care of animal - UTC 408) or 7739 (relating to noncharitable trust without ascertainable beneficiary - UTC 409), has the rights of a qualified beneficiary under this chapter.

(c) Office of Attorney General.--The Office of Attorney General has the rights of a qualified beneficiary with respect to a charitable trust having its situs in this Commonwealth.

Pennsylvania Comment

The additions of "notice" in the heading of this section and "or current" in subsection (a) reflect the modifications in § 7780.3 from UTC § 813.

§ 7710.1. Nonjudicial settlement agreements - UTC 111.

(a) (Reserved).

(b) General rule.--Except as otherwise provided in subsection (c), all beneficiaries and trustees of a trust may enter into a binding nonjudicial settlement agreement with respect to any matter involving the trust. The rules of Subchapter C (relating to representation) shall apply to a settlement agreement under this section.

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

(d) Matters that may be resolved.--Matters that may be resolved by a nonjudicial settlement agreement include the following:

(1) The interpretation or construction of the provisions of a trust instrument.

(2) The approval of a trustee's report or accounting or waiver of the preparation of a trustee's report or accounting.

(3) Direction to a trustee to perform or refrain from performing a particular act.

(4) The resignation or appointment of a trustee and the determination of a trustee's compensation.

(5) Transfer of a trust's situs.

(6) Liability or release from liability of a trustee for an action relating to the trust.

(7) The grant to a trustee of any necessary or desirable power.

(8) The exercise or nonexercise of any power by a trustee.

(9) Questions relating to the property or an interest in property held as part of a trust.

(10) An action or proposed action by or against a trust or trustee.

(11) The modification or termination of a trust.

(12) An investment decision, policy, plan or program of a trustee.

(13) Any other matter concerning the administration of a trust.

(e) Request of court.--Any beneficiary or trustee of a trust may request the court to approve a nonjudicial settlement agreement to determine whether the representation as provided in Subchapter C was adequate or whether the agreement contains terms and conditions the court could have properly approved.

Pennsylvania Comment

In subsection (b), the phrase "all beneficiaries and trustees of a trust" is substituted for the UTC's concept of interested persons for certainty and to eliminate circularity. The waiver of a report or accounting mentioned in subsection (d)(2), release from liability mentioned in subsection (d)(6) and matters described in subsection (d)(7) through (d)(13) are added to the UTC's list of examples of matters that may be resolved by a nonjudicial settlement agreement.

§ 7710.2. Rules of construction - UTC 112.

The rules of construction that apply in this Commonwealth to the provisions of testamentary trusts also apply as appropriate to the provisions of inter vivos trusts.

Pennsylvania Comment

This section imports 20 Pa.C.S. §§ 2507, 2514 and 2517 and other statutory and judicial rules of interpretation that apply to trusts under wills.

SUBCHAPTER B

JUDICIAL PROCEEDINGS

Sec.
7711. Role of court in administration of trust - UTC 201.
7712. Jurisdiction over trustee and beneficiary - UTC 202.
7713. (Reserved).
7714. Venue - UTC 204.

§ 7711. Role of court in administration of trust - UTC 201.

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

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

(c) Scope of proceeding.--A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for declaratory judgment.

§ 7712. Jurisdiction over trustee and beneficiary - UTC 202.

(a) Personal jurisdiction over trustee.--By accepting the trusteeship of a trust having its situs in this Commonwealth or by moving the situs to this Commonwealth, the trustee submits personally to the jurisdiction of the courts of this Commonwealth regarding any matter involving the trust.

(b) Personal jurisdiction over beneficiary.--With respect to their interests in the trust, the beneficiaries of a trust having its situs in this Commonwealth are subject to the jurisdiction of the courts of this Commonwealth regarding any matter involving the trust. By not releasing or disclaiming the beneficiary's beneficial interest in the trust, a beneficiary of a trust having its situs in this Commonwealth submits personally to the jurisdiction of the courts of this Commonwealth regarding any matter involving the trust.

(c) Additional jurisdictional methods.--This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary or other person receiving property from the trust.

Pennsylvania Comment

> **UTC § 202(b) recognizes personal jurisdiction over a beneficiary who accepts a distribution from a trust. Subsection (b) broadens this concept to recognize personal jurisdiction over a beneficiary who does not release or disclaim an interest in the trust. The difference is potentially significant in trusts, often known as "sprinkling" or "spray" trusts, which have multiple concurrent beneficiaries. The concept derives from 42 Pa.C.S. § 5322(a)(7) and restates existing Pennsylvania law.**

§ 7713. (Reserved).

Pennsylvania Comment

> **UTC § 203 is omitted because similar provisions are set forth in 20 Pa.C.S. §§ 711 and 712.**

§ 7714. Venue - UTC 204.

(a) General rule.--Except as otherwise provided in subsection (b), venue for a judicial proceeding involving a trust is in the county of this Commonwealth in

which the trust's situs is located and, if the trust is created by will and the estate is not yet closed, in the county in which the decedent's estate is being administered.

(b) Exceptions.--

(1) If a trust has no trustee, venue for a judicial proceeding for the appointment of a trustee is in:

(i) any county in which a beneficiary resides;

(ii) any county in which trust property is located; or

(iii) if the trust is created by will, the county in which the decedent's estate was or is being administered.

(2) The venue of proceedings that are pending on the effective date of this section shall not be disturbed.

Pennsylvania Comment

Venue is equated with situs, but subsection (b)(2) clarifies that the venue of proceedings that are pending when this chapter takes effect is not disturbed. Otherwise, like situs, venue may change from county to county.

SUBCHAPTER C

REPRESENTATION

Sec.
7721. Scope; definition of trust matter.
7722. Representation of parties in interest in general.
7723. Representatives and persons represented.
7724. Appointment of representative.
7725. Notice of representation.
7726. Representation ineffective if person timely objects.

Pennsylvania Comment

Article 3 of the UTC, relating to representation of parties in both nonjudicial and judicial proceedings affecting a trust, is completely rewritten. The concept of a "trust matter" incorporates the list of examples set forth in § 7710.1(d). Departing from analogous concepts in the UTC, § 7722(a) and (b) and § 7725 require the trustee to notify the intended representative whom the trustee anticipates that representative will represent and recognize the right of the proposed representative to decline the proposed representation by written notice to the trustee. This subchapter takes no position as to the liability, if any, of a representative to the person or persons represented. Section 7724 reflects 20 Pa.C.S. § 751(6) as it previously applied to trusts.

§ 7721. Scope; definition of trust matter.

(a) Scope.--This subchapter shall apply to this entire chapter unless the context clearly specifies the contrary.

(b) Definition.--As used in this subchapter, the term “trust matter” includes a judicial proceeding and a nonjudicial settlement, agreement or act pertaining to any matter listed in section 7710.1(d) (relating to nonjudicial settlement agreements - UTC 111).

§ 7722. Representation of parties in interest in general.

(a) Judicial proceeding.--In a judicial proceeding involving a trust matter, an order or decree of the court that binds the representative or representatives is binding upon a person, class of persons or both represented in accordance with section 7723 (relating to representatives and persons represented) if the trustee notifies the representatives in writing whom they represent, they do not decline

the representation as provided in section 7725 (relating to notice of representation) and they act in good faith.

(b) Nonjudicial resolution.--In a nonjudicial resolution of a trust matter, notice to, the consent or approval of or the waiver or release by the representative or representatives is binding upon a person, class of persons or both represented in accordance with section 7723 if the trustee notifies the representatives in writing whom they represent, they do not decline the representation as provided in section 7725 and they act in good faith.

(c) Permissible consideration.--In making decisions, a representative may consider general benefit accruing to the living members of the family of the person represented.

§ 7723. Representatives and persons represented.

The following rules, except as set forth in paragraph (7), apply to the extent there is no conflict of interest with respect to the matter at issue between the representative and the person or persons represented that might affect the impartiality of the representative and, if two or more persons are being represented, to the extent there is no conflict of interest with respect to the matter at issue between or among the persons represented that might affect the impartiality of the representative:

(1) A plenary guardian represents the person whose estate the guardian supervises, and a limited guardian represents the person whose estate the

guardian supervises within the scope of authority prescribed by the court order that defines the guardian's authority.

(2) An agent under a general power of attorney represents the agent's principal, and an agent under a limited power of attorney represents the principal within the scope of the agent's authority under the power of attorney.

(3) Where property or an interest in property is vested in a class of persons, the living sui juris class members represent the class members who are minors, unborn, unknown or unascertained.

(4) Where property or an interest in property will pass to a class of persons upon the occurrence of a future event, the living sui juris class members represent the class members who are minors, unborn, unknown or unascertained. The class members entitled to represent other class members or potential class members are the persons who would take the property or interest in property if the future event had occurred immediately before the commencement of the judicial proceeding relating to the property or interest in property or immediately before the effective date of the nonjudicial resolution of the matter.

(5) Where property or an interest in property will pass to a person, class of persons or both upon the occurrence of a future event, but the property or interest in property will pass to another person, class of persons or both upon the occurrence of an additional future event, the person, class of persons or

both who would take upon the occurrence of the first event represents the person, class of persons or both who would take upon the occurrence of the additional event, provided their interests are identical or substantially similar for purposes of the particular trust matter. If a class of persons would take upon the occurrence of the first event, paragraph (4) applies to representation between or among the class.

(6) A person represents all minors or unborn individuals and persons whose identity or location is unknown and not reasonably ascertainable, to the extent such persons are not otherwise represented, if the interests of the person and the person represented are substantially identical with respect to the particular question or dispute involved.

(7) Whether or not there is a conflict of interest described in this section, the sole holder or all coholders of a presently exercisable or testamentary power of appointment represent all potential appointees and all takers in default of exercise of the power of appointment if the holder may appoint to:

(i) the holder's estate, the holder's creditors or the creditors of the holder's estate; or

(ii) anyone other than the holder's estate, the holder's creditors and the creditors of the holder's estate.

(8) The sole holder or all coholders of a presently exercisable or testamentary power of appointment not described in paragraph (7) represent

all potential appointees and all takers in default of exercise of the power who are also potential appointees.

(9) Except as provided in paragraph (1), a person represents the person's minor and unborn descendants.

Pennsylvania Comment

The interplay between paragraphs (4) and (5) is illustrated by the following example. Suppose a trust provides that income is payable to testator's spouse and upon the spouse's death the principal is payable to the testator's children (or descendants of deceased children) and in default of descendants to the testator's heirs. If one or more children are sui juris, they represent all the testator's descendants by virtue of paragraph (4), and they represent all heirs by virtue of paragraph (5). Consequently, the sui juris children represent other children, descendants and heirs. If the trust were to continue for the children's lives with remainders to grandchildren, the sui juris children may represent all children but would not represent the class of grandchildren with respect to some financial matters because of the conflict of interest between the life and remainder beneficiaries. The holder of a power of appointment does not represent the takers in default of exercise of the power unless the power is a general power or virtually a general power or unless the takers in default are also potential appointees. *See* paragraphs (7) and (8).

§ 7724. Appointment of representative.

Notwithstanding any other provision of this subchapter, if in any judicial proceeding involving a trust matter the court determines that the representation provided by section 7723 (relating to representatives and persons represented) is or might be inadequate, the court may appoint a guardian ad litem or trustee ad litem to represent the inadequately represented person, class of persons or both.

Pennsylvania Comment

This section preserves the power of the court to appoint a guardian ad litem or trustee ad litem in appropriate circumstances as provided in § 751(6).

§ 7725. Notice of representation.

A person representing another must be given written notice by the trustee that he is representing the other person. The person to whom the notice is given may decline the representation by a writing that is given to the trustee no later than 60 days after receipt of the trustee's notice.

Pennsylvania Comment

The requirement that the trustee give notice of proposed representation and the option to decline representation do not appear in the UTC.

§ 7726. Representation ineffective if person timely objects.

Notwithstanding the provisions of this subchapter, a person may not represent another who is sui juris and files a written objection to representation with the trustee.

Pennsylvania Comment

Representation under this subchapter will be ineffective if the person to be represented is sui juris and timely objects to the representation. A similar concept appears in UTC § 301(b).

SUBCHAPTER D

CREATION, VALIDITY, MODIFICATION

AND TERMINATION OF TRUST

Sec.

7731. Creation of trust - UTC 401.
7732. Requirements for creation - UTC 402.
7733. Written trusts created in other jurisdictions - UTC 403.
7734. Trust purposes - UTC 404.
7735. Charitable purposes; enforcement - UTC 405.
7736. Creation of trust induced by fraud, duress or undue influence - UTC 406.
7737. Oral trusts unenforceable.
7738. Trust for care of animal - UTC 408.
7739. Noncharitable trust without ascertainable beneficiary - UTC 409.
7740. Termination of trusts; proceedings for termination or modification of trusts - UTC 410.
7740.1. Modification or termination of noncharitable irrevocable trust by consent - UTC 411.
7740.2. Modification or termination of noncharitable irrevocable trust by court - UTC 412.
7740.3. Charitable trusts - UTC 413.
7740.4. Modification or termination of noncharitable trust - UTC 414.
7740.5. Reformation to correct mistakes - UTC 415.
7740.6. Modification to achieve settlor's tax objectives - UTC 416.
7740.7. Division of trusts.
7740.8. Combination of trusts.

§ 7731. Creation of trust - UTC 401.

A trust may be created by:

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

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

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

§ 7732. Requirements for creation - UTC 402.

(a) Requirements.--A trust is created only if:

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

(2) the settlor signs a writing that indicates an intention to create the trust and contains provisions of the trust;

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

(i) a charitable trust;

(ii) a trust for the care of an animal, as provided in section 7738 (relating to trust for care of animal - UTC 408); or

(iii) a trust for a noncharitable purpose, as provided in section 7739 (relating to noncharitable trust without ascertainable beneficiary - UTC 409);

(4) the trustee has duties to perform; and

(5) the same person is not the sole trustee and sole beneficiary of the trust.

(b) (Reserved).

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

(d) Definition.--As used in this section, the term “definite beneficiary” means a beneficiary that can be ascertained now or in the future, subject to any applicable rule against perpetuities.

Pennsylvania Comment

Departing from the UTC's recognition of oral trusts, §§ 7731 and 7732 require trusts to be in writing. Reflecting the requirement that trusts be written, §§ 7731 and 7732 require more specificity than the UTC to create a trust.

§ 7733. Written trusts created in other jurisdictions - UTC 403.

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

(1) the settlor was domiciled, had a residence or was a national;

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

(3) any trust property was located.

§ 7734. Trust purposes - UTC 404.

A trust may be created only to the extent its purposes are lawful and not contrary to public policy.

Pennsylvania Comment

The requirements of the UTC that a trust be for the benefit of the beneficiaries and that a trust have purposes possible to achieve are omitted because they are likely to provoke unnecessary litigation.

§ 7735. Charitable purposes; enforcement - UTC 405.

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

(b) Selection by court.--If the provisions of a charitable trust instrument do not indicate or authorize the trustee to select a particular charitable purpose or beneficiary, the court may select one or more charitable purposes or beneficiaries. The selection must be consistent with the settlor's intention to the extent it can be ascertained.

(c) Proceeding to enforce trust.--A proceeding to enforce a charitable trust may be brought by the settlor during the settlor's lifetime or at any time by the Attorney General, the trust's beneficiaries or other persons who have standing.

Pennsylvania Comment

Adopting the position of the UTC and changing existing Pennsylvania law, subsection (c) recognizes the settlor's right to initiate a proceeding to enforce a charitable trust.

§ 7736. Creation of trust induced by fraud, duress or undue influence - UTC 406.

A trust or an amendment to a trust is voidable to the extent its creation was induced by fraud, duress or undue influence.

Pennsylvania Comment

The word "void" in the UTC is changed to "voidable."

§ 7737. Oral trusts unenforceable.

Oral trusts are unenforceable in this Commonwealth.

Pennsylvania Comment

Unlike UTC § 407, this section renders oral trusts unenforceable. The enforcement of oral trusts not created in Pennsylvania is left to case law.

§ 7738. Trust for care of animal - UTC 408.

(a) Creation and termination.--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) Enforcement.--A trust authorized by this section may be enforced by a person appointed in the trust instrument or, if no person is so appointed, by a person appointed by the court. A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.

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

§ 7739. Noncharitable trust without ascertainable beneficiary - UTC 409.

Except as otherwise provided in section 7738 (relating to trust for care of animal - UTC 408) or by another statute:

(1) A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise

valid purpose to be selected by the trustee. The trust may not be enforced for more than 21 years.

(2) A trust authorized by this section may be enforced by a person appointed in the trust instrument or, if no person is so appointed, by a person appointed by the court.

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

§ 7740. Termination of trusts; proceedings for termination or modification of trusts - UTC 410.

(a) Termination.--A trust terminates to the extent it is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved or the purposes of the trust have become unlawful or contrary to public policy. In addition, a trust may be terminated by the methods prescribed by sections 7740.1 (relating to modification or termination of noncharitable irrevocable trust by consent - UTC 411) through 7740.4 (relating to modification or termination of noncharitable trust - UTC 414).

(b) Proceedings for termination or modification.--The settlor, the trustee or a beneficiary may commence a proceeding to approve or disapprove a proposed

modification or termination under sections 7740.1 through 7740.6 (relating to modification to achieve settlor's tax objectives - UTC 416), the division of a trust under section 7740.7 (relating to division of trusts) or the combination of trusts under section 7740.8 (relating to combination of trusts). The settlor of a charitable trust may commence a proceeding to modify the trust under section 7740.3 (relating to charitable trusts - UTC 413).

Pennsylvania Comment

The requirement that a trust's purposes be possible to achieve is omitted from subsection (a) for consistency with § 7734. Changing existing Pennsylvania law, the last sentence of subsection (b) recognizes the settlor's right to commence a proceeding to modify a charitable trust.

§ 7740.1. Modification or termination of noncharitable irrevocable trust by consent - UTC 411.

(a) Consent by settlor and beneficiaries.--A noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust. A settlor's power to consent to a trust's modification or termination may be exercised by a guardian, an agent under the settlor's general power of attorney or an agent under the settlor's limited power of attorney that specifically authorizes that action. Notwithstanding Subchapter C (relating to representation), the settlor may not represent a beneficiary in the modification or termination of a trust under this subsection.

(b) Consent by beneficiaries with court approval.--A noncharitable irrevocable trust may be modified upon the consent of all the beneficiaries only if the court concludes that the modification is not inconsistent with a material purpose of the trust. A noncharitable irrevocable trust may be terminated upon consent of all the beneficiaries only if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust.

(c) Spendthrift provision.--A spendthrift provision in a trust instrument is presumed to constitute a material purpose of the trust.

(d) Distribution upon termination.--Upon termination of a trust under subsection (a) or (b), the trustee shall distribute the trust property as agreed by the beneficiaries.

(e) Consent by some beneficiaries with court approval.--If not all the beneficiaries consent to a proposed modification or termination of the trust under subsection (a) or (b), the modification or termination may be approved by the court only if the court is satisfied that:

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

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

Pennsylvania Comment

Subsection (c) codifies existing Pennsylvania law that a spendthrift clause reflects the settlor's deliberate choice and, consequently, is a material purpose of the trust.

§ 7740.2. Modification or termination of noncharitable irrevocable trust by court - UTC 412.

(a) Unanticipated circumstances.--The court may modify the administrative or dispositive provisions of a noncharitable irrevocable trust, make an allowance from the principal of the trust or terminate the trust if, because of circumstances that apparently were not anticipated by the settlor, modification, allowance or termination will further the purposes of the trust. To the extent practicable, the modification or allowance shall approximate the settlor's probable intention.

(b) Inability to administer effectively.--The court may modify the administrative provisions of a noncharitable irrevocable trust if adherence to the existing provisions would be impracticable or wasteful or impair the trust's administration.

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

Pennsylvania Comment

This section reflects former 20 Pa.C.S § 6102 and adopts the UTC's position, different from existing Pennsylvania law, that a court may modify the dispositive provisions of a noncharitable irrevocable trust. The findings that the court must make under subsection (a) have been streamlined by deleting from former § 6102 the requirement of a finding that the settlor's original purpose "cannot be carried out or is impractical of fulfillment" in order to recognize the concepts of equitable deviation described in the comment to UTC § 412 and thereby acknowledge that there may be circumstances not addressed by former § 6102 where deviation, under court supervision, is appropriate.

§ 7740.3. Charitable trusts - UTC 413.

(a) General rule.--Except as otherwise provided in subsection (b), if a particular charitable purpose becomes unlawful, impracticable or wasteful:

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

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

(3) the court shall apply cy pres to fulfill as nearly as possible the settlor's charitable intention, whether it be general or specific.

(b) Exception.--A provision in the terms of a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power of the court under subsection (a) to apply cy pres.

(c) Administrative deviation.--A court may modify an administrative provision of a charitable trust only to the extent necessary to preserve the trust.

(d) Administrative termination of small charitable trusts.--A trust solely for charitable purposes having assets of less than $100,000 may be terminated at its inception or at any time thereafter by the trustee with the consent of the Attorney General and all charitable organizations that are designated as beneficiaries by name in the trust instrument. Upon such termination the assets, subject to the approval of the Attorney General, shall be delivered to the organizations, if any, designated in the trust instrument or, if none, to organizations selected by the trustee, in either case to be held and applied for such general or specific charitable

purposes and on such terms as will, in the trustee's discretion, fulfill as nearly as possible the settlor's intention.

(e) Judicial termination of charitable trusts.--If the separate existence of a trust, whenever created, solely for charitable purposes results or will result in administrative expense or other burdens unreasonably out of proportion to the charitable benefits, the court may, upon application of the trustee or any interested person and after notice to the Attorney General, terminate the trust, either at its inception or at any time thereafter, and award the assets outright, free of the trust, to the charitable organizations, if any, designated in the trust instrument or, if none, to charitable organizations selected by the court, in either case for such purposes and on such terms as the court may direct to fulfill as nearly as possible the settlor's intentions other than any intent to continue the trust, if the court is satisfied that the charitable organizations will properly use or administer the assets.

Pennsylvania Comment

UTC § 413(a)(3), directing the court to apply cy pres, is refined to incorporate the position of former 20 Pa.C.S. § 6110(a) that cy pres is available whether the settlor's charitable intent is general or specific. Because the concepts of cy pres are sufficiently developed in Pennsylvania, some explanatory language in UTC § 413(a) is omitted. Subsection (b) reflects a judgment that there is no public policy reason to refuse enforcement of a settlor's expressed intent to divert the assets of a charitable trust to noncharitable beneficiaries. Subsections (c), (d) and (e) are added to the UTC's provisions. Subsection (c) codifies existing Pennsylvania law. Subsection (d) reflects former 20 Pa.C.S. § 6110(b) but increases the limit from $10,000 to $100,000. Subsection (e) reflects former 20 Pa.C.S. § 6110(c).

§ 7740.4. Modification or termination of noncharitable trust - UTC 414.

(a) Trustee's authority.--A trustee of a noncharitable trust may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration, the trustee has given written notice to the qualified beneficiaries at least 60 days before the proposed termination and no qualified beneficiary provides the trustee with a written objection to the proposed termination on or before the date specified in the notice.

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

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

Pennsylvania Comment

The dollar limitation appearing in the UTC is eliminated as unnecessary.

§ 7740.5. Reformation to correct mistakes - UTC 415.

The court may reform a trust instrument, even if unambiguous, to conform to the settlor's probable intention if it is proved by clear and convincing evidence that the settlor's intent as expressed in the trust instrument was affected by a mistake of fact or law, whether in expression or inducement. The court may provide that the modification have retroactive effect.

Pennsylvania Comment

Absent from UTC § 415, the last sentence of this section gives modification retroactive effect if the court so directs and it is consistent with § 7740.6. Permission to reform an unambiguous trust instrument is a change in existing Pennsylvania law and follows the UTC. The requirement that "clear and convincing evidence" of intent be "expressed in the trust instrument" is a clarification of the UTC and consistent with the refusal to recognize oral trusts in Pennsylvania.

§ 7740.6. Modification to achieve settlor's tax objectives - UTC 416.

The court may modify a trust instrument in a manner that is not contrary to the settlor's probable intention in order to achieve the settlor's tax objectives. The court may provide that the modification have retroactive effect.

Pennsylvania Comment

This section follows the UTC and codifies existing Pennsylvania case law.

§ 7740.7. Division of trusts.

(a) Without court approval.--A trustee may, without court approval, divide a trust into separate trusts, allocating to each separate trust either a fractional share of each asset and each liability held by the original trust or assets having an appropriate aggregate fair market value and fairly representing the appreciation or depreciation in the assets of the original trust as a whole. The beneficiaries of the separate trusts may be different so long as their rights are not impaired. If the division reflects disclaimers or different tax elections, the division shall relate back to the date to which the disclaimer or tax election relates.

(b) With court approval.--The court, for cause shown, may authorize the division of a trust into two separate trusts upon such terms and conditions and with such notice as the court shall direct.

(c) Separate fund.--A trustee may, without court approval, set aside property in a separate fund prior to actual distribution, after which income earned on the separate fund and appreciation or depreciation of the fund set-aside shall belong to the separate fund.

Pennsylvania Comment

This section clarifies but does not change former 20 Pa.C.S. § 7191.

§ 7740.8. Combination of trusts.

(a) With court approval.--The court, for cause shown, may authorize the combination of separate trusts with substantially similar provisions upon such terms and conditions and with such notice as the court shall direct notwithstanding that the trusts may have been created by separate instruments and by different persons. If necessary to protect possibly different future interests, the assets shall be valued at the time of any such combination and a record made of the proportionate interest of each separate trust in the combined fund.

(b) Without court approval.--A trustee may, without court approval, combine trusts that were created under the same or different instruments if the trusts have identical provisions, tax attributes and trustees.

Pennsylvania Comment

Subsection (a) restates former 20 Pa.C.S. § 7192. Subsection (b), parallel to § 7740.7(a), changes Pennsylvania law by permitting a trustee to combine trusts without court approval in limited circumstances.

SUBCHAPTER E

CREDITOR'S CLAIMS; SPENDTHRIFT AND

DISCRETIONARY TRUSTS

Sec.
7741. Rights of beneficiary's creditor or assignee - UTC 501.
7742. Spendthrift provision - UTC 502.
7743. Exceptions to spendthrift provision - UTC 503.
7744. Discretionary trusts; effect of standard - UTC 504.
7745. Creditor's claim against settlor - UTC 505.
7746. Overdue distribution - UTC 506.
7747. Personal obligations of trustee - UTC 507.

Pennsylvania Comment

This subchapter preserves and clarifies former 20 Pa.C.S. § 6112 and Pennsylvania case law on spendthrift trusts.

§ 7741. Rights of beneficiary's creditor or assignee - UTC 501.

A judgment creditor or assignee of the beneficiary may reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means to the extent the beneficiary's interest is not protected by a spendthrift provision.

Pennsylvania Comment

Consistent with existing Pennsylvania practice, this section eliminates the UTC's requirement that a judgment creditor or beneficiary's assignee apply to the court to reach the beneficiary's interest in a non-spendthrifted trust.

§ 7742. Spendthrift provision - UTC 502.

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

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

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

§ 7743. Exceptions to spendthrift provision - UTC 503.

(a) (Reserved).

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

(c) When unenforceable.--A spendthrift provision is unenforceable against a claim of this Commonwealth or the Federal Government to the extent a statute of this Commonwealth or Federal law so provides.

(d) Definition.--As used in this section, the term “child” includes any person for whom an order or judgment for child support has been entered in this or another state.

Pennsylvania Comment

Alimony constitutes support for the purpose of subsection (b) if awarded as support and not in lieu of or as a form of equitable distribution.

§ 7744. Discretionary trusts; effect of standard - UTC 504.

(a) (Reserved).

(b) Distribution not compelled.--Except as otherwise provided in subsection (c), whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee’s discretion, even if:

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

(2) the trustee has abused the discretion.

(c) Exception.--To the extent a trustee has not complied with a standard of distribution or has abused a discretion:

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

(2) the court shall direct the trustee to pay to the child, spouse or former spouse such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the

benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

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

(e) Definition.--As used in this section, the term "child" includes any person for whom an order or judgment for child support has been entered in this or another State.

Pennsylvania Comment

Alimony constitutes support for the purpose of subsection (c) if awarded as support and not in lieu of or as a form of equitable distribution.

§ 7745. Creditor's claim against settlor - UTC 505.

(a) General rule.--Whether or not a trust instrument contains a spendthrift provision:

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

(2) A judgment creditor or assignee of the settlor of an irrevocable trust may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the creditor or assignee of a particular settlor may reach the portion of the trust attributable to that settlor's contribution.

(3) After the death of a settlor and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains and the family exemption to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses and exemption and no other statute specifically exempts the property from such claims.

(b) Holder of power of withdrawal.--For purposes of this section:

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

(2) upon the lapse, release or waiver of a power of withdrawal, the holder of the power of withdrawal is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release or waiver exceeds the greater of the amount specified in section 2041(b)(2), 2503(b) or 2514(e) of the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. § 2041(b)(2), 2503(b) or 2514(e)(2)).

Pennsylvania Comment

This section recognizes Federal and Pennsylvania statutes that exempt specific property, such as participations in retirement plans and proceeds of insurance on the settlor's life, from the reach of the settlor's creditors.

§ 7746. Overdue distribution - UTC 506.

Whether or not the interest of the beneficiary in the trust is subject to a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the mandated distribution date.

§ 7747. Personal obligations of trustee - UTC 507.

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

SUBCHAPTER F

REVOCABLE TRUSTS

Sec.
7751. Capacity of settlor of revocable trust - UTC 601.
7752. Revocation or amendment of revocable trust - UTC 602.
7753. Trustee's duties; powers of withdrawal - UTC 603.
7754. Actions contesting validity of revocable trust.
7755. Claims and distribution after settlor's death.

§ 7751. Capacity of settlor of revocable trust - UTC 601.

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

§ 7752. Revocation or amendment of revocable trust - UTC 602.

(a) Power to revoke or amend.--The settlor may revoke or amend a trust unless the trust instrument expressly provides that the trust is irrevocable.

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

(1) to the extent the trust consists of community property, either spouse alone who notifies the other spouse may revoke the trust, but the trust may be amended only by joint action of both spouses;

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

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

(c) How to revoke or amend.--The settlor may revoke or amend a revocable trust only:

(1) by substantial compliance with a method provided in the trust instrument; or

(2) if the trust instrument does not provide a method or the method provided in the trust instrument is not expressly made exclusive, by a later writing, other than a will or codicil, that is signed by the settlor and expressly refers to the trust or specifically conveys property that would otherwise have passed according to the trust instrument.

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

(e) Agent.--A settlor's powers with respect to revocation or amendment of the nondispositive provisions of or withdrawal of property from a trust may be exercised by an agent under a power of attorney only to the extent expressly authorized by the trust instrument or the power. The agent under a power of attorney that expressly authorizes the agent to do so may amend the dispositive provisions of a revocable trust as the court may direct.

(f) Guardian.--A guardian of the settlor's estate may exercise the settlor's powers with respect to revocation or amendment of or withdrawal of property from a revocable trust as the court may direct.

(g) Liability.--A trustee who does not know that a trust has been revoked or amended is not liable to the settlor, the settlor's successors in interest or the beneficiaries for distributions made and other actions taken on the assumption that the trust had not been amended or revoked.

Pennsylvania Comment

Adopting the position of the UTC, subsection (a) reverses prior Pennsylvania law and presumes that a trust created after the effective date of this chapter is revocable unless the trust instrument expressly provides that it shall not be. Consistent with the position that a revocable trust is not testamentary, subsection (c) does not permit a will or codicil to amend or revoke a revocable trust unless the provisions of the trust instrument expressly authorize amendment or revocation by that means. Consistent with the departure from the UTC's recognition of oral trusts, UTC § 602(c)(2)(B), recognizing unwritten amendment or revocation, is not adopted.

§ 7753. Trustee's duties; powers of withdrawal - UTC 603.

(a) Power of settlor.--Regardless of the legal capacity of the settlor, the rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor while a trust is revocable.

(b) Holder of power of withdrawal.--The holder of a power of withdrawal has the rights of a settlor of a revocable trust under this section to the extent of the property subject to the power during the period the power may be exercised.

Pennsylvania Comment

> **Subsection (a) places a revocable trust on the same footing as a will, under which no beneficial interest is effective until the testator's death. This differs from the UTC, which gives rights to the beneficiaries while the settlor is alive if the settlor lacks capacity to revoke the trust.**

§ 7754. Actions contesting validity of revocable trust.

(a) How action may be commenced.--A person having standing to do so may contest the validity of a revocable trust by filing a petition with the court.

(b) Time limit.--The petition described in subsection (a) must be filed no later than one year after the date on which the trustee gave the notice required by section 7780.3 (c) (relating to duty to inform and report). The court, upon petition of a party in interest and with such notice as the court may direct, may limit the time by which a petition under this section must be filed to six month after the date on which the trustee gave the notice required by section 7780.3(c).

(c) Grounds for contest.--The grounds for contesting the validity of a revocable trust shall be the same as those for contesting the validity of a will.

Pennsylvania Comment

This section and § 7755 replace UTC § 604. Subsections (a) and (b) are based upon UTC § 604(a). The concepts contained in UTC § 604(b) are now part of § 7755. Recognizing that revocable trusts are typically will substitutes, this section and § 7755 apply comparable rules to the two documents as they relate to notice after the settlor has died, procedures for challenging the governing instrument, grounds for challenge, the rights of creditors and the procedures for clearing creditors' claims. In doing so, this subchapter is intended to eliminate any need to probate the trust instrument. *Compare Estate of Pew*, 655 A.2d 521 (Pa. Super. Ct. 1994) and the Non-Precedential Memorandum Opinion issued July 9, 2003 by the Superior Court in *Newhart Estate* (affirming orders issued June 25, 2002 by the Montgomery County Court of Common Pleas, Orphans' Court Division to file numbers 95-2066 and 89-2836). Because there is no requirement that a trust instrument be filed with the Register of Wills or elsewhere in the public records, the provisions of 20 Pa.C.S. governing actions before the Register of Wills are not applied to such trusts, and a challenge to the validity of a revocable trust must be filed with the court. For the same reason, the one-year period of limitations applicable to will contests is modified so that it commences with the giving of the notice required by § 7780.3(c) after the settlor's death. That period of time may be reduced by the court if, for example, the trustee seeks to make distributions promptly after the settlor's death.

§ 7755. Claims and distribution after settlor's death.

(a) Creditors' rights.--Creditors of the settlor of a revocable trust shall have the same rights against the trust assets determined immediately before the settlor's death as they have against the settlor's estate, but the assets of the settlor's estate shall be applied first toward satisfaction of the creditors' claims. This subsection shall not expose to any such claims trust assets for which other provisions of substantive law provide exemption from the claims of the settlor's creditors.

(b) Enforcement of claim against revocable trust.--A creditor may make a

claim against a revocable trust by notifying the settlor's personal representative as provided in section 3384 (relating to notice of claim) or, if no personal representative has been appointed, by notifying the trustee according to the methods set forth in section 3384. A personal representative who receives such notice shall within 20 days notify the trustee in writing and upon doing so shall have no liability under this section to the creditor.

(c) No personal representative.--If no personal representative is appointed within 90 days after the settlor's death, the trustee shall advertise the trust's existence and the name and address of the trustee in the manner set forth in section 3162 (relating to advertisement of grant of letters).

(d) Liability of personal representative.--A personal representative who has received the notice required by section 7780.3(c) (relating to duty to inform and report) and does not notify the trustee of a revocable trust of a creditor's claim known to the personal representative within one year after the first complete advertisement of the grant of letters to the personal representative shall be liable to the creditor to the extent the creditor's interest is prejudiced thereby. A personal representative shall have no liability under this section to a creditor whose claim is not known to the personal representative within one year after the first complete advertisement of the grant of letters to the personal representative. The provisions of this section shall not affect the liability of the settlor's personal representative under other provisions of law.

(e) Liability to any creditor.--At the trustee's own risk and without the filing, audit or confirmation of the trustee's account, a trustee of a revocable trust who has either given the settlor's personal representative the notice required by section 7780.3(c) or given the notice required by subsection (c) may distribute real or personal property of the revocable trust. That distribution shall be without liability to any creditor of the settlor unless the claim of that creditor is known to the trustee within 13 months after the first complete advertisement of the grant of letters to the personal representative or, if no personal representative has been appointed, within one year after the first complete advertisement under subsection (c).

(f) Rights of creditors against distributed property.--

(1) No creditor shall have any claim against personal property distributed by the trustee of a revocable trust at the trustee's own risk under subsection (e) unless the claim of the creditor is known to the trustee within 13 months after the first complete advertisement of the grant of letters to the personal representative or, if no personal representative has been appointed, within one year after the first complete advertisement of the trust under subsection (c).

(2) No creditor shall have any claim against real property distributed by the trustee of a revocable trust at the trustee's own risk under subsection (e) unless the creditor, within one year after the settlor's death, files a written notice of claim with the clerk. The claim against real property shall expire at

the end of five years after the settlor's death unless within that time the trustee files an account or the creditor files a petition to compel an accounting.

(g) Judicial principles.--In any proceeding by a creditor against a trustee or beneficiary of a revocable trust, the court shall apply principles analogous to sections:

(1) 3387 (relating to claims not due; certain to become due);

(2) 3388 (relating to claims not certain to become due);

(3) 3392 (relating to classification and order of payment); and

(4) 3393 (relating to notice to Commonwealth and political subdivisions).

Pennsylvania Comment

The clearance of creditors' claims against revocable trusts appears together with the provisions governing challenges to the validity of such trusts in UTC § 604. The two topics are sufficiently unrelated to merit separate provisions, codified in § 7754 and this section, governing claims and distribution after the settlor's death. Recognizing that revocable trusts are often will substitutes, this section borrows the analogous concepts of 20 Pa.C.S. §§ 3162 and 3532. It provides a road map for the clearance of creditors' claims against a settlor or trustee and distributions from revocable trusts after the settlor's death, where there is a parallel administration of the settlor's estate and where there is no such administration. The provisions of UTC § 604(b) and (c) are substantially rewritten to reflect the different approach to trustee reports adopted in § 7780.3 as they apply to revocable trusts. Subsections (e) and (f) adopt the concepts set forth in 20 Pa.C.S. § 3532. This approach differs from the UTC, which allows trustees of revocable trusts to distribute the trust property as soon after the settlor's death as the trustee likes, without trustee liability to creditors. Subsections (e) and (f) impose liability on the trustee with respect to creditor claims known to the trustee within 13 months after advertisement. The UTC version probably reflects the practice in many other states of using revocable

trusts to avoid the delays in distribution that are associated with testamentary bequests in those states.

SUBCHAPTER G

OFFICE OF TRUSTEE

Sec.
7761. Accepting or declining trusteeship - UTC 701.
7762. Trustee's bond - UTC 702.
7763. Cotrustees - UTC 703.
7764. Vacancy in trusteeship; appointment of successor - UTC 704.
7765. Resignation of trustee; filing resignation.
7766. Removal of trustee - UTC 706.
7767. Delivery of property by former trustee - UTC 707.
7768. Compensation of trustee - UTC 708.
7769. Reimbursement of expenses - UTC 709.
7770. Liability of successor trustee.

§ 7761. Accepting or declining trusteeship - UTC 701.

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

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

(2) if the trust instrument does not provide a method or the method provided in the trust instrument is not expressly made exclusive, by accepting delivery of the trust property, exercising powers or performing duties as trustee or by otherwise indicating acceptance of the trusteeship.

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

(c) Actions not constituting acceptance of trusteeship.--A person designated as trustee, without accepting the trusteeship, may:

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

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

§ 7762. Trustee's bond - UTC 702.

(a) When required.--A trustee shall give bond to secure performance of the trustee's duties only if the court finds that a bond is needed to protect the interests of the beneficiaries or is required by the provisions of the trust instrument and the court has not dispensed with the requirement.

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

(c) Institutional trustees.--An institution qualified to do trust business in this Commonwealth need not give bond even if required by the trust instrument.

Pennsylvania Comment

Reflecting a modern approach to fiduciary bonds, this section replaces former 20 Pa.C.S. §§ 7111 and 7112.

§ 7763. Cotrustees - UTC 703.

(a) Majority decision.--Cotrustees who do not reach a unanimous decision may act by majority decision.

(a.1) When no majority.--When a dispute arises among trustees as to the exercise or nonexercise of any of their powers and there is no agreement by a majority of them, unless otherwise provided by the trust instrument, the court in its discretion, upon petition filed by any of the trustees or any party in interest, aided if necessary by the report of a master, may direct the exercise or nonexercise of the power as it deems necessary for the best interest of the trust.

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

(c) Performance.--A cotrustee must participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function or the cotrustee has properly delegated the performance of the function to another trustee.

(d) Unavailability.--If a cotrustee is unavailable to perform duties and prompt action is necessary to achieve the purposes of the trust or to avoid injury or loss to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.

(e) (Reserved).

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

(g) Reasonable care.--Each trustee shall exercise reasonable care to:

(1) prevent a cotrustee from committing a breach of trust involving fraud or self-dealing; and

(2) compel a cotrustee to redress a breach of trust involving fraud or self-dealing.

(h) Dissenting trustee.--A dissenting trustee shall join the majority to carry out a majority decision requiring affirmative action and may be ordered to do so by the court. A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified any cotrustee of the dissent at or before the time of the action is not liable for the action unless the action is a breach of trust involving fraud or self-dealing.

Pennsylvania Comment

This section applies the same rules to trustees as 20 Pa.C.S. § 3328 applies to decedents' personal representatives. Subsection (c) clarifies existing Pennsylvania law that every trustee has responsibilities and discourages the view that some trustees are "honorary" or privileged to be inactive for other reasons. In order to avoid uncertainty about what the settlor "reasonably expected," UTC § 703(e) is not adopted. Subsections (g) and (h) of UTC § 703, each referring to a trustee's "serious breach of trust," are narrowed to refer instead to "a breach of trust involving fraud or self-dealing" to clarify when one trustee is vicariously liable for the acts or omissions of another. Subsection (h) borrows the concept applied to dissenting personal representatives in 20 Pa.C.S § 3328(a).

§ 7764. Vacancy in trusteeship; appointment of successor - UTC 704.

(a) When vacancy occurs.--A vacancy in a trusteeship occurs if:

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

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

(3) a trustee resigns;

(4) a trustee is disqualified or removed;

(5) a trustee dies; or

(6) a trustee is determined by the court to be incapacitated pursuant to section 5511 (relating to petition and hearing; independent evaluation).

(b) Filling of vacancy.--A vacancy in a trusteeship need not be filled if one or more cotrustees remain in office and the trust instrument does not require that it be filled. A vacancy shall be filled if the trust has no remaining trustee.

(c) Filling vacancy for noncharitable trust.--A vacancy in a trusteeship of a noncharitable trust that is required to be filled must be filled in the following order of priority:

(1) by a person designated in or pursuant to the provisions of the trust instrument to act as successor trustee;

(2) by a person appointed by unanimous written agreement of the qualified beneficiaries; or

(3) by a person appointed by the court.

(d) Filling vacancy for charitable trust.--A vacancy in a trusteeship of a charitable trust that is required to be filled must be filled in the following order of priority:

(1) by a person designated in or under the provisions of the trust instrument to act as successor trustee;

(2) by a person selected by unanimous written agreement of the qualified beneficiaries if the Office of Attorney General concurs in the selection; or

(3) by a person appointed by the court.

(e) Appointment by court.--Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee or special fiduciary whenever the court considers the appointment desirable for the administration of the trust.

(f) Filing appointment.--An appointment of a trustee and an acceptance of an appointment of a trustee may be filed with the clerk of court having jurisdiction over the trust.

Pennsylvania Comment

> **Subsections (c)(2) and (d)(2) change Pennsylvania law and adopt the position of the UTC that a trust's qualified beneficiaries, joined by the Office of the Attorney General in the case of a charitable trust, may fill a vacancy in the office of trustee. The option of court appointment in former 20 Pa.C.S. § 7101 is preserved. The substance of former 20 Pa.C.S. § 7103 is addressed by the broader language of subsection (e). Subsection (f) reflects former 20 Pa.C.S. § 7105.**

§ 7765. Resignation of trustee; filing resignation.

(a) Court approval.--Any trustee may resign with court approval.

(b) Without court approval if authorized by trust instrument.--Any trustee may resign without court approval if authorized to resign by the trust instrument.

(c) When individual trustee may resign without court approval and without authorization in trust instrument.--Unless expressly provided to the contrary in the trust instrument, an individual trustee may resign without court approval and without authorization in the trust instrument if:

(1) there is at least one cotrustee and all cotrustees consent in writing to the resignation; and

(2) all the qualified beneficiaries consent in writing to the resignation.

This subsection shall not authorize the sole trustee of a trust to resign unless the trust instrument names a successor trustee or provides a method for appointing a successor trustee, and in either case the resignation shall not be effective until the successor trustee accepts the appointment in writing.

(d) Liability.--The resignation of a trustee shall not by itself relieve the resigning trustee of liability in connection with the administration of the trust.

(e) Filing resignation.--A resignation of a trustee may be filed with the clerk of the court having jurisdiction over the trust.

Pennsylvania Comment

This section reflects former 20 Pa.C.S. §§ 7104 and 7105 but imports the UTC's concept of qualified beneficiaries.

§ 7766. Removal of trustee - UTC 706.

(a) Request to remove trustee; court authority.--The settlor, a cotrustee or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.

(b) When court may remove trustee.--The court may remove a trustee if it finds that removal of the trustee best serves the interests of the beneficiaries of the trust and is not inconsistent with a material purpose of the trust, a suitable cotrustee or successor trustee is available and:

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

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

(3) the trustee has not effectively administered the trust because of the trustee's unfitness, unwillingness or persistent failures;

(4) there has been a substantial change of circumstances; or

(5) removal is requested by all the qualified beneficiaries.

(c) Court remedies.--Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under section 7781(b) (relating to remedies for breach of trust - UTC 1001) as may be necessary to protect the trust property or the interests of the beneficiaries.

(d) Procedure.--The procedure for removal and discharge of a trustee and the effect thereof shall be the same as that set forth in sections 3183 (relating to procedure for and effect of removal) and 3184 (relating to discharge of personal representative and surety).

Pennsylvania Comment

> **UTC § 706 is reorganized but adopted in substance. Subsection (b)(5) changes Pennsylvania law by permitting the court to remove a trustee whether or not the trustee is at fault. That provision and the other grounds for removal listed in subsections (b)(1) through (b)(4) assume an active inquiry and findings by the court as to the three elements set forth in the introduction to subsection (b).**

§ 7767. Delivery of property by former trustee - UTC 707.

(a) Duties and powers of trustee.--Unless a cotrustee remains in office or the court otherwise orders, a trustee who has resigned or been removed has the duties

of a trustee and the powers necessary to protect the trust property until the trust property is delivered to a successor trustee or other person entitled to it.

(b) Delivery of trust property.--A trustee who has resigned or been removed shall proceed expeditiously to deliver the trust property within the trustee's possession to the cotrustee, successor trustee or other person entitled to it.

§ 7768. Compensation of trustee - UTC 708.

(a) If unspecified.--If neither the trust instrument nor a separate written agreement signed by the settlor or anyone who is authorized by the trust instrument to do so specifies the trustee's compensation, the trustee is entitled to compensation that is reasonable under the circumstances. Neither a compensation provision in a trust instrument nor a fee agreement governs compensation payable from trust principal unless it explicitly so provides.

(b) If specified; adjustment.--If a trust instrument or written fee agreement signed by the settlor or anyone who is authorized by the trust instrument to do so specifies a trustee's compensation, the trustee is entitled to the specified compensation, but the court may allow reasonable compensation that is more or less than that specified if:

(1) the duties of the trustee have become substantially different from those contemplated when the trust was created or when the fee agreement was executed;

(2) the compensation specified in the trust instrument or fee agreement would be unreasonable; or

(3) the trustee performed extraordinary services, and the trust instrument or fee agreement does not specify the trustee's compensation for those services.

(c) Entitlement not barred.--None of the following shall bar a trustee's entitlement to compensation from the income or principal of the trust:

(1) The trust is perpetual or for any other reason has not yet terminated.

(2) The trustee's term of office has not yet ended.

(3) The trustee of a testamentary trust also acted as a personal representative of the settlor and was or might have been compensated for services as personal representative from the principal of the settlor's estate.

(d) Court authority.--In determining reasonable compensation, the court may consider, among other facts, the market value of the trust and may determine compensation as a fixed or graduated percentage of the trust's market value. The court may allow compensation from principal, income or both and determine the frequency with which compensation may be collected.

(e) Cemetery lots.--The authority in this section to pay compensation from trust principal shall not apply to trusts created by cemetery lot owners as endowments for the endowed care and maintenance of burial or cemetery lots where the principal sum involved is less than $20,000. Compensation shall be paid exclusively from the income of such trusts.

Pennsylvania Comment

This section is an amalgamation of UTC § 708 and former 20 Pa.C.S. § 7185 and codifies existing Pennsylvania law. A trust

instrument or fee agreement specifies compensation if it incorporates an extrinsic fee schedule that may change from time to time. This section does not address the measure of compensation payable to a trustee for services, like the administration of a family office or grant-processing as agent for a family foundation, that the trustee renders apart from the trust relationship. Subsection (c)(3) repeals the contrary rule of *In re Williamson's Estate,* 82 A.2d 49 (Pa. 1951), as to the few trusts that might still be affected by the rule. Subsection (e) is based upon former 20 Pa.C.S. § 7185(d), with the amount raised from $5,000 to $20,000 to reflect the passage of time since the provision was first adopted.

§ 7769. Reimbursement of expenses - UTC 709.

(a) Reimbursement from trust property.--A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for:

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

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

(b) Advance.--An advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.

Pennsylvania Comment

Subsection (a)(1) authorizes the reimbursement of expenses that the trustee incurs to defend the trustee's administration absent the trustee's breach of trust.

§ 7770. Liability of successor trustee.

A successor trustee shall not be personally liable for the acts or omissions of the trustee's predecessor and shall have no duty to investigate the acts or omissions of the predecessor.

Pennsylvania Comment

This section clarifies existing Pennsylvania law and has no counterpart in the UTC. While a successor trustee is not personally liable for the acts or omissions of the trustee's predecessor or under any duty to investigate the predecessor's acts or omissions as trustee, the successor trustee and the trust's beneficiaries have standing to challenge the predecessor's acts or omissions, and a successor trustee who is aware of a predecessor's breach of trust may nevertheless be obligated to share that information with the trust's beneficiaries so that they may decide whether to take action against the prior trustee.

SUBCHAPTER H

DUTIES AND POWERS OF TRUSTEE

Sec.

7771. Duty to administer trust - UTC 801.
7772. Duty of loyalty - UTC 802.
7773. Impartiality - UTC 803.
7774. Prudent administration - UTC 804.
7775. Costs of administration - UTC 805.
7776. Trustee's skills - UTC 806.
7777. Delegation by trustee.
7778. Powers to direct - UTC 808.
7779. Control and protection of trust property - UTC 809.
7780. Recordkeeping and identification of trust property - UTC 810.
7780.1. Enforcement and defense of claims - UTC 811.
7780.2. (Reserved).
7780.3. Duty to inform and report.
7780.4. Discretionary powers.
7780.5. Powers of trustees - UTC 815.
7780.6. Illustrative powers of trustee.
7780.7. Distribution upon termination.

§ 7771. Duty to administer trust - UTC 801.

Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its provisions and purposes and the interests of the beneficiaries and in accordance with applicable law.

§ 7772. Duty of loyalty - UTC 802.

(a) Duty of trustee.--A trustee shall administer the trust solely in the interests of the beneficiaries.

(b) Effect of conflict of interest.--Subject to the rights of persons dealing with or assisting the trustee as provided in section 7790.2 (relating to protection of person dealing with trustee - UTC 1012), a sale, purchase, exchange, encumbrance or other disposition of property between a trust and either the trustee in the trustee's individual capacity or one of the persons identified in subsection (c) is voidable by a court upon application by a beneficiary affected by the transaction unless:

(1) the transaction was authorized by the trust instrument;

(2) the transaction was approved by the court;

(3) the beneficiary did not commence a judicial proceeding within the time allowed by section 7785 (relating to limitation of action against trustee);

(4) the beneficiary consented to the trustee's conduct, ratified the transaction or released the trustee in compliance with section 7789 (relating to beneficiary's consent, release or ratification - UTC 1009); or

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

(c) What constitutes conflict of interest.--A sale, purchase, exchange, encumbrance or other disposition of property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:

(1) the trustee's spouse;

(2) the trustee's parents, parents' descendants or spouses of any of the foregoing;

(3) an agent of the trustee unless the trustee is a corporation and the agent is an affiliate of the corporation or the transaction is authorized by section 7209 (relating to mutual funds);

(4) a corporation or other person or enterprise in which the trustee or a person that owns a significant interest in the trustee has an interest that might affect the trustee's judgment, but this subsection does not apply to an affiliate of a corporate trustee or to a transaction authorized by section 7209; or

(5) the trustee personally.

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

by a court upon application by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.

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

(f) (Reserved).

(g) Business enterprises.--In voting shares of stock or in exercising powers of control over similar interests in other forms of business enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or business enterprise in the best interests of the beneficiaries.

(h) Permissible transactions.--This section does not preclude the following transactions if fair to the beneficiaries:

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

(2) payment of reasonable compensation to the trustee and payment of reasonable compensation to affiliates of a corporate trustee if the compensation is disclosed to the current beneficiaries;

(3) a transaction between a trust and another trust, decedent's estate or guardianship of which the trustee is a fiduciary or in which a beneficiary has an interest;

(4) a deposit of trust money in a regulated financial-service institution operated by the trustee;

(5) an advance by the trustee of money for the protection of the trust; or

(6) a transaction authorized by section 7209.

(i) (Reserved).

Pennsylvania Comment

Subsection (b) broadens the UTC's definition of a conflict of interest by including purchases by a trust from the trustee. Codifying existing Pennsylvania law, subsection (c)(4) clarifies that transactions between a corporate trustee and its affiliates, and transactions authorized by 20 Pa.C.S. § 7209 are not presumed to be tainted by a conflict of interest. Transactions in mutual funds are also addressed in subsection (h)(6), which does not appear in the UTC. UTC § 802(h)(2) has been broadened to permit the payment of reasonable compensation to affiliates of a corporate trustee if disclosed to the trust's current beneficiaries. UTC § 802(i) was not adopted because its subject matter is already addressed by 20 Pa.C.S. Chapter 43.

§ 7773. Impartiality - UTC 803.

If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing and distributing the trust property, giving due regard to the beneficiaries' respective interests in light of the purposes of the trust. The duty to act impartially does not mean that the trustee must treat the beneficiaries equally.

Rather, the trustee must treat the beneficiaries equitably in light of the purposes of the trust.

Pennsylvania Comment

Because they are central to the statute, some of the comments to UTC § 803 have been incorporated directly into the statute.

§ 7774. Prudent administration - UTC 804.

A trustee shall administer the trust as a prudent person would, by considering the purposes, provisions, distributional requirements and other circumstances of the trust and by exercising reasonable care, skill and caution.

§ 7775. Costs of administration - UTC 805.

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

§ 7776. Trustee's skills - UTC 806.

A trustee who has special skills or expertise or who is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise shall use those special skills or expertise.

§ 7777. Delegation by trustee.

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

(1) selecting an agent;

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

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

(b) Agent's duty.--The agent shall comply with the scope and terms of the delegation and shall exercise the delegated duties and powers with reasonable care, skill and caution and shall be liable to the trust for failure to do so. An agent who represents that he has special skills or expertise shall use those special skills or that expertise.

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

(d) Jurisdiction.--An agent who accepts the delegation of powers or duties from a trustee who is subject to the jurisdiction of a court of this Commonwealth shall be deemed to have submitted to the jurisdiction of that court even if the terms of the delegation provide for a different jurisdiction or venue.

(e) When one trustee may delegate to another.--A trustee may delegate duties and powers to another trustee if the delegating trustee reasonably believes that the other trustee has greater skills than the delegating trustee with respect to those duties and powers and the other trustee accepts the delegation. The delegating trustee shall not be responsible for the decisions, actions or inaction of the trustee to whom those duties and powers have been delegated if the delegating trustee has exercised reasonable care, skill and caution in establishing the scope and specific

terms of the delegation and in reviewing periodically the performance of the trustee to whom the duties and powers have been delegated and that trustee's compliance with the scope and specific terms of the delegation.

Pennsylvania Comment

UTC § 807 was rewritten so as to parallel 20 Pa.C.S. § 7206, which is part of the prudent investor rule.

§ 7778. Powers to direct - UTC 808.

(a) Direction of settlor.--While a trust is revocable, the trustee may follow a written direction of the settlor that is contrary to the trust instrument.

(b) Compliance with power.--If a trust instrument confers upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with a written exercise of the power unless the attempted exercise is manifestly contrary to the trust instrument or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

(c) Modification or termination of trust.--A trust instrument may confer upon a trustee or other person a power to modify or terminate the trust.

(d) Fiduciary relationship.--A person, other than a beneficiary, who holds a power to direct certain actions of a trustee is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of the holder's fiduciary duty.

§ 7779. Control and protection of trust property - UTC 809.

A trustee shall take reasonable steps to take control of and protect the trust property.

§ 7780. Recordkeeping and identification of trust property - UTC 810.

(a) Records.--A trustee shall keep adequate records of the administration of the trust.

(b) Commingling trust property prohibited.--A trustee shall keep trust property separate from the trustee's own property.

(c) Designating trust property.--Except as otherwise provided in subsection (d) and section 3321 (relating to nominee registration; corporate fiduciary as agent; deposit of securities in a clearing corporation; book-entry securities), a trustee shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.

(d) Investing property of separate trusts.--If the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of two or more separate trusts.

§ 7780.1. Enforcement and defense of claims - UTC 811.

Except as provided in section 7770 (relating to liability of successor trustee), a trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust. When one of several trustees is individually liable to the

trust, the other trustee or trustees shall take any legal action against that trustee necessary to protect the trust.

Pennsylvania Comment

The second sentence of this section incorporates the concept of 20 Pa.C.S. § 3317, formerly applied to trusts by 20 Pa.C.S. § 7133.

§ 7780.2. (Reserved).

§ 7780.3. Duty to inform and report.

(a) Duty to respond to requests.--A trustee shall promptly respond to a beneficiary's reasonable request for information related to the trust's administration.

(b) Notice after settlor of revocable trust has been adjudicated incapacitated.--No later than 30 days after the date on which the trustee of a revocable trust learns that the settlor has been adjudicated incapacitated, the trustee shall send the notice described in subsection (i) to the settlor's guardian.

(c) Notice after settlor of revocable trust has died.--No later than 30 days after the date on which the trustee of a revocable trust learns that the settlor has died, the trustee shall send the notice described in subsection (i) to:

(1) the settlor's personal representative;

(2) the settlor's spouse or, if the settlor's spouse is incapacitated, the spouse's guardian;

(3) each of the settlor's children who is sui juris and the guardian, if any, of each such child who is not sui juris; and

(4) the trust's current beneficiaries.

(d) Notice after settlor of irrevocable trust has been adjudicated incapacitated. --No later than 30 days after the date on which the trustee of an irrevocable trust learns that the settlor has been adjudicated incapacitated, the trustee shall send the notice described in subsection (i) to the trust's current beneficiaries. A revocable trust shall not be deemed irrevocable for the purposes of this subsection merely because the settlor has been adjudicated incapacitated.

(e) Notice after settlor of irrevocable trust has died.--No later than 30 days after the date on which the trustee of an irrevocable trust learns that the settlor has died, the trustee shall send the notice described in subsection (i) to the trust's current beneficiaries unless the settlor had been adjudicated incapacitated and the trustee sent notices to the current beneficiaries as required by subsection (d).

(f) Notice to current beneficiaries.--No later than 30 days after the date on which the trustee of an irrevocable trust learns that a person who did not previously receive the notice described in subsection (i) is a current beneficiary of the trust, the trustee shall send the notice described in subsection (i) to the current beneficiary if at that time the trustee knows that the settlor is then deceased or has been adjudicated incapacitated.

(g) Change in trusteeship.--Apart from the other requirements of this section, the trustee shall send the notice described in subsection (i) to the current beneficiaries each time there is a change in trusteeship.

(h) Trustee's notice to any beneficiary at any time.--Apart from the requirements of this section, the trustee may send the notice described in subsection (i) to any beneficiary of the trust at any time.

(i) Contents of notice.--Any notice under this section shall be written and convey the following information:

(1) The fact of the trust's existence.

(2) The identity of the settlor.

(3) The trustee's name, address and telephone number.

(4) The recipient's right to receive a copy of the trust instrument.

(5) The recipient's right to receive, at least annually, a written report of the trust's assets and their market values if feasible, the trust's liabilities and the trust's receipts and disbursements since the date of the last such report.

(j) Waiver.--Any beneficiary may waive in writing the right to receive the notice described in subsection (i) and thereafter may rescind in writing that waiver.

(k) Applicability.--

(1) Where the death or adjudication of incapacity described in subsection (b), (c), (d) or (e) occurs on or after (in preparing this act for printing in the Laws of Pennsylvania and the Pennsylvania Consolidated Statutes, the Legislative Reference Bureau shall insert here, in lieu of this statement, the effective date of this section), the time limit for notice set forth in that subsection shall apply.

(2) Where the death or adjudication of incapacity described in subsection (b), (c), (d) or (e) has occurred before (in preparing this act for printing in the Laws of Pennsylvania and the Pennsylvania Consolidated Statutes, the Legislative Reference Bureau shall insert here, in lieu of this statement, the effective date of this section), the time limit for notice set forth in that subsection shall be (in preparing this act for printing in the Laws of Pennsylvania and the Pennsylvania Consolidated Statutes, the Legislative Reference Bureau shall insert here, in lieu of this statement, the date that is two years after the effective date of this section).

(3) The notice under subsection (f) shall not be required to be completed until two years after (in preparing this act for printing in the Laws of Pennsylvania and the Pennsylvania Consolidated Statutes, the Legislative Reference Bureau shall insert here, in lieu of this statement, the effective date of this section).

Pennsylvania Comment

UTC § 813 has been entirely rewritten in order to provide the trustee with a road map describing when and what information the trustee must communicate to the trust's beneficiaries. It is an effort to balance the settlor's likely expectation that the trust relationship will remain substantially private during the settlor's lifetime, like a will, and the reality that a beneficiary cannot protect an interest in the trust without knowledge of the trust's provisions and operations. This section recognizes that most revocable trusts are will substitutes and preserves the privacy associated with wills until the settlor's death. The duty set forth in subsection (a) to respond to beneficiaries' requests does not exist while the settlor is alive. *See* § 7753(a). Mandatory communication after the settlor's death is generally limited to the trust's current

beneficiaries, who are persons 18 years of age or older to or for whom trust income or principal must be distributed currently and persons 25 years of age or older to or for whom trust income or principal may, in the trustee's discretion, be distributed currently. The UTC requires much broader notice. The settlor's spouse and children, whether or not they are current beneficiaries of the trust, are entitled to notice of a trust that was revocable immediately before the settlor's death, as they would be of an estate settlement consistent with Pennsylvania Orphans' Court Rule 5.6. This section permits a trustee to share relevant information with any beneficiary of the trust at any time and thereby clarifies existing law. The notice requirements of this section are among the mandatory rules of § 7705(b) that a settlor may not disable by direction in the trust instrument.

§ 7780.4. Discretionary powers.

The trustee shall exercise a discretionary power in good faith and in accordance with the provisions and purposes of the trust and the interests of the beneficiaries, notwithstanding the breadth of discretion granted to a trustee in the trust instrument, including the use of such terms as "absolute," "sole" or "uncontrolled."

Pennsylvania Comment

This section is based upon UTC § 814(a). UTC § 814(b), (c) and (d) were not adopted because their subject matter is addressed by 20 Pa.C.S. Chapter 75.

§ 7780.5. Powers of trustees - UTC 815.

(a) Exercise of power.--Except as otherwise provided in the trust instrument or in other provisions of this title, a trustee has all the powers over the trust property that an unmarried competent owner has over individually owned property and

may exercise those powers without court approval from the time of creation of the trust until final distribution of the assets of the trust.

(b) (Reserved).

Pennsylvania Comment

The language of this section derives from the Uniform Trustees' Powers Act, not otherwise adopted in Pennsylvania, rather than from the UTC.

§ 7780.6. Illustrative powers of trustee.

(a) Listing.--The powers which a trustee may exercise pursuant to section 7780.5 (relating to powers of trustees - UTC 815) include, but are not limited to, the following powers:

(1) To accept, hold, invest in and retain investments as provided in Chapter 72 (relating to prudent investor rule).

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

(3) To resolve a dispute regarding the interpretation of the trust or the administration of the trust by mediation, arbitration or other alternative dispute resolution procedures.

(4) To prosecute or defend actions, claims or proceedings for the protection of trust assets and of the trustee in the performance of his duties.

(5) To abandon or decline to administer any property which is of little or no value, transfer title to abandoned property and decline to accept title to and

administer any property which has or may have environmental or other liability attached to it.

(6) To insure the assets of the trust against damage or loss and, at the expense of the trust, protect the trustee, the trustee's agents and the beneficiaries from liability to third persons arising from the administration of the trust.

(7) To advance money for the protection of the trust and for all expenses, losses and liability sustained in the administration of the trust or because of the holding or ownership of any trust assets, for which advances with any interest the trustee has a lien on the trust assets as against the beneficiary.

(8) To pay taxes, assessments, compensation of the trustee and employees and agents of the trustee and other expenses incurred in the administration of the trust.

(9) To receive additions to the assets of the trust.

(10) To sell or exchange any real or personal property at public or private sale, without obligation to repudiate an otherwise binding agreement in favor of better offers; provided that when the trustee has been required to give bond, no proceeds of the sale of real estate, including proceeds arising by the reason of involuntary conversion, shall be paid to the trustee until the court has made an order excusing the trustee from entering additional security or requiring additional security, and in the latter event, only after the trustee has entered the additional security.

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

(12) To grant options for sales or leases of a trust asset and acquire options for the acquisition of assets, including options exercisable after the trust terminates.

(13) To join in any reorganization, consolidation, merger, dissolution, liquidation, voting-trust plan or other concerted action of security holders, and delegate discretionary duties with respect thereto.

(14) To vote a security, in person or by general or limited proxy, with or without power of substitution.

(15) To borrow funds and mortgage or pledge trust assets as security for repayment of the funds borrowed, including repayments after the trust terminates.

(16) To make loans to and buy property from the personal representatives of the settlor and the settlor's spouse. Loans under this paragraph shall be adequately secured, and the purchases under this paragraph shall be for fair market value.

(17) To partition, subdivide, repair, improve or develop real estate; enter into agreements concerning the partition, subdivision, repair, improvement, development, zoning or management of real estate; impose or extinguish restrictions on real estate; dedicate land and easements to public use; adjust

boundaries; and do anything else regarding real estate which is commercially reasonable or customary under the circumstances.

(18) With respect to possible liability for violation of environmental law:

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

(ii) to take action to prevent, abate or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of governmental enforcement;

(iii) to decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;

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

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

(19) To operate, repair, maintain, equip and improve any farm or farm operation; purchase and sell livestock, crops, feed and other property that is normally perishable; purchase, use and dispose of farm equipment and employ

one or more farm managers and others in connection therewith and pay them reasonable compensation.

(20) To make any ordinary or extraordinary repairs or alterations in buildings or other structures; demolish any improvements; and raze existing, or erect new, party walls or buildings.

(21) To enter into a lease or arrangements for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement.

(22) To exercise all rights and incidents of ownership of life insurance policies held by the trust, including borrowing on policies, entering into and terminating split-dollar plans, exercising conversion privileges and rights to acquire additional insurance and selecting settlement options.

(23) To employ a custodian; hold property unregistered or in the name of a nominee, including the nominee of any institution employed as custodian, without disclosing the fiduciary relationship and without retaining possession and control of any securities or other property so held or registered; and pay reasonable compensation to the custodian.

(24) To apply any funds distributable to a beneficiary who is, in the trustee's opinion, disabled by illness or other cause and unable properly to manage the funds directly for the beneficiary's benefit or pay such funds to the beneficiary, a guardian of the beneficiary's estate, an agent acting under a general power of attorney for the beneficiary or, if none, to a relative or other

person having legal or physical custody or care of the beneficiary, to be expended on the beneficiary's behalf.

(25) To pay any funds distributable to a minor beneficiary to the minor or to a guardian of the minor's estate, or apply the funds directly for the minor's benefit.

(26) To do any of the following:

(i) Pay any funds distributable to a beneficiary who is not 21 years of age or older to:

(A) the beneficiary;

(B) an existing custodian for the beneficiary under Chapter 53 (relating to Pennsylvania Uniform Transfers to Minors Act) or under any other state's version of the Uniform Transfers to Minors Act;

(C) an existing custodian for the beneficiary under the former Pennsylvania Uniform Gifts to Minors Act, or under any other state's version of the Uniform Gifts to Minors Act; or

(D) a custodian for the beneficiary appointed by the trustee under Chapter 53.

(ii) Apply the funds for the beneficiary.

(27) To pay calls, assessments and any other sums chargeable or accruing against or on account of securities.

(28) To sell or exercise stock subscription or conversion rights.

(29) To continue or participate in the operation of any business or other enterprise and to effect incorporation, merger, consolidation, dissolution or other change in the form of the organization of the business or enterprise.

(30) To select a mode of payment under any qualified employee benefit plan or any retirement plan payable to the trustee and exercise rights thereunder.

(31) To distribute in cash or in kind or partly in each and allocate particular assets in proportionate or disproportionate shares.

(32) To appoint a trustee to act in another jurisdiction with respect to trust property located in the other jurisdiction, confer upon the appointed trustee all the powers and duties of the appointing trustee, require that the appointed trustee furnish security and remove any trustee so appointed.

(33) To execute and deliver all instruments which will accomplish or facilitate the exercise of the trustee's powers.

(b) Effect.--The trustee shall have no further responsibility or liability for funds upon any of the following:

(1) Payment under subsection (a)(24).

(2) Payment under subsection (a)(25).

(3) Payment or application under subsection (a)(26).

Pennsylvania Comment

The provisions of UTC § 816 have been rewritten to promote clarity, maintain Pennsylvania's abrogation in 20 Pa.C.S. § 3360 of the "higher offer rule" and address specific matters previously covered by former provisions of 20 Pa.C.S. The

provisions of the UTC empowering a trustee to make loans to beneficiaries and to pledge trust property to guarantee loans made by third parties to beneficiaries have been omitted so as not to encourage such transactions. The provisions of the UTC allowing trust funds to be deposited in a regulated financial institution, enabling exercise of tax options, and authorizing trustees to exercise powers appropriate to the termination of trusts have been omitted as unnecessary. The subject matter of former 20 Pa.C.S. § 7131 is covered in § 7771 and paragraphs (4), (6), (7), (8), (17) and (18) of subsection (a). The subject matter of former 20 Pa.C.S. § 7134 is replaced by subsection (a)(1). The subject matter of former 20 Pa.C.S. §§ 7132, 7141, 7142, 7184, 7191 and 7192 is covered by paragraphs (5), (10), (11), (21) and (25) of subsection (a) and §§ 7740.7 and 7740.8. The five-year term limitation on leases in former 20 Pa.C.S. § 7142 is replaced by the general reasonableness standard of §§ 7774 and 7780.4. The provisions of 20 Pa.C.S. § 7133 applying 20 Pa.C.S. §§ 3313, 3314, 3315, 3317, 3319, 3320, 3321(a), (b) and (c), 3327, 3328 and 3331 to trustees are repealed because their subject matter is now addressed in paragraphs (6), (14) and (29) of subsection (a); §§ 7763(a.1), 7764, 7777, 7780.1 and 7790 and 20 Pa.C.S. § 7206. The provisions of 20 Pa.C.S. § 7133 applying 20 Pa.C.S. §§ 3318, 3322 and 5147 are repealed as unnecessary. Abandonment of property under subsection (a)(5) is also covered by § 7791.

§ 7780.7. Distribution upon termination.

Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed to distribute the trust property within a reasonable time to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses and taxes.

Pennsylvania Comment

This section derives from UTC § 817(b), which is not adopted. The substance of UTC § 817(c) overlaps UTC § 1009, incorporated into this chapter as § 7789.

SUBCHAPTER I

LIABILITY OF TRUSTEES AND RIGHTS

OF PERSONS DEALING WITH TRUSTEES

Sec.
7781. Remedies for breach of trust - UTC 1001.
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7790. Limitation on personal liability of trustee - UTC 1010.
7790.1. Interest as general partner - UTC 1011.
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7790.3. Certification of trust - UTC 1013.

§ 7781. Remedies for breach of trust - UTC 1001.

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

(b) Remedies.--To remedy a breach of trust that has occurred or may occur, the court may order any appropriate relief, including, but not limited to, the following:

(1) Compelling the trustee to perform the trustee's duties.

(2) Enjoining the trustee from committing a breach of trust.

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

(4) Ordering a trustee to file an account.

(5) Taking any action authorized by Chapter 43 (relating to temporary fiduciaries).

(6) (Reserved).

(7) Removing the trustee as provided in section 7766 (relating to removal of trustee - UTC 706).

(8) Reducing or denying compensation to the trustee.

(9) Subject to section 7790.2 (relating to protection of person dealing with trustee - UTC 1012):

(i) voiding an act of the trustee;

(ii) imposing a lien or a constructive trust on trust property; or

(iii) tracing trust property wrongfully disposed of and recovering the property or its proceeds.

(10) (Reserved).

§ 7782. Damages for breach of trust - UTC 1002.

(a) Amount of damages.--A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of:

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

(2) the profit, excluding reasonable compensation, the trustee made by reason of the breach.

(b) Contribution.--Except as otherwise provided in this subsection, if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee is

entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

§ 7783. Damages in absence of breach - UTC 1003.

(a) Profit.--A trustee is accountable to an affected beneficiary for any profit, excluding reasonable compensation, made by the trustee arising from the administration of the trust, even absent a breach of trust.

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

§ 7784. (Reserved).

§ 7785. Limitation of action against trustee.

(a) (Reserved).

(a.1) Imposed by trustee's written reports.--

(1) A beneficiary may not challenge a transaction or assert a claim against a trustee for breach of trust on the basis of a transaction if:

(i) the trustee provided the beneficiary with a written report of the trust's assets and their market values if feasible, the trust's liabilities and

the trust's receipts and disbursements for the year in which the transaction occurred and for each of the four subsequent calendar years;

(ii) the transaction was disclosed in the first of the five reports to which subparagraph (i) refers;

(iii) the beneficiary did not notify the trustee in writing within six months after receiving the fifth such annual report that the beneficiary objects to the transaction and provide the basis in writing for that objection; and

(iv) all such reports were accompanied by a conspicuous written statement describing the effect of this subsection.

(2) A claim preserved by the beneficiary in the manner described in paragraph (1) may nevertheless be barred by subsection (c).

(b) (Reserved).

(c) Five-year absolute bar.--If not previously barred by subsection (a.1) or section 7798 (relating to failure to present claim at audit):

(1) Except as provided in paragraph (2), a claim by a beneficiary against a trustee, including a claim preserved by the beneficiary notifying the trustee in the manner described in subsection (a.1), shall be barred five years after the first to occur of the following events:

(i) the date after the removal, resignation or death of the trustee on which the beneficiary was given the notice required by section 7780.3(g) (relating to duty to inform and report);

(ii) the termination of the beneficiary's interest in the trust; or

(iii) the termination of the trust.

(2) If the first to occur of the events set forth in paragraph (1) occurred before (in preparing this act for printing in the Laws of Pennsylvania and the Pennsylvania Consolidated Statutes, the Legislative Reference Bureau shall insert here, in lieu of this statement, the effective date of this section), a claim described in paragraph (1) shall be barred five years after (in preparing this act for printing in the Laws of Pennsylvania and the Pennsylvania Consolidated Statutes, the Legislative Reference Bureau shall insert here, in lieu of this statement, the effective date of this section).

(3) A claim described in paragraph (1) is not barred if, prior to the respective date set forth in either paragraph (1) or (2), the trustee has filed an account with the court or the beneficiary has petitioned the court to compel the trustee to file an account.

Pennsylvania Comment

This section imposes two new time limitations on actions for breach of trust, one available to the trustee by taking steps the section specifies and the other absolute. The first, in subsection (a.1), is an effort to codify in part the laches doctrine by enabling a trustee who has furnished a series of annual reports to the beneficiaries to foreclose actions by those beneficiaries for a breach of trust after a time certain. The assumption underlying the provision is that most trust transactions will be in sufficient context after four full calendar years of subsequent reports to provide the beneficiary with a basis to question them. Subsection (a.1) is not intended to exhaust application of the laches doctrine. The absolute time limitation appears in subsection (c). A beneficiary's action against a trustee for breach of trust, if not already barred by a prior

adjudication or subsection (a.1), is barred five years after the earliest of the following events, unless by that time the beneficiary has applied to the court for relief: the beneficiary's receipt of the notice required by § 7780.3(g) on the occasion of the removal, resignation or death of the trustee; the termination of the beneficiary's interest in the trust; or the termination of the trust. However, if any such event has occurred before the effective date of this chapter, the time limit is extended to five years after the effective date of this section.

§ 7786. Reliance on trust instrument - UTC 1006.

A trustee who acts in reasonable reliance on the express provisions of the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

§ 7787. Event affecting administration or distribution - UTC 1007.

If the happening of an event, including, without limitation, marriage, divorce, performance of educational requirements, attaining a specific age or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge.

§ 7788. Exculpation of trustee - UTC 1008.

(a) When exculpatory provision unenforceable.--A provision of a trust instrument relieving a trustee of liability for breach of trust is unenforceable to the extent that it:

(1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or

(2) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

(b) Exculpatory provision by trustee.--An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.

§ 7789. Beneficiary's consent, release or ratification - UTC 1009.

A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach or ratified the transaction constituting the breach, unless the consent, release or ratification of the beneficiary was induced by improper conduct of the trustee.

Pennsylvania Comment

UTC § 1009(2) has not been adopted because it would render the validity of consents and releases by beneficiaries uncertain.

§ 7790. Limitation on personal liability of trustee - UTC 1010.

(a) When trustee not personally liable.--Except as otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering the trust if the trustee in the contract disclosed the fiduciary capacity.

(b) When trustee personally liable.--A trustee is personally liable for torts committed in the course of administering a trust or for obligations arising from

ownership or control of trust property, including liability for violation of environmental law, only if the trustee is personally at fault.

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

§ 7790.1. Interest as general partner - UTC 1011.

(a) Contractual liability.--Except as otherwise provided in subsection (c) or unless personal liability is imposed in the contract, a trustee who holds an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership after the trust's acquisition of the interest if the fiduciary capacity was disclosed in the contract or in a statement previously filed pursuant to 15 Pa.C.S. Chapter 83 (relating to general partnerships) or 85 (relating to limited partnerships).

(b) Tortious liability.--Except as otherwise provided in subsection (c), a trustee who holds an interest as a general partner is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault.

(c) When immunity inapplicable.--The immunity provided by this section does not apply if an interest in the partnership is held by the trustee in a capacity

other than that of trustee or is held by the trustee's spouse or one or more of the trustee's descendants, siblings or parents, or the spouse of any of them.

(d) Personal liability of settlor.--If the trustee of a revocable trust holds an interest as a general partner, the settlor is personally liable for contracts and other obligations of the partnership as if the settlor were a general partner.

§ 7790.2. Protection of person dealing with trustee - UTC 1012.

(a) (Reserved).

(a.1) Protection from liability.--Unless a person assisting or dealing with a trustee has actual knowledge that the trustee is committing a breach of trust or has knowledge of such facts that the trustee's conduct amounts to bad faith, the person:

(1) may assume without inquiry the existence of trust powers and their proper exercise by the trustee;

(2) is not bound to inquire whether the trustee has power to act or is properly exercising the power; and

(3) is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers he purports to exercise.

(b) No requirement to inquire.--A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise.

(c) (Reserved).

(c.1) Ultra vires.--A trustee's act may not be set aside or not specifically enforced because the trustee's act was not authorized by section 7780.5 (relating to powers of trustees - UTC 815) or 7780.6 (relating to illustrative powers of trustee) or because the trustee's act was authorized but the authority was improperly exercised; however, a court's power to set aside a transaction for fraud, accident, mistake or self-dealing is unaffected by this subsection.

(d) Former trustee.--A person other than a beneficiary who in good faith assists a former trustee, or who in good faith and for value deals with a former trustee, without knowledge that the trusteeship has terminated is protected from liability as if the former trustee were still a trustee.

(e) Effect of other laws.--Comparable protective provisions of other laws relating to commercial transactions or transfer of securities by fiduciaries prevail over the protection provided by this section.

Pennsylvania Comment

Subsection (a.1) derives from the Uniform Trustees' Powers Act rather than from the UTC. Subsections (b), (d) and (e) derive from the UTC.

§ 7790.3. Certification of trust - UTC 1013.

(a) Contents of certification.--Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:

(1) The trust's existence and the date the trust instrument was executed.

(2) The identity of the settlor.

(3) The identity and address of the currently acting trustee.

(4) The powers of the trustee.

(5) The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust.

(6) The authority of cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee.

(7) The trust's taxpayer identification number.

(8) The manner of taking title to trust property.

(b) Authentication.--A certification of trust may be signed or otherwise authenticated by any trustee.

(c) Assurance of representations.--A certification of trust must state that the trust has not been revoked, modified or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

(d) Dispositive trust provisions.--A certification of trust need not contain the dispositive provisions of the trust instrument.

(e) Provisions to be made available upon request.--A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments which designate the trustee and confer upon the trustee the power to act in the pending transaction.

(f) Reliance on certification.--A person who acts in reliance upon a certification of trust without knowledge that the representations contained therein

are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the provisions of the trust instrument may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the certification.

(g) Enforcement.--A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

(h) Liability.--A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.

(i) Applicability.--This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

SUBCHAPTER J

MISCELLANEOUS PROVISIONS

Sec.
7791. Abandonment of property.
7792. Powers, duties and liabilities identical with personal representatives.
7793. Effect of removal, or of probate of later will or codicil.
7794. Title of purchaser.
7795. Reports for school district trustees.
7796. Jurisdiction.
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7799. Income on distributive shares.
7799.1. Annexation of account of distributed estate or trust.
7799.2. Accounts, audits and distribution.
7799.3. Pooled trusts for persons with disabilities.

§ 7791. Abandonment of property.

When any property is so burdensome or is so encumbered or is in such condition that it is of no value to the trust, the trustee may abandon it. If property without value cannot be abandoned without transfer of title to another or without a formal renunciation, the court may authorize the trustee to transfer or renounce it without consideration if it finds that this will be for the best interests of the trust.

> **<u>Comment</u>: This section is based upon to former § 7132 and supplements the power of the trustee under §§ 7780.5 and 7780.6(5) to abandon property of the trust.**

§ 7792. Powers, duties and liabilities identical with personal representatives.

The provisions concerning the powers, duties and liabilities of a trustee shall be the same as those set forth in the following provisions of this title for the administration of a decedent's or a minor's estate:

Section 3184 (relating to discharge of personal representative and surety).

Section 3321(d) and (e) (relating to nominee registration; corporate fiduciary as agent; deposit of securities in a clearing corporation; book-entry securities).

Section 3323 (relating to compromise of controversies).

Section 3324 (relating to death or incapacity of fiduciary).

Section 3332 (relating to inherent powers and duties).

Section 3353 (relating to order of court).

Section 3354 (relating to power given in governing instrument).

Section 3355 (relating to restraint of sale).

Section 3356 (relating to purchase by personal representative).

Section 3358 (relating to collateral attack).

Section 3359 (relating to record of proceedings; county where real estate lies).

<u>Comment</u>: This section is based upon former § 7133. The reference to § 3184 is new. The following references in former § 7133 are not incorporated into this section because they are covered by other provisions of chapter 77: §§ 3313; 3314; 3315; 3317; 3318; 3319; 3320; 3321(a), (b) and (c); 3322; 3327; 3328; 3331; 3360 and 5147.

§ 7793. Effect of removal, or of probate of later will or codicil.

(a) No impeachment.--No act of administration performed by a testamentary trustee in good faith shall be impeached by the subsequent:

(1) revocation of the probate of the will from which the trustee derives authority;

(2) probate of a later will or of a codicil;

(3) dismissal of the trustee.

(b) Good faith dealings.--Regardless of the good or bad faith of the testamentary trustee, no person who deals in good faith with a testamentary trustee shall be prejudiced by the occurrence of any of the contingencies set forth in subsection (a).

<u>Comment</u>: This section is based upon former § 7136.

§ 7794. Title of purchaser.

If the trustee has given a bond, if any, as required in accordance with this title, any sale, pledge, mortgage or exchange by a trustee, whether pursuant to a decree or to the exercise of a power conferred by the trust instrument or of a power under this title, shall pass the full title of the trust therein, unless otherwise specified. Persons dealing with the trustee shall have no obligation to see to the proper application of the cash or other assets given in exchange for the property of the trust. Any sale or exchange by a trustee pursuant to a decree under section 3353 (relating to order of court) shall have the effect of a judicial sale as to the discharge of liens, but the court may decree a sale or exchange freed and discharged from the lien of any mortgage otherwise preserved from discharge by existing law if the holder of such mortgage shall consent by writing filed in the proceeding. No sale, mortgage, exchange or conveyance shall be prejudiced by the subsequent dismissal of the trustee. No sale, mortgage, exchange or conveyance by a testamentary trustee shall be prejudiced by the terms of a will or codicil thereafter probated if the person dealing with the trustee did so in good faith.

Comment: This section is based upon former § 7143.

§ 7795. Reports for school district trustees.

(a) Scope.--This section applies if a school district is a trustee of land in accordance with all of the following:

(1) The land is held for the benefit of the public.

(2) The land is not used directly for school purposes.

(b) Requirement.--

(1) By January 30, the school district shall prepare a report for the prior year concerning the trust.

(2) The report shall detail all of the following:

(i) Revenues generated.

(ii) Expenses incurred.

(iii) Balance of funds held by the school district as trustee.

(iv) A statement regarding the activities taken by the trustee during the prior year to advance the purposes of the trust.

(3) The report must be certified as correct by the district superintendent.

(4) The report shall be made public as follows:

(i) The report shall be published in 14-point type in a newspaper of general circulation in each county in which the land is located.

(ii) The report shall be available during business hours for inspection and copying at the office of the district superintendent. A reasonable fee may be charged for copying.

Comment: This section is based upon former § 7144.

§ 7796. Jurisdiction.

Notwithstanding 42 Pa.C.S. § 931 (relating to original jurisdiction and venue), jurisdiction over an action involving land referred to in section 7795 (relating to

reports for school district trustees) shall be vested in the court of common pleas in the judicial district where:

(1) all of the land is located; or

(2) more than 50% of the land is located.

<u>Comment</u>: This section is based upon former § 7145.

§ 7797. Filing accounts.

(a) When to file.--A trustee shall file an account of his administration whenever directed to do so by the court and may file an account at any other time.

(b) Where to file.--All accounts of trustees shall be filed in the office of the clerk.

<u>Comment</u>: Subsection (a) is based upon former § 7181. Subsection (b) is based upon former § 7182.

§ 7798. Failure to present claim at audit.

(a) Applicability.--This section applies to a person that, at the audit of a trustee's account, has a claim that:

(1) arose out of the administration of trust property or arises out of the distribution of trust property upon any interim or final accounting of the trust; and

(2) is not reported to the court as an admitted claim.

(b) Bar.--A person that fails, at the call for audit or confirmation, to present a claim under subsection (a) shall be forever barred against:

(1) trust property distributed pursuant to the audit or confirmation;

(2) distributee of trust property distributed pursuant to the audit or confirmation; and

(3) except as otherwise provided in section 3521 (relating to rehearing; relief granted), trust property awarded back upon further trust pursuant to the audit or confirmation.

(c) Liens and charges unimpaired.--Nothing in this section shall be construed as impairing any lien or charge on real or personal estate of the trust existing at the time of the audit.

<u>Comment</u>: This section is based upon former § 7186.

§ 7799. Income on distributive shares.

Except as otherwise provided by the trust instrument or by the provisions of section 3543 (relating to income on distributive shares):

(1) Pecuniary gift.--When a sum of money is directed to be set aside at a specified time as a separate trust, it shall be entitled to income at the rate of 5% per annum from the date it was to be set aside until it is set aside. When a sum of money is directed to be paid outright, it shall be entitled to income at the rate of 5% per annum from three months after it became payable until it is paid.

(2) Specific gift.--A donee of a gift of specific real or personal property directed to be distributed from a trust shall be entitled to the net income from property given to him accrued from the date it became distributable to him.

(3) Residuary gift.--All income from real and personal property earned during the administration of a trust and not payable to others pursuant to the governing instrument of the provisions of this section shall be distributed pro rata among the income beneficiaries of any continuing trust of a residuary share and other persons entitled to residuary shares of the trust.

<u>Comment</u>: This section is based upon former § 7187. The term "interest" is replaced with 'income" to reflect the rule under this section and § 3543 that payments under such provisions constitute a first charge against earned income and, consequently, carry out distributable net income (DNI) as a tier one distribution. Computation at the fixed rate of 5% is retained for simplicity in place of the proration of income suggested by the Uniform Principal and Income Act. Under § 8121(2), if income is insufficient to make the 5% payment, the deficiency is made up from principal.

§ 7799.1. Annexation of account of distributed estate or trust.

A trustee who has received property from a personal representative or from another trustee in distribution of an estate or another trust, may annex a copy of an account of the administration of the estate or other trust to an account filed by the trustee covering the administration of the trust under the trustee's management. If notice of the annexation of the account of the estate or other trust is given to the persons required to be notified of the filing of the trustee's account of the principal trust, confirmation of the principal account shall relieve both the trustee of the principal trust and the personal representative or trustee of the distributed estate or other trust of all liability to beneficiaries of the principal trust for transactions shown in the account so annexed to the same extent as if the annexed account had been separately filed and confirmed. When the fund covered by the annexed

account has itself received property from another source under circumstances that would have permitted annexation of an account under this section or under section 3501.2 (relating to annexation of account of terminated trust, guardianship or agency), accounts for both funds may be annexed.

<u>Comment</u>: This section is based upon former § 7188.

§ 7799.2. Accounts, audits and distribution.

The provisions concerning accounts, audits and distributions in trust estates shall be the same as those set forth in the following provisions of this title for the administration of a decedent's estate:

Section 3511 (relating to audits in counties having separate orphans' court division).

Section 3512 (relating to audits in counties having no separate orphans' court division).

Section 3513 (relating to a statement of proposed distribution).

Section 3514 (relating to confirmation of account and approval of proposed distribution).

Section 3521 (relating to rehearing; relief granted).

Section 3533 (relating to award upon final confirmation of account).

Section 3536 (relating to recording and registering decrees awarding real estate).

Section 3538 (relating to distributions involving persons born out of wedlock).

Section 3539 (relating to change in law after pattern of distribution established).

Section 3540 (relating to absentee and additional distributees).

Section 3541 (relating to order of abatement).

Section 3545 (relating to transcripts of balanced due by personal representative).

<u>Comment</u>: This section is based upon former § 7183. The following references in former § 7183 are not incorporated into this section because they are covered by other provisions of Chapter 77: §§ 3503, 3504, 3532(c), 3534 and 3544.

§ 7799.3. Pooled trusts for persons with disabilities.

(a) Scope.--This section relates to pooled trusts.

(b) Organization of pooled trust.--

(1) A pooled trust shall be administered by a trustee governed by a board. The trust may employ persons as necessary.

(2) The members of a board and employees of a trustee, if any, shall stand in a fiduciary relationship to the beneficiaries and the trustee regarding investment of the trust and shall not profit, either directly or indirectly, with respect thereto.

(3) A trustee shall maintain a separate account for each beneficiary of a pooled trust, but, for purposes of investment and management of funds, the trustee may pool these accounts. The trustee shall have exclusive control and authority to manage and invest the money in the pooled trust in accordance with this section, subject, however, to the exercise of that degree of judgment,

skill and care under the prevailing circumstances that persons of prudence, discretion and intelligence who are familiar with investment matters exercise in the management of their affairs, considering the probable income to be derived from the investment and the probable safety of their capital. The trustee may charge a trust management fee to cover the costs of administration and management of the pooled trust.

(4) A board member shall disclose and abstain from participation in a discussion or voting on an issue when a conflict of interest arises with the board member on a particular issue or vote.

(5) No board member may receive compensation for services provided as a member of the board. No fees or commissions may be paid to a board member. A board member may be reimbursed for necessary expenses incurred which are in the best interest of the beneficiaries of the pooled trust as a board member upon presentation of receipts.

(6) The trustee shall disburse money from a beneficiary's account only on behalf of the beneficiary. A disbursement from a beneficiary's account shall be in the best interest of the beneficiary.

(c) Pooled trust fund.--All moneys received for pooled trust funds shall be deposited with a court-approved corporate fiduciary or with the State Treasury if no court-approved corporate fiduciary is available to the trustee. The funds shall be pooled for investment and management. A separate account shall be maintained for each beneficiary, and quarterly accounting statements shall be

provided to each beneficiary by the trustee. The court-approved corporate fiduciary or the State Treasury shall provide quarterly accounting statements to the trustee. The court-approved corporate fiduciary or the State Treasury may charge a trust management fee to cover the costs of managing the funds in the pooled trust.

(d) Reporting.--

(1) In addition to reports required to be filed under 15 Pa.C.S. Pt. III (relating to partnerships and limited liability companies), the trustee shall file an annual report with the Office of Attorney General along with an itemized statement which shows the funds collected for the year, income earned, salaries paid, other expenses incurred and the opening and final trust balances. A copy of this statement shall be available to the beneficiary, settlor or designee of the settlor upon request.

(2) The trustee shall prepare and provide each settlor or the settlor's designee annually with a detailed individual statement of the services provided to the settlor's beneficiary during the previous 12 months and of the services to be provided during the following 12 months. The trustee shall provide a copy of this statement to the beneficiary upon request.

(e) Coordination of services.--

(1) In the determination of eligibility for medical assistance benefits, the interest of any disabled beneficiary in a pooled trust shall not be considered as

a resource for purposes of determining the beneficiary's eligibility for medical assistance.

(2) No State agency may reduce the benefits or services available to an individual because that person is a beneficiary of a pooled trust. The beneficiary's interest in a pooled trust is not reachable in satisfaction of a claim for support and maintenance of the beneficiary.

(f) Notice.--The Office of Attorney General shall make available information on the treatment of pooled trusts for the persons with disabilities in the medical assistance program.

(g) Applicability.--This section shall apply to all of the following:

(1) Pooled trusts established after March 8, 2003.

(2) Accounts of individual beneficiaries established after March 8, 2003, in pooled trusts created before March 9, 2003.

(h) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Beneficiary." An individual with a disability who has the right to receive services and benefits of a pooled trust.

"Board." A group of persons vested with the management of the business affairs of a trustee.

"Disability." A physical or mental impairment as defined in section 1614 of the Social Security Act (49 Stat. 620, 42 U.S.C. § 1382c).

"Pooled trust." A trust which meets all of the following:

(1) Contains assets of more than one beneficiary.

(2) Each beneficiary has a disability.

(3) It is managed by a nonprofit corporation.

(4) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts. Accounts in the trust may be established by the parent, grandparent or legal guardian of the individual with a disability, by the individual with a disability or by a court.

(5) Upon the death of a beneficiary, amounts remaining in the beneficiary's accounts are:

(i) retained by the trust for the benefit of other beneficiaries or other individuals with disabilities; or

(ii) used to reimburse the Commonwealth in an amount equal to the total amount of medical assistance paid on behalf of the beneficiary.

"Trustee." A nonprofit organization that manages a pooled trust.

<u>Comment</u>: The substance of this section is identical to that of the former act of Dec. 9, 2002 (P.L.1379, No.168), known as the Pooled Trust Act. The sole purpose of this section is to relocate the Pooled Trust Act into this chapter. Technical amendments were made to the extent necessary to relocate the former act into this section. Subsection (g) reflects the applicability provision contained in the former act; the former act was signed into law on Dec. 9, 2002 and contained a provision that the act shall take effect in 90 days.

CONFORMING AMENDMENTS TO TITLE 20

§ 751. Appointment; purpose.

The orphans' court division may appoint:

* * *

(6) Representation of parties in interest.--Persons interested in an estate [or trust] as beneficiary or heir, if minors or otherwise legally incapacitated, and possible unborn or unascertained persons, may be represented in a judicial proceeding by a guardian or trustee ad litem if the court deems necessary. The court may dispense with the appointment of a guardian or trustee ad litem for a person who is a minor or otherwise legally incapacitated, unborn or unascertained if there is a living person sui juris having a similar interest or if such person is or would be issue of a living ancestor sui juris and interested in the estate [or trust] whose interest is not adverse to his. If the whereabouts of any beneficiary or heir is unknown or if there is doubt as to his existence, the court shall provide for service of notice and representation in the judicial proceeding as it deems proper.

<u>Comment</u>: The reference to a trust has been deleted because § 7724 addresses the same subject as applied to trusts.

§ 3384.1. Notice after settlor of revocable trust has died.

No later than 30 days after the date on which the trustee of a revocable trust learns that the settlor has died and that a personal representative has been appointed for the settlor's estate, the trustee shall send to the settlor's personal representative the notice described in section 7780.3(i) (relating to duty to inform and report).

Comment: This section restates the rule from Chapter 77 and is added for convenience.

§ 6114. Rules of interpretation.

[In] (a) General rule.--Except as provided in subsection (b), in the absence of a contrary intent appearing therein, conveyances shall be construed, as to real and personal estate, in accordance with the following rules:

* * *

(b) Exception.--This section does not apply to trusts under Chapter 77 (relating to trusts).

Comment: The rules of interpretation as applied to trusts are now covered in § 7701.2.

§ 8121. Determination and distribution of net income.

After a decedent dies in the case of an estate or after an income interest in a trust ends, the following rules apply:

* * *

(2) A fiduciary shall distribute to a beneficiary who receives a pecuniary amount outright and shall allocate to a pecuniary amount in trust the [interest, other] income or other amount provided by the governing instrument or, in the absence of any such provision, the income provided in section 3543 (relating to [interest or] income on distributive shares) or [7187] 7799 (relating to income on distributive shares) from net income determined under paragraph (3) or from principal to the extent that net income is insufficient.

* * *

TRANSITIONAL PROVISIONS FOR THE PENNSYLVANIA UNIFORM TRUST ACT AND CONFORMING AMENDMENTS TO TITLE 20

REPEALERS

Sections 723, 724, 725, 6102, 6110 and 6112 and Chapter 71 of Title 20 are repealed. The act of December 9, 2002 (P.L.1379, No.168), known as the Pooled Trust Act, is also repealed.

APPLICABILITY

(1) Except as provided in paragraph (2), the addition of 20 Pa.C.S. Ch. 77 shall apply to all trusts created before, on or after the effective date of this paragraph.

(2) The following apply:

(i) The addition of 20 Pa.C.S. § 7737 shall not apply to oral trusts created before the effective date of this paragraph.

(ii) The addition of 20 Pa.C.S. § 7752(a) shall not apply to trusts created before the effective date of this paragraph.

> **<u>Comment</u>: Sections 7780.3(k) and 7785(c) dictate when the rules of their respective sections become applicable. Under the common law, the past actions of trustees, beneficiaries and others regarding trusts are governed by the legal principle in effect when the actions occurred. Chapter 77 does not change those common law concepts.**

EFFECTIVE DATE

Chapter 77 and its conforming amendments and the repealers shall take effect in 120 days.

UNIFORM TRUST CODE[6]

ARTICLE 1
GENERAL PROVISIONS AND DEFINITIONS

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

SECTION 102. SCOPE. This [Code] applies to express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust.

SECTION 103. DEFINITIONS. In this [Code]:

(1) "Action," with respect to an act of a trustee, includes a failure to act.

(2) "Beneficiary" means a person that:

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

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

(3) "Charitable trust" means a trust, or portion of a trust, created for a charitable purpose described in Section 405(a).

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

(5) "Environmental law" means a federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.

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

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[6] Reprinted with permission, © 2000, 2001 by the National Conference of Commissioners on Uniform State Laws.

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

(8) "Jurisdiction," with respect to a geographic area, includes a State or country.

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

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

(11) "Property" means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein.

(12) "Qualified beneficiary" means a beneficiary who, on the date the beneficiary's qualification is determined:

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

(B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (A) terminated on that date; or

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

(13) "Revocable," as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.

(14) "Settlor" means a person, including a testator, who creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.

(15) "Spendthrift provision" means a term of a trust which restrains both voluntary and involuntary transfer of a beneficiary's interest.

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

(17) "Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.

(18) "Trust instrument" means an instrument executed by the settlor that contains terms of the trust, including any amendments thereto.

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

SECTION 104. KNOWLEDGE.

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

(1) has actual knowledge of it;

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

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

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

SECTION 105. DEFAULT AND MANDATORY RULES.

(a) Except as otherwise provided in the terms of the trust, this [Code] 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 [Code] except:

(1) the requirements for creating a trust;

(2) the duty of a trustee to act in good faith and in accordance with the purposes of the trust;

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

(4) the power of the court to modify or terminate a trust under Sections 410 through 416;

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

(6) the power of the court under Section 702 to require, dispense with, or modify or terminate a bond;

(7) the power of the court under Section 708(b) to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;

(8) except for a qualified beneficiary who has not attained 25 years of age, the duty under Section 813(b)(2) and (3) to notify qualified beneficiaries of an irrevocable trust of the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports;

(9) the duty under Section 813(a) to respond to the request of a beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust;

(10) the effect of an exculpatory term under Section 1008;

(11) the rights under Sections 1010 through 1013 of a person other than a trustee or beneficiary;

(12) periods of limitation for commencing a judicial proceeding; [and]

(13) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice [; and

(14) the subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in Sections 203 and 204].

SECTION 106. COMMON LAW OF TRUSTS; PRINCIPLES OF EQUITY. The common law of trusts and principles of equity supplement this [Code], except to the extent modified by this [Code] or another statute of this State.

SECTION 107. GOVERNING LAW. The meaning and effect of the terms of a trust are determined by:

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

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

SECTION 108. PRINCIPAL PLACE OF ADMINISTRATION.

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

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

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

(b) A trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries.

(c) Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee, in furtherance of the duty prescribed by subsection (b), may transfer the trust's principal place of administration to another State or to a jurisdiction outside of the United States.

(d) The trustee shall notify the qualified beneficiaries of a proposed transfer of a trust's principal place of administration not less than 60 days before initiating the transfer. The notice of proposed transfer must include:

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

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

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

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

(5) the date, not less than 60 days after the giving of the notice, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.

(e) The authority of a trustee under this section to transfer a trust's principal place of administration terminates if a qualified beneficiary notifies the trustee of an objection to the proposed transfer on or before the date specified in the notice.

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

SECTION 109. METHODS AND WAIVER OF NOTICE.

(a) Notice to a person under this [Code] or the sending of a document to a person under this [Code] must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document include first-class mail, personal delivery, delivery to the person's last known place of residence or place of business, or a properly directed electronic message.

(b) Notice otherwise required under this [Code] or a document otherwise required to be sent under this [Code] need not be provided to a person whose identity or location is unknown to and not reasonably ascertainable by the trustee.

(c) Notice under this [Code] or the sending of a document under this [Code] may be waived by the person to be notified or sent the document.

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

SECTION 110. OTHERS TREATED AS QUALIFIED BENEFICIARIES.

(a) Whenever notice to qualified beneficiaries of a trust is required under this [Code] , the trustee must also give notice to any other beneficiary who has sent the trustee a request for notice.

(b) A charitable organization expressly designated to receive distributions under the terms of a charitable trust or a person appointed to enforce a trust created for the care of an animal or another noncharitable purpose as provided in Section 408 or 409 has the rights of a qualified beneficiary under this [Code].

(c) The [attorney general of this State] has the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in this State.

SECTION 111. NONJUDICIAL SETTLEMENT AGREEMENTS.

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

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

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

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

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

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

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

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

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

(6) liability of a trustee for an action relating to the trust.

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

[**SECTION 112. RULES OF CONSTRUCTION.** The rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.]

ARTICLE 2
JUDICIAL PROCEEDINGS

SECTION 201. ROLE OF COURT IN ADMINISTRATION OF TRUST.

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

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

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

SECTION 202. JURISDICTION OVER TRUSTEE AND BENEFICIARY.

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

(b) With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this State are subject to the jurisdiction of the courts of this State regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.

(c) This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust.

[**SECTION 203. SUBJECT-MATTER JURISDICTION.**

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

(b) The [designate] court has concurrent jurisdiction with other courts of this State of other proceedings involving a trust.]

[**SECTION 204. VENUE.**

(a) Except as otherwise provided in subsection (b), venue for a judicial proceeding involving a trust is in the [county] of this State in which the trust's principal place of administration is or will be located and, if the trust is created by will and the estate is not yet closed, in the [county] in which the decedent's estate is being administered.

(b) If a trust has no trustee, venue for a judicial proceeding for the appointment of a trustee is in a [county] of this State in which a beneficiary resides, in a [county] in which any trust property is located, and if the trust is created by will, in the [county] in which the decedent's estate was or is being administered.]

ARTICLE 3
REPRESENTATION

SECTION 301. REPRESENTATION: BASIC EFFECT.

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

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

(c) Except as otherwise provided in Sections 411 and 602, a person who under this [article] may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor's behalf.

SECTION 302. REPRESENTATION BY HOLDER OF GENERAL TESTAMENTARY POWER OF APPOINTMENT. To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or

dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.

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

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

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

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

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

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

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

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

SECTION 305. APPOINTMENT OF REPRESENTATIVE.

(a) If the court determines that an interest is not represented under this [article], or that the otherwise available representation might be inadequate, the court may appoint a [representative] to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown. A [representative] may be appointed to represent several persons or interests.

(b) A [representative] may act on behalf of the individual represented with respect to any matter arising under this [Code], whether or not a judicial proceeding concerning the trust is pending.

(c) In making decisions, a [representative] may consider general benefit accruing to the living members of the individual's family.

ARTICLE 4
CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

SECTION 401. METHODS OF CREATING TRUST. A trust may be created by:

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

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

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

SECTION 402. REQUIREMENTS FOR CREATION.

(a) A trust is created only if:

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

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

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

(A) a charitable trust;

(B) a trust for the care of an animal, as provided in Section 408; or

(C) a trust for a noncharitable purpose, as provided in Section 409;

(4) the trustee has duties to perform; and

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

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

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

SECTION 403. TRUSTS CREATED IN OTHER JURISDICTIONS. A trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation:

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

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

(3) any trust property was located.

SECTION 404. TRUST PURPOSES. A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries.

SECTION 405. CHARITABLE PURPOSES; ENFORCEMENT.

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

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

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

SECTION 406. CREATION OF TRUST INDUCED BY FRAUD, DURESS, OR UNDUE INFLUENCE. A trust is void to the extent its creation was induced by fraud, duress, or undue influence.

SECTION 407. EVIDENCE OF ORAL TRUST. Except as required by a statute other than this [Code], a trust need not be evidenced by a trust instrument,

but the creation of an oral trust and its terms may be established only by clear and convincing evidence.

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

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

SECTION 409. NONCHARITABLE TRUST WITHOUT ASCERTAINABLE BENEFICIARY. Except as otherwise provided in Section 408 or by another statute, the following rules apply:

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

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

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

SECTION 410. MODIFICATION OR TERMINATION OF TRUST; PROCEEDINGS FOR APPROVAL OR DISAPPROVAL.

(a) In addition to the methods of termination prescribed by Sections 411 through 414, a trust terminates to the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve.

(b) A proceeding to approve or disapprove a proposed modification or termination under Sections 411 through 416, or trust combination or division under Section 417, may be commenced by a trustee or beneficiary, and a proceeding to approve or disapprove a proposed modification or termination under Section 411 may be commenced by the settlor. The settlor of a charitable trust may maintain a proceeding to modify the trust under Section 413.

SECTION 411. MODIFICATION OR TERMINATION OF NONCHARITABLE IRREVOCABLE TRUST BY CONSENT.

(a) A noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust. A settlor's power to consent to a trust's termination may be exercised by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust; by the settlor's [conservator] with the approval of the court supervising the [conservatorship] if an agent is not so authorized; or by the settlor's [guardian] with the approval of the court supervising the [guardianship] if an agent is not so authorized and a conservator has not been appointed.

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

(c) A spendthrift provision in the terms of the trust is not presumed to constitute a material purpose of the trust.

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

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

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

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

SECTION 412. MODIFICATION OR TERMINATION BECAUSE OF UNANTICIPATED CIRCUMSTANCES OR INABILITY TO ADMINISTER TRUST EFFECTIVELY.

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

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

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

SECTION 413. CY PRES.

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

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

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

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

(b) A provision in the terms of a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the

power of the court under subsection (a) to apply cy pres to modify or terminate the trust only if, when the provision takes effect:

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

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

SECTION 414. MODIFICATION OR TERMINATION OF UNECONOMIC TRUST.

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

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

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

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

SECTION 415. REFORMATION TO CORRECT MISTAKES. The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

SECTION 416. MODIFICATION TO ACHIEVE SETTLOR'S TAX OBJECTIVES. To achieve the settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect.

SECTION 417. COMBINATION AND DIVISION OF TRUSTS. After notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trust.

ARTICLE 5
CREDITOR'S CLAIMS; SPENDTHRIFT AND DISCRETIONARY TRUSTS

SECTION 501. RIGHTS OF BENEFICIARY'S CREDITOR OR ASSIGNEE. To the extent a beneficiary's interest is not protected by a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to such relief as is appropriate under the circumstances.

SECTION 502. SPENDTHRIFT PROVISION.

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

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

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

SECTION 503. EXCEPTIONS TO SPENDTHRIFT PROVISION.

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

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

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

SECTION 504. DISCRETIONARY TRUSTS; EFFECT OF STANDARD.

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

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

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

(2) the trustee has abused the discretion.

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

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

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

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

SECTION 505. CREDITOR'S CLAIM AGAINST SETTLOR.

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

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

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

(3) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's

creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and [statutory allowances] to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and [allowances].

(b) For purposes of this section:

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

(2) upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in Section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, or Section 2503(b) of the Internal Revenue Code of 1986, in each case as in effect on [the effective date of this [Code]] [, or as later amended].

SECTION 506. OVERDUE DISTRIBUTION. Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.

SECTION 507. PERSONAL OBLIGATIONS OF TRUSTEE. Trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.

ARTICLE 6
REVOCABLE TRUSTS

SECTION 601. CAPACITY OF SETTLOR OF REVOCABLE TRUST. The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.

SECTION 602. REVOCATION OR AMENDMENT OF REVOCABLE TRUST.

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

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

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

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

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

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

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

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

(B) any other method manifesting clear and convincing evidence of the settlor's intent.

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

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

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

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

SECTION 603. SETTLOR'S POWERS; POWERS OF WITHDRAWAL.

(a) While a trust is revocable and the settlor has capacity to revoke the trust, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

(b) If a revocable trust has more than one settlor, the duties of the trustee are owed to all of the settlors having capacity to revoke the trust.

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

SECTION 604. LIMITATION ON ACTION CONTESTING VALIDITY OF REVOCABLE TRUST; DISTRIBUTION OF TRUST PROPERTY.

(a) A person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of:

(1) [three] years after the settlor's death; or

(2) [120] days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding.

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

(1) the trustee knows of a pending judicial proceeding contesting the validity of the trust; or

(2) a potential contestant has notified the trustee of a possible judicial proceeding to contest the trust and a judicial proceeding is commenced within 60 days after the contestant sent the notification.

(c) A beneficiary of a trust that is determined to have been invalid is liable to return any distribution received.

ARTICLE 7
OFFICE OF TRUSTEE

SECTION 701. ACCEPTING OR DECLINING TRUSTEESHIP.

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

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

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

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

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

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

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

SECTION 702. TRUSTEE'S BOND.

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

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

[(c) A regulated financial-service institution qualified to do trust business in this State need not give bond, even if required by the terms of the trust.]

SECTION 703. COTRUSTEES.

(a) Cotrustees who are unable to reach a unanimous decision may act by majority decision.

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

(c) A cotrustee must participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity or the cotrustee has properly delegated the performance of the function to another trustee.

(d) If a cotrustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.

(e) A trustee may not delegate to a cotrustee the performance of a function the settlor reasonably expected the trustees to perform jointly. Unless a delegation was irrevocable, a trustee may revoke a delegation previously made.

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

(g) Each trustee shall exercise reasonable care to:

(1) prevent a cotrustee from committing a serious breach of trust; and

(2) compel a cotrustee to redress a serious breach of trust.

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

SECTION 704. VACANCY IN TRUSTEESHIP; APPOINTMENT OF SUCCESSOR.

(a) A vacancy in a trusteeship occurs if:

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

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

(3) a trustee resigns;

(4) a trustee is disqualified or removed;

(5) a trustee dies; or

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

(b) If one or more cotrustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustee.

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

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

(2) by a person appointed by unanimous agreement of the qualified beneficiaries; or

(3) by a person appointed by the court.

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

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

(2) by a person selected by the charitable organizations expressly designated to receive distributions under the terms of the trust if the [attorney general] concurs in the selection; or

(3) by a person appointed by the court.

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

SECTION 705. RESIGNATION OF TRUSTEE.

(a) A trustee may resign:

(1) upon at least 30 days' notice to the qualified beneficiaries, the settlor, if living, and all cotrustees; or

(2) with the approval of the court.

(b) In approving a resignation, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property.

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

SECTION 706. REMOVAL OF TRUSTEE.

(a) The settlor, a cotrustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.

(b) The court may remove a trustee if:

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

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

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

(4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

(c) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief

under Section 1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries.

SECTION 707. DELIVERY OF PROPERTY BY FORMER TRUSTEE.

(a) Unless a cotrustee remains in office or the court otherwise orders, and until the trust property is delivered to a successor trustee or other person entitled to it, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the trust property.

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

SECTION 708. COMPENSATION OF TRUSTEE.

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

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

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

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

SECTION 709. REIMBURSEMENT OF EXPENSES.

(a) A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for:

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

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

(b) An advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.

ARTICLE 8
DUTIES AND POWERS OF TRUSTEE

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

SECTION 802. DUTY OF LOYALTY.

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

(b) Subject to the rights of persons dealing with or assisting the trustee as provided in Section 1012, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:

(1) the transaction was authorized by the terms of the trust;

(2) the transaction was approved by the court;

(3) the beneficiary did not commence a judicial proceeding within the time allowed by Section 1005;

(4) the beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with Section 1009; or

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

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

(1) the trustee's spouse;

(2) the trustee's descendants, siblings, parents, or their spouses;

(3) an agent or attorney of the trustee; or

(4) a corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

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

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

(f) An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment complies with the prudent investor rule of [Article] 9. The trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust if the trustee at least annually notifies the persons entitled under Section 813 to receive a copy of the trustee's annual report of the rate and method by which the compensation was determined.

(g) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.

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

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

(2) payment of reasonable compensation to the trustee;

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

(4) a deposit of trust money in a regulated financial-service institution operated by the trustee; or

(5) an advance by the trustee of money for the protection of the trust.

(i) The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

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

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

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

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

SECTION 807. DELEGATION BY TRUSTEE.

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

(1) selecting an agent;

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

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

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

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

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

SECTION 808. POWERS TO DIRECT.

(a) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.

(b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

(c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

(d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.

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

SECTION 810. RECORDKEEPING AND IDENTIFICATION OF TRUST PROPERTY.

(a) A trustee shall keep adequate records of the administration of the trust.

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

(c) Except as otherwise provided in subsection (d), a trustee shall cause the trust property to be designated so that the interest of the trust, to the extent

feasible, appears in records maintained by a party other than a trustee or beneficiary.

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

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

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

SECTION 813. DUTY TO INFORM AND REPORT.

(a) A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust.

(b) A trustee:

(1) upon request of a beneficiary, shall promptly furnish to the beneficiary a copy of the trust instrument;

(2) within 60 days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number;

(3) within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee's report as provided in subsection (c); and

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

(c) A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values. Upon a vacancy in a trusteeship, unless a cotrustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative, [conservator], or [guardian] may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.

(d) A beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. A beneficiary, with respect to future reports and other information, may withdraw a waiver previously given.

SECTION 814. DISCRETIONARY POWERS; TAX SAVINGS.

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

(b) Subject to subsection (d), and unless the terms of the trust expressly indicate that a rule in this subsection does not apply:

(1) a person other than a settlor who is a beneficiary and trustee of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee's personal benefit may exercise the power only in accordance with an ascertainable standard relating to the trustee's individual health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code of 1986, as in effect on [the effective date of this [Code]] [, or as later amended]; and

(2) a trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

(c) A power whose exercise is limited or prohibited by subsection (b) may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.

(d) Subsection (b) does not apply to:

(1) a power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined in Section 2056(b)(5) or 2523(e) of the Internal Revenue Code of 1986, as in effect on [the effective date of this [Code]] [, or as later amended], was previously allowed;

(2) any trust during any period that the trust may be revoked or amended by its settlor; or

(3) a trust if contributions to the trust qualify for the annual exclusion under Section 2503(c) of the Internal Revenue Code of 1986, as in effect on [the effective date of this [Code]] [, or as later amended].

SECTION 815. GENERAL POWERS OF TRUSTEE.

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

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

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

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

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

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

(b) The exercise of a power is subject to the fiduciary duties prescribed by this [article].

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

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

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

(3) exchange, partition, or otherwise change the character of trust property;

(4) deposit trust money in an account in a regulated financial-service institution;

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

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

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

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

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

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

(D) deposit the securities with a depositary or other regulated financial-service institution;

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

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

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

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

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

(13) with respect to possible liability for violation of environmental law:

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

(B) take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of governmental enforcement;

(C) decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;

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

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

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

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

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

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

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

(19) pledge trust property to guarantee loans made by others to the beneficiary;

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

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

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

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

(C) if the trustee does not know of a [conservator], [guardian], custodian, or custodial trustee, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf; or

(D) managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution;

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

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

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

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

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

SECTION 817. DISTRIBUTION UPON TERMINATION.

(a) Upon termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. The right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within 30 days after the proposal was sent but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection.

(b) Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.

(c) A release by a beneficiary of a trustee from liability for breach of trust is invalid to the extent:

(1) it was induced by improper conduct of the trustee; or

(2) the beneficiary, at the time of the release, did not know of the beneficiary's rights or of the material facts relating to the breach.

ARTICLE 9
UNIFORM PRUDENT INVESTOR ACT

ARTICLE 10
LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH TRUSTEE

SECTION 1001. REMEDIES FOR BREACH OF TRUST.

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

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

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

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

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

(4) order a trustee to account;

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

(6) suspend the trustee;

(7) remove the trustee as provided in Section 706;

(8) reduce or deny compensation to the trustee;

(9) subject to Section 1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or

(10) order any other appropriate relief.

SECTION 1002. DAMAGES FOR BREACH OF TRUST.

(a) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of:

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

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

(b) Except as otherwise provided in this subsection, if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who

received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

SECTION 1003. DAMAGES IN ABSENCE OF BREACH.

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

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

SECTION 1004. ATTORNEY'S FEES AND COSTS. In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

SECTION 1005. LIMITATION OF ACTION AGAINST TRUSTEE.

(a) A beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.

(b) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.

(c) If subsection (a) does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within five years after the first to occur of:

(1) the removal, resignation, or death of the trustee;

(2) the termination of the beneficiary's interest in the trust; or

(3) the termination of the trust.

SECTION 1006. RELIANCE ON TRUST INSTRUMENT. A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument

is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

SECTION 1007. EVENT AFFECTING ADMINISTRATION OR DISTRIBUTION. If the happening of an event, including marriage, divorce, performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge.

SECTION 1008. EXCULPATION OF TRUSTEE.

(a) A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:

(1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or

(2) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

(b) An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.

SECTION 1009. BENEFICIARY'S CONSENT, RELEASE, OR RATIFICATION. A trustee is not liable to a beneficiary for breach of trust if the beneficiary, consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:

(1) the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or

(2) at the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.

SECTION 1010. LIMITATION ON PERSONAL LIABILITY OF TRUSTEE.

(a) Except as otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the

course of administering the trust if the trustee in the contract disclosed the fiduciary capacity.

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

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

[**SECTION 1011. INTEREST AS GENERAL PARTNER.**

(a) Except as otherwise provided in subsection (c) or unless personal liability is imposed in the contract, a trustee who holds an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership after the trust's acquisition of the interest if the fiduciary capacity was disclosed in the contract or in a statement previously filed pursuant to the [Uniform Partnership Act or Uniform Limited Partnership Act].

(b) Except as otherwise provided in subsection (c), a trustee who holds an interest as a general partner is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault.

(c) The immunity provided by this section does not apply if an interest in the partnership is held by the trustee in a capacity other than that of trustee or is held by the trustee's spouse or one or more of the trustee's descendants, siblings, or parents, or the spouse of any of them.

(d) If the trustee of a revocable trust holds an interest as a general partner, the settlor is personally liable for contracts and other obligations of the partnership as if the settlor were a general partner.]

SECTION 1012. PROTECTION OF PERSON DEALING WITH TRUSTEE.

(a) A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers is protected from liability as if the trustee properly exercised the power.

(b) A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise.

(c) A person who in good faith delivers assets to a trustee need not ensure their proper application.

(d) A person other than a beneficiary who in good faith assists a former trustee, or who in good faith and for value deals with a former trustee, without knowledge that the trusteeship has terminated is protected from liability as if the former trustee were still a trustee.

(e) Comparable protective provisions of other laws relating to commercial transactions or transfer of securities by fiduciaries prevail over the protection provided by this section.

SECTION 1013. CERTIFICATION OF TRUST.

(a) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:

(1) that the trust exists and the date the trust instrument was executed;

(2) the identity of the settlor;

(3) the identity and address of the currently acting trustee;

(4) the powers of the trustee;

(5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;

(6) the authority of cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee;

(7) the trust's taxpayer identification number; and

(8) the manner of taking title to trust property.

(b) A certification of trust may be signed or otherwise authenticated by any trustee.

(c) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

(d) A certification of trust need not contain the dispositive terms of a trust.

(e) A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments which designate the trustee and confer upon the trustee the power to act in the pending transaction.

(f) A person who acts in reliance upon a certification of trust without knowledge that the representations contained therein are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the certification.

(g) A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

(h) A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.

(i) This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

ARTICLE 11
MISCELLANEOUS PROVISIONS

SECTION 1101. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this Uniform Act , consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

SECTION 1102. ELECTRONIC RECORDS AND SIGNATURES. The provisions of this [Code] 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. Section 7002) and supersede, modify, and limit the requirements of the Electronic Signatures in Global and National Commerce Act.

SECTION 1103. SEVERABILITY CLAUSE. If any provision of this [Code] or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this [Code] which can be given effect without the invalid provision or application, and to this end the provisions of this [Code] are severable.

SECTION 1104. EFFECTIVE DATE. This [Code] takes effect on _____.

SECTION 1105. REPEALS. The following Acts are repealed:

(1) Uniform Trustee Powers Act ;
(2) Uniform Probate Code, Article VII;
(3) Uniform Trusts Act (1937); and
(4) Uniform Prudent Investor Act.

SECTION 1106. APPLICATION TO EXISTING RELATIONSHIPS.

(a) Except as otherwise provided in this [Code], on [the effective date of this [Code]]:

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

(2) this [Code] applies to all judicial proceedings concerning trusts commenced on or after [its effective date];

(3) this [Code] applies to judicial proceedings concerning trusts commenced before [its effective date] unless the court finds that

application of a particular provision of this [Code] would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this [Code] does not apply and the superseded law applies;

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

(5) an act done before [the effective date of the [Code]] is not affected by this [Code].

(b) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before [the effective date of the [Code]], that statute continues to apply to the right even if it has been repealed or superseded.

UNIFORM TRUST CODE COMMENTS[7]

PREFATORY NOTE

The Uniform Trust Code (2000) is the first national codification of the law of trusts. The primary stimulus to the Commissioners' drafting of the Uniform Trust Code is the greater use of trusts in recent years, both in family estate planning and in commercial transactions, both in the United States and internationally. This greater use of the trust, and consequent rise in the number of day-to-day questions involving trusts, has led to a recognition that the trust law in many States is thin. It has also led to a recognition that the existing Uniform Acts relating to trusts, while numerous, are fragmentary. The Uniform Trust Code will provide States with precise, comprehensive, and easily accessible guidance on trust law questions. On issues on which States diverge or on which the law is unclear or unknown, the Code will for the first time provide a uniform rule. The Code also contains a number of innovative provisions.

Default Rule: Most of the Uniform Trust Code consists of default rules that apply only if the terms of the trust fail to address or insufficiently cover a particular issue. Pursuant to Section 105, a drafter is free to override a substantial majority of the Code's provisions. The exceptions are scheduled in Section 105(b).

Innovative Provisions: Much of the Uniform Trust Code is a codification of the common law of trusts. But the Code does contain a number of innovative provisions. Among the more significant are specification of the rules of trust law that are not subject to override in the trust's terms (Section 105), the inclusion of a comprehensive article on representation of beneficiaries (Article 3), rules on trust modification and termination that will enhance flexibility (Sections 410-417), and the inclusion of an article collecting the special rules pertaining to revocable trusts (Article 6).

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

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Existing Uniform Laws on Trust Law Subjects: Certain older Uniform Acts are incorporated into the Uniform Trust Code. Others, addressing more specialized topics, will continue to be available for enactment in free-standing form.

The following Uniform Acts are incorporated into or otherwise superseded by the Uniform Trust Code:

Uniform Probate Code Article VII - Originally approved in 1969, Article VII has been enacted in about 15 jurisdictions. Article VII, although titled "Trust Administration," is a modest statute, addressing only a limited number of topics. Except for its provisions on trust registration, Article VII is superseded by the Uniform Trust Code. Its provisions on jurisdiction are incorporated into Article 2 of the Code, and its provision on trustee liability to persons other than beneficiaries are replaced by Section 1010.

Uniform Prudent Investor Act (1994) - This Act has been enacted in 35 jurisdictions. This Act, and variant forms enacted in a number of other States, has displaced the older "prudent man" standard, bringing trust law into line with modern investment practice. States that have enacted the Uniform Prudent Investor Act are encouraged to recodify it as part of their enactment of the Uniform Trust Code. A place for this is provided in Article 9.

Uniform Trustee Powers Act (1964) - This Act has been enacted in 16 States. The Act contains a list of specific trustee powers and deals with other selected issues, particularly relations of a trustee with persons other than beneficiaries. The Uniform Trustee Powers Act is outdated and is entirely superseded by the Uniform Trust Code, principally at Sections 815, 816, and 1012. States enacting the Uniform Trust Code should repeal their existing trustee powers legislation.

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

The following Uniform Acts are not affected by enactment of the Uniform Trust Code and do not need to be amended or repealed:

Uniform Common Trust Fund Act - Originally approved in 1938, this Act has been enacted in 34 jurisdictions. The Uniform Trust Code does not address the subject of common trust funds. In recent years, many banks have replaced their common trust funds with mutual funds that may also be available to non-trust customers. The Code addresses investment in mutual funds at Section 802(f).

Uniform Custodial Trust Act (1987) - This Act has been enacted in 14 jurisdictions. This Act allows standard trust provisions to be automatically incorporated into the terms of a trust simply by referring to the Act. This Act is not displaced by the Uniform Trust Code but complements it.

Uniform Management of Institutional Funds Act (1972) - This Act has been enacted in 47 jurisdictions. It governs the administration of endowment funds held by charitable, religious, and other eleemosynary institutions. The Uniform Management of Institutional Funds Act establishes a standard of prudence for use of appreciation on assets, provides specific authority for the making of investments, authorizes the delegation of this authority, and specifies a procedure, through either donor consent or court approval, for removing restrictions on the use of donated funds.

Uniform Principal and Income Act (1997) - The 1997 Uniform Principal and Income Act is a major revision of the widely enacted Uniform Act of the same name approved in 1962. Because this Act addresses issues with respect both to decedent's estates and trusts, a jurisdiction enacting the revised Uniform Principal and Income Act may wish to include it either as part of this Code or as part of its probate laws.

Uniform Probate Code - Originally approved in 1969, and enacted in close to complete form in about 20 States but influential in virtually all, the UPC overlaps with trust topics in several areas. One area of overlap, already mentioned, is UPC Article VII. Another area of overlap concerns representation of beneficiaries. UPC Section 1-403 provides principles of representation for achieving binding judicial settlements of matters involving both estates and trusts. The Uniform Trust Code refines these representation principles, and extends them to nonjudicial settlement agreements and to optional notices and consents. *See* Uniform Trust Code, Section 111 and Article 3. A final area of overlap between the UPC and trust law concerns rules of construction. The UPC, in Article II, Part 7, extends certain of the rules on the construction of wills to trusts and other nonprobate instruments. The Uniform Trust Code similarly extends to trusts the rules on the construction of wills. Unlike the UPC, however, the Trust Code does not prescribe the exact rules. Instead, Section 112 of the

Uniform Trust Code is an optional provision applying to trusts whatever rules the enacting jurisdiction already has in place on the construction of wills.

Uniform Statutory Rule Against Perpetuities - Originally approved in 1986, this Act has been enacted in 27 jurisdictions. The Act reforms the durational limit on when property interests, including interests created under trusts, must vest or fail. The Uniform Trust Code does not limit the duration of trusts or alter the time when interests must otherwise vest, but leaves this issue to other state law. The Code may be enacted without change regardless of the status of the perpetuities law in the enacting jurisdiction.

Uniform Supervision of Trustees for Charitable Purposes Act (1954) - This Act, which has been enacted in four States, is limited to mechanisms for monitoring the actions of charitable trustees. Unlike the Uniform Trust Code, the Supervision of Trustees for Charitable Purposes Act does not address the substantive law of charitable trusts.

Uniform Testamentary Additions to Trusts Act - This Act is available in two versions: the 1960 Act, with 24 enactments; and the 1991 Act, with 20 enactments through 1999. As its name suggests, this Act validates pourover devises to trusts. Because it validates provisions in wills, it is incorporated into the Uniform Probate Code, not into the Uniform Trust Code.

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

Overview of Uniform Trust Code

The Uniform Trust Code consists of 11 articles. The substance of the Code is focused in the first 10 articles; Article 11 is primarily an effective date provision.

Article 1 - General Provisions and Definitions - In addition to definitions, this article addresses miscellaneous but important topics. The

Uniform Trust Code is primarily default law. A settlor, subject to certain limitations, is free to draft trust terms departing from the provisions of this Code. The settlor, if minimum contacts are present, may in addition designate the trust's principal place of administration; the trustee, if certain standards are met, may transfer the principal place of administration to another State or country. To encourage nonjudicial resolution of disputes, the Uniform Trust Code provides more certainty for when such settlements are binding. While the Code does not prescribe the exact rules to be applied to the construction of trusts, it does extend to trusts whatever rules the enacting jurisdiction has on the construction of wills. The Uniform Trust Code, although comprehensive, does not legislate on every issue. Its provisions are supplemented by the common law of trusts and principles of equity.

Article 2 - Judicial Proceedings - This article addresses selected issues involving judicial proceedings concerning trusts, particularly trusts having contacts with more than one State or country. The courts in the trust's principal place of administration have jurisdiction over both the trustee and the beneficiaries as to any matter relating to the trust. Optional provisions on subject-matter jurisdiction and venue are provided. The minimal coverage of this article was deliberate. The Drafting Committee concluded that most issues related to jurisdiction and procedure are not appropriate to a Trust Code, but are best left to other bodies of law.

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

Article 4 - Creation, Validity, Modification and Termination of Trust - This article specifies the requirements for creating, modifying and terminating trusts. Most of the requirements relating to creation of trusts (Sections 401 through 409) track traditional doctrine, including requirements of intent, capacity, property, and valid trust purpose. The Uniform Trust Code articulates a three-part classification system for trusts: noncharitable, charitable, and honorary. Noncharitable trusts, the most common type, require an ascertainable beneficiary and a valid purpose. Charitable trusts, on the other hand, by their very nature are created to benefit the public at large. The so called honorary or purposes trust,

although unenforceable at common law, is valid and enforceable under this Code despite the absence of an ascertainable beneficiary. The most common example is a trust for the care of an animal.

Sections 410 through 417 provide a series of interrelated rules on when a trust may be terminated or modified other than by its express terms. The overall objective of these sections is to enhance flexibility consistent with the principle that preserving the settlor's intent is paramount. Termination or modification may be allowed upon beneficiary consent if the court concludes that the trust or a particular provision no longer serves a material purpose or if the settlor concurs; by the court in response to unanticipated circumstances or to remedy ineffective administrative terms; or by the court or trustee if the trust is of insufficient size to justify continued administration under its existing terms. Trusts may be reformed to correct a mistake of law or fact, or modified to achieve the settlor's tax objectives. Trusts may be combined or divided. Charitable trusts may be modified or terminated under cy pres to better achieve the settlor's charitable purposes.

Article 5 - Creditor's Claims; Spendthrift and Discretionary Trusts - This article addresses the validity of a spendthrift provision and other issues relating to the rights of creditors to reach the trust to collect a debt. To the extent a trust is protected by a spendthrift provision, a beneficiary's creditor may not reach the beneficiary's interest until distribution is made by the trustee. To the extent not protected by a spendthrift provision, a creditor can reach the beneficiary's interest, subject to the court's power to limit the award. Certain categories of claims are exempt from a spendthrift restriction, including certain governmental claims and claims for child support or alimony. Other issues addressed in this article include creditor claims against discretionary trusts; creditor claims against a settlor, whether the trust is revocable or irrevocable; and the rights of creditors when a trustee fails to make a required distribution within a reasonable time.

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

Article 7 - Office of Trustee - This article contains a series of default rules dealing with the office of trustee, all of which may be modified in the terms of the trust. Rules are provided on acceptance of office and bonding. The role of the cotrustee is addressed, including the extent that one cotrustee may delegate to another, and the extent to which one cotrustee can be held liable for actions of

another trustee. Also covered are changes in trusteeship, including the circumstances when a vacancy must be filled, the procedure for resignation, the grounds for removal, and the process for appointing a successor trustee. Finally, standards are provided for trustee compensation and reimbursement for expenses.

Article 8 - Duties and Powers of Trustee - This article states the fundamental duties of a trustee and enumerates the trustee's powers. The duties listed are not new, although some of the particulars have changed over the years. This article was drafted where possible to conform to the Uniform Prudent Investor Act. The Uniform Prudent Investor Act prescribes a trustee's responsibilities with respect to the management and investment of trust property. This article also addresses a trustee's duties regarding distributions to beneficiaries.

Article 9 - Uniform Prudent Investor Act - This article provides a place for a jurisdiction to enact, reenact or codify its version of the Uniform Prudent Investor Act. States adopting the Uniform Trust Code which have previously enacted the Uniform Prudent Investor Act are encouraged to reenact their version of the Prudent Investor Act in this article.

Article 10 - Liability of Trustees and Rights of Persons Dealing With Trustees - Sections 1001 through 1009 list the remedies for breach of trust, describe how money damages are to be determined, provide a statute of limitations on claims against a trustee, and specify other defenses, including consent of a beneficiary and recognition of and limitations on the effect of an exculpatory clause. Sections 1010 through 1013 address trustee relations with persons other than beneficiaries. The objective is to encourage third parties to engage in commercial transactions with trustees to the same extent as if the property were not held in trust.

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

Article 1
General Provisions and Definitions

General Comment

The Uniform Trust Code is primarily a default statute. Most of the Code's provisions can be overridden in the terms of the trust. The provisions not subject to override are scheduled in Section 105(b). These include the duty of a trustee to

act in good faith and with regard to the purposes of the trust, public policy exceptions to enforcement of spendthrift provisions, the requirements for creating a trust, and the authority of the court to modify or terminate a trust on specified grounds.

The remainder of the article specifies the scope of the Code (Section 102), provides definitions (Section 103), and collects provisions of importance not amenable to codification elsewhere in the Uniform Trust Code. Sections 106 and 107 focus on the sources of law that will govern a trust. Section 106 clarifies that despite the Code's comprehensive scope, not all aspects of the law of trusts have been codified. The Uniform Trust Code is supplemented by the common law of trusts and principles of equity. Section 107 addresses selection of the jurisdiction or jurisdictions whose laws will govern the trust. A settlor, absent overriding public policy concerns, is free to select the law that will determine the meaning and effect of a trust's terms.

Changing a trust's principal place of administration is sometimes desirable, particularly to lower a trust's state income tax. Such transfers are authorized in Section 108. The trustee, following notice to the "qualified beneficiaries," defined in Section 103(12), may without approval of court transfer the principal place of administration to another State or country if a qualified beneficiary does not object and if the transfer is consistent with the trustee's duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries. The settlor, if minimum contacts are present, may also designate the trust's principal place of administration.

Sections 104 and 109 through 111 address procedural issues. Section 104 specifies when persons, particularly persons who work in organizations, are deemed to have acquired knowledge of a fact. Section 109 specifies the methods for giving notice and excludes from the Code's notice requirements persons whose identity or location is unknown and not reasonably ascertainable. Section 110 allows beneficiaries with remote interests to request notice of actions, such as notice of a trustee resignation, which are normally given only to the qualified beneficiaries.

Section 111 ratifies the use of nonjudicial settlement agreements. While the judicial settlement procedures may be used in all court proceedings relating to the trust, the nonjudicial settlement procedures will not always be available. The terms of the trust may direct that the procedures not be used, or settlors may negate or modify them by specifying their own methods for obtaining consents. Also, a nonjudicial settlement may include only terms and conditions a court could properly approve.

The Uniform Trust Code does not prescribe the rules of construction to be applied to trusts created under the Code. The Code instead recognizes that enacting jurisdictions are likely to take a diversity of approaches, just as they have with respect to the rules of construction applicable to wills. Section 112 accommodates this variation by providing that the State's specific rules on construction of wills, whatever they may be, also apply to the construction of trusts.

Comment to Section 102
(Scope)

The Uniform Trust Code, while comprehensive, applies only to express trusts. Excluded from the Code's coverage are resulting and constructive trusts, which are not express trusts but remedial devices imposed by law. For the requirements for creating an express trust and the methods by which express trusts are created, see Sections 401-402. The Code does not attempt to distinguish express trusts from other legal relationships with respect to property, such as agencies and contracts for the benefit of third parties. For the distinctions, see Restatement (Third) of Trusts §§ 2, 5 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 2, 5-16C (1959).

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

Express trusts also may be created by means of court judgment or decree. Examples include trusts created to hold the proceeds of personal injury recoveries and trusts created to hold the assets of a protected person in a conservatorship proceeding. *See, e.g.*, Uniform Probate Code § 5-411(a)(4).

Comment to Section 103
(Definitions)

A definition of "action" (paragraph (1)) is included for drafting convenience, to avoid having to clarify in the numerous places in the Uniform

Trust Code where reference is made to an "action" by the trustee that the term includes a failure to act.

"Beneficiary" (paragraph (2)) refers only to a beneficiary of a trust as defined in the Uniform Trust Code. In addition to living and ascertained individuals, beneficiaries may be unborn or unascertained. Pursuant to Section 402(b), a trust is valid only if a beneficiary can be ascertained now or in the future. The term "beneficiary" includes not only beneficiaries who received their interests under the terms of the trust but also beneficiaries who received their interests by other means, including by assignment, exercise of a power of appointment, resulting trust upon the failure of an interest, gap in a disposition, operation of an antilapse statute upon the predecease of a named beneficiary, or upon termination of the trust. The fact that a person incidentally benefits from the trust does not mean that the person is a beneficiary. For example, neither a trustee nor persons hired by the trustee become beneficiaries merely because they receive compensation from the trust. *See* Restatement (Third) of Trusts § 48 cmt. c (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 126 cmt. c (1959).

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

A power of appointment is authority to designate the recipients of beneficial interests in property. *See* Restatement (Second) of Property: Donative Transfers §11.1 (1986). A power is either general or nongeneral and either presently exercisable or not presently exercisable. A general power of appointment is a power exercisable in favor of the holder of the power, the power holder's creditors, the power holder's estate, or the creditors of the power holder's estate. *See* Restatement (Second) of Property: Donative Transfers §11.4 (1986). All other powers are nongeneral. A power is presently exercisable if the power holder can currently create an interest, present or future, in an object of the power. A power of appointment is not presently exercisable if exercisable only by the power holder's will or if its exercise is not effective for a specified period of time or until occurrence of some event. *See* Restatement (Second) of Property: Donative Transfers §11.5 (1986). Powers of appointment may be held in either a fiduciary or nonfiduciary capacity. The definition of "beneficiary" excludes powers held by a trustee but not powers held by others in a fiduciary capacity.

While all categories of powers of appointment are included within the definition of "beneficiary," the Uniform Trust Code elsewhere makes distinctions among types of powers. A "power of withdrawal" (paragraph (10)) is defined as a presently exercisable general power of appointment other than a power exercisable only upon consent of the trustee or a person holding an adverse interest. Under Section 302, the holder of a testamentary general power of appointment may represent and bind persons whose interests are subject to the power.

The definition of "beneficiary" includes only those who hold beneficial interests in the trust. Because a charitable trust is not created to benefit ascertainable beneficiaries but to benefit the community at large (*see* Section 405(a)), persons receiving distributions from a charitable trust are not beneficiaries as that term is defined in this Code. However, pursuant to Section 110(b), charitable organizations expressly designated to receive distributions under the terms of a charitable trust, even though not beneficiaries as defined, are granted the rights of qualified beneficiaries under the Code.

The Uniform Trust Code leaves certain issues concerning beneficiaries to the common law. Any person with capacity to take and hold legal title to intended trust property has capacity to be a beneficiary. *See* Restatement (Third) of Trusts § 43 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts §§ 116-119 (1959). Except as limited by public policy, the extent of a beneficiary's interest is determined solely by the settlor's intent. *See* Restatement (Third) of Trusts § 49 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts §§ 127-128 (1959). While most beneficial interests terminate upon a beneficiary's death, the interest of a beneficiary may devolve by will or intestate succession the same as a corresponding legal interest. *See* Restatement (Third) of Trusts § 55(1) (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts §§ 140, 142 (1959).

Under the Uniform Trust Code, when a trust has both charitable and noncharitable beneficiaries only the charitable portion qualifies as a "charitable trust" (paragraph (3)). The great majority of the Code's provisions apply to both charitable and noncharitable trusts without distinction. The distinctions between the two types of trusts are found in the requirements relating to trust creation and modification. Pursuant to Sections 405 and 413, a charitable trust must have a charitable purpose and charitable trusts may be modified or terminated under the doctrine of cy pres. Also, Section 411 allows a noncharitable trust to in certain instances be terminated by its beneficiaries while noncharitable trusts do not have beneficiaries in the usual sense. To the extent of these distinctions, a split-interest trust is subject to two sets of provisions, one applicable to the charitable interests, the other the noncharitable.

For discussion of the definition of "conservator" (paragraph (4)), see the definition of "guardian" (paragraph (6)).

To encourage trustees to accept and administer trusts containing real property, the Uniform Trust Code contains several provisions designed to limit exposure to possible liability for violation of "environmental law" (paragraph (5)). Section 701(c)(2) authorizes a nominated trustee to investigate trust property to determine potential liability for violation of environmental law or other law without accepting the trusteeship. Section 816(13) grants a trustee comprehensive and detailed powers to deal with property involving environmental risks. Section 1010(b) immunizes a trustee from personal liability for violation of environmental law arising from the ownership and control of trust property.

Under the Uniform Trust Code, a "guardian" (paragraph (6)) makes decisions with respect to personal care; a "conservator" (paragraph (4)) manages property. The terminology used is that employed in Article V of the Uniform Probate Code, and in its free-standing Uniform Guardianship and Protective Proceedings Act. Enacting jurisdictions not using these terms in the defined sense should substitute their own terminology. For this reason, both terms have been placed in brackets. The definition of "guardian" accommodates those jurisdictions which allow appointment of a guardian by a parent or spouse in addition to appointment by a court. Enacting jurisdictions which allow appointment of a guardian solely by a court should delete the bracketed language "a parent, or a spouse."

The phrase "interests of the beneficiaries" (paragraph (7)) is used with some frequency in the Uniform Trust Code. The definition clarifies that the interests are as provided in the terms of the trust and not as determined by the beneficiaries. Absent authority to do so in the terms of the trust, Section 108 prohibits a trustee from changing a trust's principal place of administration if the transfer would violate the trustee's duty to administer the trust at a place appropriate to the interests of the beneficiaries. Section 706(b) conditions certain of the grounds for removing a trustee on the court's finding that removal of the trustee will best serve the interests of the beneficiaries. Section 801 requires the trustee to administer the trust in the interests of the beneficiaries, and Section 802 makes clear that a trustee may not place its own interests above those of the beneficiaries. Section 808(d) requires the holder of a power to direct who is subject to a fiduciary obligation to act with regard to the interests of the beneficiaries. Section 1002(b) may impose greater liability on a cotrustee who commits a breach of trust with reckless indifference to the interests of the beneficiaries. Section 1008 invalidates an exculpatory term to the extent it relieves a trustee of liability for breach of trust committed with reckless indifference to the interests of the beneficiaries.

"Jurisdiction" (paragraph (8)), when used with reference to a geographic area, includes a State or country but is not necessarily so limited. Its precise scope will depend on the context in which it is used. "Jurisdiction" is used in Sections 107 and 403 to refer to the place whose law will govern the trust. The term is used in Section 108 to refer to the trust's principal place of administration. The term is used in Section 816 to refer to the place where the trustee may appoint an ancillary trustee and to the place in whose courts the trustee can bring and defend legal proceedings.

The definition of "property" (paragraph (11)) is intended to be as expansive as possible and to encompass anything that may be the subject of ownership. Included are choses in action, claims, and interests created by beneficiary designations under policies of insurance, financial instruments, and deferred compensation and other retirement arrangements, whether revocable or irrevocable. Any such property interest is sufficient to support creation of a trust. *See* Section 401 Comment.

Due to the difficulty of identifying beneficiaries whose interests are remote and contingent, and because such beneficiaries are not likely to have much interest in the day-to-day affairs of the trust, the Uniform Trust Code uses the concept of "qualified beneficiary" (paragraph (12)) to limit the class of beneficiaries to whom certain notices must be given or consents received. The definition of qualified beneficiaries is used in Section 705 to define the class to whom notice must be given of a trustee resignation. The term is used in Section 813 to define the class to be kept informed of the trust's administration. Section 417 requires that notice be given to the qualified beneficiaries before a trust may be combined or divided. Actions which may be accomplished by the consent of the qualified beneficiaries include the appointment of a successor trustee as provided in Section 704. Prior to transferring a trust's principal place of administration, Section 108(d) requires that the trustee give at least 60 days notice to the qualified beneficiaries.

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

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

Charitable trusts and trusts for a valid noncharitable purpose do not have beneficiaries in the usual sense. However, certain persons, while not technically beneficiaries, do have an interest in seeing that the trust is enforced. Section 110 expands the definition of qualified beneficiaries to encompass this wider group. It grants the rights of qualified beneficiaries to the attorney general of the State and charitable organizations expressly entitled to receive benefits under the terms of a charitable trust. It also grants the rights of qualified beneficiaries to persons appointed by the terms of the trust or by the court to enforce a trust created for an animal or other noncharitable purpose.

The definition of "revocable" (paragraph (13)) clarifies that revocable trusts include only trusts whose revocation is substantially within the settlor's control. The consequences of classifying a trust as revocable are many. The Uniform Trust Code contains provisions relating to liability of a revocable trust for payment of the settlor's debts (Section 505), the standard of capacity for creating a revocable trust (Section 601), the procedure for revocation (Section 602), the subjecting of the beneficiaries' rights to the settlor's control (Section 603), the period for contesting a revocable trust (Section 604), the power of the settlor of a revocable trust to direct the actions of a trustee (Section 808(a)), notice to the qualified beneficiaries upon the settlor's death (Section 813(b)), and the liability of a trustee of a revocable trust for the obligations of a partnership of which the trustee is a general partner (Section 1011(d)).

Because under Section 603(d) the holder of a power of withdrawal has the rights of a settlor of a revocable trust, the definition of "power of withdrawal" (paragraph (10)), and "revocable" (paragraph (13)) are similar. Both exclude individuals who can exercise their power only with the consent of the trustee or person having an adverse interest.

The definition of "settlor" (paragraph (14)) refers to the person who creates, or contributes property to, a trust, whether by will, self-declaration, transfer of property to another person as trustee, or exercise of a power of appointment. For the requirements for creating a trust, see Section 401. Determining the identity of the "settlor" is usually not an issue. The same person will both sign the trust instrument and fund the trust. Ascertaining the identity of the settlor becomes more difficult when more than one person signs the trust

instrument or funds the trust. The fact that a person is designated as the "settlor" by the terms of the trust is not necessarily determinative. For example, the person who executes the trust instrument may be acting as the agent for the person who will be funding the trust. In that case, the person funding the trust, and not the person signing the trust instrument, will be the settlor. Should more than one person contribute to a trust, all of the contributors will ordinarily be treated as settlors in proportion to their respective contributions, regardless of which one signed the trust instrument. *See* Section 602(b).

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

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

"Spendthrift provision" (paragraph (15)) means a term of a trust which restrains the transfer of a beneficiary's interest, whether by a voluntary act of the beneficiary or by an action of a beneficiary's creditor or assignee, which at least as far as the beneficiary is concerned, would be involuntary. A spendthrift provision is valid under the Uniform Trust Code only if it restrains both voluntary and involuntary transfer. For a discussion of this requirement and the effect of a spendthrift provision in general, see Section 502. The insertion of a spendthrift provision in the terms of the trust may also constitute a material purpose sufficient to prevent termination of the trust by agreement of the beneficiaries under Section 411, although the Code does not presume this result.

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

A manifestation of a settlor's intention does not constitute evidence of a trust's terms if it would be inadmissible in a judicial proceeding in which the trust's terms are in question. *See* Restatement (Third) of Trusts § 4 cmt. b (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 4 cmt. b (1959). *See also* Restatement (Third) Property: Donative Transfers §§ 10.2, 11.1-11.3 (Tentative Draft No. 1, approved 1995). For example, in many States a trust of real property is unenforceable unless evidenced by a writing, although Section 407 of this Code does not so require, leaving this issue to be covered by separate statute if the enacting jurisdiction so elects. Evidence otherwise relevant to determining the terms of a trust may also be excluded under other principles of law, such as the parol evidence rule.

"Trust instrument" (paragraph (18)) is a subset of the definition of "terms of a trust" (paragraph (17)), referring to only such terms as are found in an instrument executed by the settlor. Section 403 provides that a trust is validly created if created in compliance with the law of the place where the trust instrument was executed. Pursuant to Section 604(a)(2), the contest period for a revocable trust can be shortened by providing the potential contestant with a copy of the trust instrument plus other information. Section 813(b)(1) requires that the trustee upon request furnish a beneficiary with a copy of the trust instrument. To allow a trustee to administer a trust with some dispatch without concern about liability if the terms of a trust instrument are contradicted by evidence outside of the instrument, Section 1006 protects a trustee from liability to the extent a breach of trust resulted from reasonable reliance on those terms. Section 1013 allows a trustee to substitute a certification of trust in lieu of providing a third person with a copy of the trust instrument. Section 1106(a)(4) provides that unless there is a clear indication of a contrary intent, rules of construction and presumptions provided in the Uniform Trust Code apply to trust instruments executed before the effective date of the Code.

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

Comment to Section 104
(Knowledge)

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).

Comment to Section 105
(Default and Mandatory Rules)

Subsection (a) emphasizes that the Uniform Trust Code is primarily a default statute. While this Code provides numerous procedural rules on which a settlor may wish to rely, the settlor is generally free to override these rules and to

prescribe the conditions under which the trust is to be administered. With only limited exceptions, the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary are as specified in the terms of the trust.

Subsection (b) lists the items not subject to override in the terms of the trust. Because subsection (b) refers specifically to other sections of the Code, enacting jurisdictions modifying these other sections may also need to modify subsection (b).

Subsection (b)(1) confirms that the requirements for a trust's creation, such as the necessary level of capacity and the requirement that a trust have a legal purpose, are controlled by statute and common law, not by the settlor. For the requirements for creating a trust, see Sections 401-409. Subsection (b)(12) makes clear that the settlor may not reduce any otherwise applicable period of limitations for commencing a judicial proceeding. *See* Sections 604 (period of limitations for contesting validity of revocable trust) and 1005 (period of limitation on action for breach of trust). Similarly, a settlor may not so negate the responsibilities of a trustee that the trustee would no longer be acting in a fiduciary capacity. Subsection (b)(2) provides that the terms may not eliminate a trustee's duty to act in good faith and in accordance with the purposes of the trust. Subsection (b)(3) provides that the terms may not eliminate the requirement that a trust and its terms must be for the benefit of the beneficiaries. Subsection (b)(2)-(3) are echoed in Sections 404 (trust and its terms must be for benefit of beneficiaries), 801 (trustee must administer trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries), 814 (trustee must exercise discretionary power in good faith and in accordance with its terms and purposes and the interests of the beneficiaries), and 1008 (exculpatory term unenforceable to extent it relieves trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust and the interests of the beneficiaries).

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

Section 813 imposes a general obligation to keep the beneficiaries informed as well as several specific notice requirements. Subsections (b)(8) and (b)(9) specify limits on the settlor's ability to waive these information requirements. With respect to beneficiaries age 25 or older, a settlor may dispense with all of the requirements of Section 813 except for the duties to inform the beneficiaries of the existence of the trust, to provide a beneficiary upon request with such reports as the trustee may have prepared, and to respond to a beneficiary's request for other information reasonably related to the trust's administration. Among the specific requirements that a settlor may waive include the duty to provide a beneficiary upon request with a copy of the trust instrument (Section 813(b)(1)), and the requirement that the trustee provide annual reports to the qualified beneficiaries (Section 813(c)). The furnishing of a copy of the entire trust instrument and preparation of annual reports may be required in a particular case, however, if such information is requested by a beneficiary and is reasonably related to the trust's administration.

Responding to the desire of some settlors that younger beneficiaries not know of the trust's bounty until they have reached an age of maturity and self-sufficiency, subsection (b)(8) allows a settlor to provide that the trustee need not even inform beneficiaries under age 25 of the existence of the trust. However, pursuant to subsection (b)(9), if the younger beneficiary learns of the trust and requests information, the trustee must respond.

During the drafting of the Uniform Trust Code, the Drafting Committee discussed and rejected a proposal that the ability of the settlor to waive required notice be based on the nature of the beneficiaries' interest and not on the beneficiaries' age. Advocates of this alternative approach concluded that a settlor should be able to waive required notices to the remainder beneficiaries, regardless of their age. Enacting jurisdictions preferring this alternative should substitute the language "adult and current or permissible distributees of trust income or principal" for the reference to "qualified beneficiaries" in subsection (b)(8). They should also delete the reference to beneficiaries "who have attained the age of 25 years."

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

Neither subsection (b)(8) nor (b)(9) apply to revocable trusts. The settlor of a revocable trust may waive all reporting to the beneficiaries, even in the event the settlor loses capacity. If the settlor is silent about the subject, reporting to the beneficiaries will be required upon the settlor's loss of capacity. *See* Section 603.

In conformity with traditional doctrine, the Uniform Trust Code limits the ability of a settlor to exculpate a trustee from liability for breach of trust. The limits are specified in Section 1008. Subsection (b)(10) of this section provides a cross-reference. Similarly, subsection (b)(7) provides a cross-reference to Section 708(b), which limits the binding effect of a provision specifying the trustee's compensation.

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

2001 Amendment. By amendment in 2001, subsections (b) (3), (8) and (9) were revised to read as above. The language in subsection (b)(3) "that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve" is new. This addition clarifies that the settlor may not waive this common law requirement, which is codified in the Code at Section 404.

Subsections (b)(8) and (9) formerly provided:

> (8) the duty to notify the qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, and of their right to request trustee's reports and other information reasonably related to the administration of the trust;
>
> (9) the duty to respond to the request of a beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust.

The amendment clarifies that the information requirements not subject to waiver are requirements specified in Section 813 of the Code.

Comment to Section 106
(Common Law of Trusts; Principles of Equity)

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

The statutory text of the Uniform Trust Code is also supplemented by these Comments, which, like the Comments to any Uniform Act, may be relied on as a guide for interpretation. *See Acierno v. Worthy Bros. Pipeline Corp.*, 656 A.2d 1085, 1090 (Del. 1995) (interpreting Uniform Commercial Code); *Yale University v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting Uniform Management of Institutional Funds Act); 2 Norman Singer, Statutory Construction § 52.05 (6th ed. 2000); Jack Davies, Legislative Law and Process in a Nutshell § 55-4 (2d ed. 1986).

Comment to Section 107
(Governing Law)

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

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

Paragraph (2) provides a rule for trusts without governing law provisions - the meaning and effect of the trust's terms are to be determined by the law of the jurisdiction having the most significant relationship to the matter at issue. Factors to consider in determining the governing law include the place of the trust's creation, the location of the trust property, and the domicile of the settlor, the trustee, and the beneficiaries. *See* Restatement (Second) of Conflict of Laws §§ 270 cmt. c and 272 cmt. d (1971). Other more general factors that may be pertinent in particular cases include the relevant policies of the forum, the relevant policies of other interested jurisdictions and degree of their interest, the protection of justified expectations and certainty, and predictability and uniformity of result. *See* Restatement (Second) of Conflict of Laws § 6 (1971). Usually, the law of the trust's principal place of administration will govern administrative matters and the law of the place having the most significant relationship to the trust's creation will govern the dispositive provisions.

This section is consistent with and was partially patterned on the Hague Convention on the Law Applicable to Trusts and on their Recognition, signed on July 1, 1985. Like this section, the Hague Convention allows the settlor to designate the governing law. Hague Convention art. 6. Absent a designation, the

Convention provides that the trust is to be governed by the law of the place having the closest connection to the trust. Hague Convention art. 7. The Convention also lists particular public policies for which the forum may decide to override the choice of law that would otherwise apply. These policies are protection of minors and incapable parties, personal and proprietary effects of marriage, succession rights, transfer of title and security interests in property, protection of creditors in matters of insolvency, and, more generally, protection of third parties acting in good faith. Hague Convention art. 15.

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

Comment to Section 108
(Principal Place of Administration)

This section prescribes rules relating to a trust's principal place of administration. Locating a trust's principal place of administration will ordinarily determine which court has primary if not exclusive jurisdiction over the trust. It may also be important for other matters, such as payment of state income tax or determining the jurisdiction whose laws will govern the trust. *See* Section 107 Comment.

Because of the difficult and variable situations sometimes involved, the Uniform Trust Code does not attempt to further define principal place of administration. A trust's principal place of administration ordinarily will be the place where the trustee is located. Determining the principal place of administration becomes more difficult, however, when cotrustees are located in different States or when a single institutional trustee has trust operations in more than one State. In such cases, other factors may become relevant, including the place where the trust records are kept or trust assets held, or in the case of an institutional trustee, the place where the trust officer responsible for supervising the account is located.

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

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

A settlor expecting to name a trustee or cotrustees with significant contacts in more than one State may eliminate possible uncertainty about the location of the trust's principal place of administration by specifying the jurisdiction in the terms of the trust. Under subsection (a), a designation in the terms of the trust is controlling if (1) a trustee is a resident of or has its principal place of business in the designated jurisdiction, or (2) all or part of the administration occurs in the designated jurisdiction. Designating the principal place of administration should be distinguished from designating the law to determine the meaning and effect of the trust's terms, as authorized by Section 107. A settlor is free to designate one jurisdiction as the principal place of administration and another to govern the meaning and effect of the trust's provisions.

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

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

In connection with a transfer of the principal place of administration, the trustee may transfer some or all of the trust property to a new trustee located outside of the State. The appointment of a new trustee may also be essential if the current trustee is ineligible to administer the trust in the new place. Subsection (f)

clarifies that the appointment of the new trustee must comply with the provisions on appointment of successor trustees as provided in the terms of the trust or under Section 704. Absent an order of succession in the terms of the trust, Section 704(c) provides for an appointment if approved by all of the qualified beneficiaries or by the court.

While transfer of the principal place of administration will normally change the governing law with respect to administrative matters, a transfer does not normally alter the controlling law with respect to the validity of the trust and the construction of its dispositive provisions. *See* 5A Austin W. Scott & William F. Fratcher, The Law of Trusts § 615 (4th ed. 1989).

Comment to Section 109
(Methods and Waiver of Notice)

Subsection (a) clarifies that notices under the Uniform Trust Code may be given by any method likely to result in its receipt by the person to be notified. The specific methods listed in the subsection are illustrative, not exhaustive. Subsection (b) relieves a trustee of responsibility for what would otherwise be an impossible task, the giving of notice to a person whose identity or location is unknown and not reasonably ascertainable by the trustee. The section does not define when a notice is deemed to have been sent or delivered or person deemed to be unknown or not reasonably ascertainable, the drafters preferring to leave this issue to the enacting jurisdiction's rules of civil procedure.

Under the Uniform Trust Code, certain actions can be taken upon unanimous consent of the beneficiaries or qualified beneficiaries. *See* Sections 411 (termination of noncharitable irrevocable trust) and 704 (appointment of successor trustee). Subsection (b) of this section only authorizes waiver of notice. A consent required from a beneficiary in order to achieve unanimity is not waived because the beneficiary is missing. But the fact a beneficiary cannot be located may be a sufficient basis for a substitute consent to be given by another person on the beneficiary's behalf under the representation principles of Article 3.

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

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

Comment to Section 110
(Others Treated as Qualified Beneficiaries)

Under the Uniform Trust Code, certain notices need be given only to the "qualified" beneficiaries. For the definition of "qualified beneficiary," see Section 103(12). Among these notices are notice of a transfer of the trust's principal place of administration (Section 108(d)), notice of a trust division or combination (Section 417), notice of a trustee resignation (Section 705(a)(1)), and notice of a trustee's annual report (Section 813(c)). Subsection (a) of this section authorizes other beneficiaries to receive one or more of these notices by filing a request for notice with the trustee.

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

Charitable trusts do not have beneficiaries in the usual sense. However, certain persons, while not technically beneficiaries, do have an interest in seeing that the trust is enforced. In the case of a charitable trust, this includes the State's attorney general and charitable organizations expressly designated to receive distributions under the terms of the trust, who under subsections (b)-(c) are granted the rights of qualified beneficiaries. Because the charitable organization must be named in the terms of the trust, excluded are organizations who may receive distributions only in the trustee's discretion and organizations holding remainder interests subject to a contingency.

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

"Attorney general" is placed in brackets in subsection (c) to accommodate jurisdictions which grant enforcement authority over charitable trusts to another designated official.

This section does not limit other means by which the attorney general or other designated official can enforce a charitable trust.

2001 Amendment. By amendment in 2001, "charitable organization expressly designated to receive distributions" was substituted for "charitable organization expressly entitled to receive benefits" in subsection (b). The amendment conforms the language of this section to terminology used elsewhere in the Code.

Comment to Section 111
(Nonjudicial Settlement Agreements)

While the Uniform Trust Code recognizes that a court may intervene in the administration of a trust to the extent its jurisdiction is invoked by interested persons or otherwise provided by law (*see* Section 201(a)), resolution of disputes by nonjudicial means is encouraged. This section facilitates the making of such agreements by giving them the same effect as if approved by the court. To achieve such certainty, however, subsection (c) requires that the nonjudicial settlement must contain terms and conditions that a court could properly approve. Under this section, a nonjudicial settlement cannot be used to produce a result not authorized by law, such as to terminate a trust in an impermissible manner.

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

Subsection (d) is a nonexclusive list of matters to which a nonjudicial settlement may pertain. Other matters which may be made the subject of a nonjudicial settlement are listed in the Article 3 General Comment. The fact that the trustee and beneficiaries may resolve a matter nonjudicially does not mean that beneficiary approval is required. For example, a trustee may resign pursuant to Section 705 solely by giving notice to the qualified beneficiaries and any cotrustees. But a nonjudicial settlement between the trustee and beneficiaries will frequently prove helpful in working out the terms of the resignation.

Because of the great variety of matters to which a nonjudicial settlement may be applied, this section does not attempt to precisely define the "interested persons" whose consent is required to obtain a binding settlement as provided in

subsection (a). However, the consent of the trustee would ordinarily be required to obtain a binding settlement with respect to matters involving a trustee's administration, such as approval of a trustee's report or resignation.

Comment to Section 112
(Rules of Construction)

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

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

Rules of construction are not the same as constructional preferences. A constructional preference is general in nature, providing general guidance for resolving a wide variety of ambiguities. An example is a preference for a construction that results in a complete disposition and avoid illegality. Rules of construction, on the other hand, are specific in nature, providing guidance for resolving specific situations or construing specific terms. Unlike a constructional preference, a rule of construction, when applicable, can lead to only one result. *See* Restatement (Third) of Property: Donative Transfers § 11.3 and cmt. b (Tentative Draft No. 1, approved 1995).

Rules of construction attribute intention to individual donors based on assumptions of common intention. Rules of construction are found both in enacted statutes and in judicial decisions. Rules of construction can involve the meaning to be given to particular language in the document, such as the meaning to be given to "heirs" or "issue." Rules of construction also address situations the

donor failed to anticipate. These include the failure to anticipate the predecease of a beneficiary or to specify the source from which expenses are to be paid. Rules of construction can also concern assumptions as to how a donor would have revised donative documents in light of certain events occurring after execution. These include rules dealing with the effect of a divorce and whether a specific devisee will receive a substitute gift if the subject matter of the devise is disposed of during the testator's lifetime.

Instead of enacting this section, a jurisdiction enacting this Code may wish to enact detailed rules on the construction of trusts, either in addition to its rules on the construction of wills or as part of one comprehensive statute applicable to both wills and trusts. For this reason and to encourage this alternative, the section has been made optional. For possible models, see Uniform Probate Code, Article 2, Parts 7 and 8, which was added to the UPC in 1990, and California Probate Code §§ 21101-21630, enacted in 1994.

Article 2
Judicial Proceedings

General Comment

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

Section 201 makes clear that the jurisdiction of the court is available as invoked by interested persons or as otherwise provided by law. Proceedings involving the administration of a trust normally will be brought in the court at the trust's principal place of administration. Section 202 provides that the trustee and beneficiaries are deemed to have consented to the jurisdiction of the court at the principal place of administration as to any matter relating to the trust. Sections 203 and 204 are optional, bracketed provisions relating to subject-matter jurisdiction and venue.

Comment to Section 201
(Role of Court in Administration of Trust)

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 pass upon final or partial termination of the trust; settling accounts and passing upon the acts of a trustee, including the exercise of discretionary powers; instructing the trustee; compelling the trustee to report information about the trust or account to the beneficiary; granting powers to the trustee; fixing or allowing payment of the trustee's compensation or reviewing the reasonableness of the compensation; appointing or removing a trustee; accepting the resignation of a trustee; compelling redress of a breach of trust by any available remedy; approving or directing the modification or termination of a trust; approving or directing the combination or division of trusts; and authorizing or directing transfer of a trust or trust property to or from another jurisdiction.

Comment to Section 202
(Jurisdiction Over Trustee and Beneficiary)

This section clarifies that the courts of the principal place of administration have jurisdiction to enter orders relating to the trust that will be binding on both the trustee and beneficiaries. Consent to jurisdiction does not

dispense with any required notice, however. With respect to jurisdiction over a beneficiary, the Comment to Uniform Probate Code § 7-103, upon which portions of this section are based, is instructive:

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

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

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

For a discussion of jurisdictional issues concerning trusts, see 5A Austin W. Scott & William F. Fratcher, The Law of Trusts §§ 556-573 (4th ed. 1989).

Comment to Section 203
(Subject-Matter Jurisdiction)

This section provides a means for distinguishing the jurisdiction of the court having primary jurisdiction for trust matters, whether denominated the probate court, chancery court, or by some other name, from other courts in a State that may on occasion resolve disputes concerning trusts. The section has been placed in brackets because the enacting jurisdiction may already address subject-matter jurisdiction by other statute or court rule. The topic also need not be addressed in States having unified court systems. For an explanation of types of proceedings which may be brought concerning the administration of a trust, see the Comment to Section 201.

Comment to Section 204
(Venue)

This optional, bracketed section is made available for jurisdictions that conclude that venue for a judicial proceeding involving a trust is not adequately addressed in local rules of civil procedure. For jurisdictions enacting this section, general rules governing venue continue to apply in cases not covered by this section. This includes most proceedings where jurisdiction over a trust, trust property, or parties to a trust is based on a factor other than the trust's principal place of administration. The general rules governing venue also apply when the principal place of administration of a trust is in another locale, but jurisdiction is proper in the enacting State.

Article 3
Representation

General Comment

This article deals with representation of beneficiaries, both representation by fiduciaries (personal representatives, trustees, guardians, and conservators), and what is known as virtual representation. Representation is a topic not adequately addressed under the trust law of most States. Representation is addressed in the Restatement (First) of Property §§ 180-186 (1936), but the coverage of this article is more complete.

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

Sections 302-305 cover the different types of representation. Section 302 deals with representation by the holder of a general testamentary power of appointment. (Revocable trusts and presently exercisable general powers of appointment are covered by Section 603, which grant the settlor or holder of the power all rights of the beneficiaries or persons whose interests are subject to the power). Section 303 deals with representation by a fiduciary, whether of an estate, trust, conservatorship, or guardianship. The section also allows a parent without a conflict of interest to represent and bind a minor or unborn child. Section 304 is the virtual representation provision. It provides for representation of and the giving of a binding consent by another person having a substantially identical interest with respect to the particular issue. Section 305 authorizes the court to appoint a representative to represent the interests of unrepresented persons or

persons for whom the court concludes the other available representation might be inadequate.

The provisions of this article are subject to modification in the terms of the trust. *See* Section 105. Settlors are free to specify their own methods for providing substituted notice and obtaining substituted consent.

Comment to Section 301
(Representation: Basic Effect)

This section is general and introductory, laying out the scope of the article.

Subsection (a) validates substitute notice to a person who may represent and bind another person as provided in the succeeding sections of this article. Notice to the substitute has the same effect as if given directly to the other person. Subsection (a) does not apply to notice of a judicial proceeding. Pursuant to Section 109(d), notice of a judicial proceeding must be given as provided in the applicable rules of civil procedure, which may require that notice not only be given to the representative but also to the person represented. For a model statute for the giving of notice in such cases, see Uniform Probate Code § 1-403(3). Subsection (a) may be used to facilitate the giving of notice to the qualified beneficiaries of a proposed transfer of principal place of administration (Section 108(d)), of a proposed trust combination or division (Section 417), of a temporary assumption of duties without accepting trusteeship (Section 701(c)(1)), of a trustee's resignation (Section 705(a)(1)), and of a trustee's report (Section 813(c)).

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

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

837 P.2d 714 (Alaska 1992), which held that the a refusal to allow an objection by an adult competent remainder beneficiary violated due process.

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

Comment to Section 302
(Representation By Holder of General Testamentary Power of Appointment)

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

Comment to Section 303
(Representation By Fiduciaries and Parents)

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

Paragraph (2) authorizes a guardian to bind and represent a ward if a conservator of the ward's estate has not been appointed. Granting a guardian authority to represent the ward with respect to interests in the trust can avoid the need to seek appointment of a conservator. This grant of authority to act with respect to the ward's trust interest may broaden the authority of a guardian in some States although not in States that have adopted the Section 1-403 of the

Uniform Probate Code, from which this section was derived. Under the Uniform Trust Code, a "conservator" is appointed by the court to manage the ward's property, a "guardian" to make decisions with respect to the ward's personal affairs. *See* Section 103.

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

Comment to Section 304
(Representation By Person Having Substantially Identical Interest)

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

Restatement (First) of Property §§ 181 and 185 (1936) provide that virtual representation is inapplicable if the interest represented was not sufficiently protected. Representation is deemed sufficiently protective as long as it does not appear that the representative acted in hostility to the interest of the person represented. Restatement (First) of Property § 185 (1936). Evidence of inactivity or lack of skill is material only to the extent it establishes such hostility. Restatement (First) of Property § 185 cmt. b (1936).

Typically, the interests of the representative and the person represented will be identical. A common example would be a trust providing for distribution to the settlor's children as a class, with an adult child being able to represent the interests of children who are either minors or unborn. Exact identity of interests is not required, only substantial identity with respect to the particular question or dispute. Whether such identity is present may depend on the nature of the interest. For example, a presumptive remaindermen may be able to represent alternative remaindermen with respect to approval of a trustee's report but not with respect to

interpretation of the remainder provision or termination of the trust. Even if the beneficial interests of the representative and person represented are identical, representation is not allowed in the event of conflict of interest. The representative may have interests outside of the trust that are adverse to the interest of the person represented, such as a prior relationship with the trustee or other beneficiaries. *See* Restatement (First) of Property § 185 cmt. d (1936).

Comment to Section 305
(Appointment of Representative)

This section is derived from Section 1-403(4) of the Uniform Probate Code. However, this section substitutes " representative" for "guardian ad litem" to signal that a representative under this Code serves a different role. Unlike a guardian ad litem, under this section a representative can be appointed to act with respect to a nonjudicial settlement or to receive a notice on a beneficiary's behalf. Furthermore, in making decisions, a representative may consider general benefit accruing to living members of the family. "Representative" is placed in brackets in case the enacting jurisdiction prefers a different term. The court may appoint a representative to act for a person even if the person could be represented under another section of this article.

Article 4
(Creation, Validity, Modification, and Termination Of Trust)

General Comment

Sections 401 through 409, which specify the requirements for the creation of a trust, largely codify traditional doctrine. Section 401 specifies the methods by which trusts are created, that is, by transfer of property, self-declaration, or exercise of a power of appointment. Whatever method may have been employed, other requirements, including intention, capacity and, for certain types of trusts, an ascertainable beneficiary, also must be satisfied before a trust is created. These requirements are listed in Section 402. Section 403 addresses the validity in the enacting jurisdiction of trusts created in other jurisdictions. A trust not created by will is validly created if its creation complied with the law of specified jurisdictions in which the settlor or trustee had a significant contact. Section 404 forbids trusts for illegal or impossible purposes, and requires that a trust and its terms must be for the benefit of its beneficiaries. Section 405 recites the permitted purposes of a charitable trust. Section 406 lists some of the grounds for contesting a trust. Section 407 validates oral trusts. The remaining sections address what are often referred to as "honorary" trusts, although such trusts are valid and enforceable under this Code. Section 408 covers a trust for the care of an animal;

Section 409 allows creation of a trust for another noncharitable purpose such as maintenance of a cemetery lot.

Sections 410 through 417 provide a series of interrelated rules on when a trust may be terminated or modified other than by its express terms. The overall objective of these sections is to enhance flexibility consistent with the principle that preserving the settlor's intent is paramount. Termination or modification may be allowed upon beneficiary consent if the court concludes that the trust or a particular provision no longer achieves a material purpose or if the settlor concurs (Section 411), by the court in response to unanticipated circumstances or due to ineffective administrative terms (Section 412), or by the court or trustee if continued administration under the trust's existing terms would be uneconomical (Section 414). A trust may be reformed to correct a mistake of law or fact (Section 415), or modified to achieve the settlor's tax objectives (Section 416). Trusts may be combined or divided (Section 417). A trustee or beneficiary has standing to petition the court with respect to a proposed termination or modification (Section 410).

Section 413 codifies and at the same time modifies the doctrine of cy pres, at least as applied in most States. The Uniform Trust Code authorizes the court to apply cy pres not only if the original means becomes impossible or unlawful but also if the means become impracticable or wasteful. Section 413 also creates a presumption of general charitable intent. Upon failure of the settlor's original plan, the court cannot divert the trust property to a noncharity unless the terms of the trust expressly so provide. Furthermore, absent a contrary provision in the terms of the trust, limits are placed on when a gift over to a noncharity can take effect upon failure or impracticality of the original charitable purpose. The gift over is effective only if, when the provision takes effect, the trust property is to revert to the settlor and the settlor is still living, or fewer than 21 years have elapsed since the date of the trust's creation.

The requirements for a trust's creation, such as the necessary level of capacity and the requirement that a trust have a legal purpose, are controlled by statute and common law, not by the settlor. *See* Section 105(b)(1). Nor may the settlor negate the court's ability to modify or terminate a trust as provided in Sections 410 through 416. *See* Section 105(b)(4). However, a settlor is free to restrict or modify the trustee's power to terminate an uneconomic trust as provided in Sections 414, and the trustee's power to combine and divide trusts as provided in Section 417.

Comment to Section 401
(Methods of Creating Trust)

This section is based on Restatement (Third) of Trusts § 10 (Tentative Draft No. 1, approved 1996), and Restatement (Second) of Trusts § 17 (1959). Under the methods specified for creating a trust in this section, a trust is not created until it receives property. For what constitutes an adequate property interest, see Restatement (Third) of Trusts §§ 40-41 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts §§ 74-86 (1959). The property interest necessary to fund and create a trust need not be substantial. A revocable designation of the trustee as beneficiary of a life insurance policy or employee benefit plan has long been understood to be a property interest sufficient to create a trust. *See* Section 103(11) ("property" defined). Furthermore, the property interest need not be transferred contemporaneously with the signing of the trust instrument. A trust instrument signed during the settlor's lifetime is not rendered invalid simply because the trust was not created until property was transferred to the trustee at a much later date, including by contract after the settlor's death. A pourover devise to a previously unfunded trust is also valid and may constitute the property interest creating the trust. *See* Uniform Testamentary Additions to Trusts Act § 1 (1991), *codified at* Uniform Probate Code § 2-511 (pourover devise to trust valid regardless of existence, size, or character of trust corpus). *See also* Restatement (Third) of Trusts § 19 (Tentative Draft No. 1, approved 1996).

While this section refers to transfer of property to a trustee, a trust can be created even though for a period of time no trustee is in office. *See* Restatement (Third) of Trusts § 2 cmt. g (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 2 cmt. i (1959). A trust can also be created without notice to or acceptance by a trustee or beneficiary. *See* Restatement (Third) of Trusts § 14 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 35-36 (1959).

The methods specified in this section are not exclusive. Section 102 recognizes that trusts can also be created by special statute or court order. *See also* Restatement (Third) of Trusts § 1 cmt. a (Tentative Draft No. 1, approved 1996); Uniform Probate Code § 2-212 (elective share of incapacitated surviving spouse to be held in trust on terms specified in statute); Uniform Probate Code § 5-411(a)(4) (conservator may create trust with court approval); Restatement (Second) of Trusts § 17 cmt. i (1959) (trusts created by statutory right to bring wrongful death action).

A trust can also be created by a promise that creates enforceable rights in a person who immediately or later holds these rights as trustee. *See* Restatement (Third) of Trusts §10(e) (Tentative Draft No. 1, approved 1996). A trust thus created is valid notwithstanding that the trustee may resign or die before the

promise is fulfilled. Unless expressly made personal, the promise can be enforced by a successor trustee. For examples of trusts created by means of promises enforceable by the trustee, see Restatement (Third) of Trusts § 10 cmt. g (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 14 cmt. h, 26 cmt. n (1959).

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

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

While this section confirms the familiar principle that a trust may be created by means of the exercise of a power of appointment (paragraph (3)), this Code does not legislate comprehensively on the subject of powers of appointment but addresses only selected issues. *See* Sections 302 (representation by holder of general testamentary power of appointment); 505(b) (creditor claims against holder of power of withdrawal); and 603(d) (rights of holder of power of withdrawal). For the law on powers of appointment generally, see Restatement (Second) of Property: Donative Transfers §§ 11.1-24.4 (1986); Restatement (Third) of Property: Wills and Other Donative Transfers (in progress).

Comment to Section 402
(Requirements for Creation)

Subsection (a) codifies the basic requirements for the creation of a trust. To create a valid trust, the settlor must indicate an intention to create a trust. *See*

Restatement (Third) of Trusts § 13 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 23 (1959). But only such manifestations of intent as are admissible as proof in a judicial proceeding may be considered. *See* Section 103(17) ("terms of a trust" defined).

To create a trust, a settlor must have the requisite mental capacity. To create a revocable or testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have capacity during lifetime to transfer the property free of trust. *See* Section 601 (capacity of settlor to create revocable trust), and *see generally* Restatement (Third) of Trusts § 11 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 18-22 (1959); and Restatement (Third) of Property: Wills and Other Donative Transfers §8.1 (Tentative Draft No. 3, 2001).

Subsection (a)(3) requires that a trust, other than a charitable trust, a trust for the care of an animal, or a trust for another valid noncharitable purpose, have a definite beneficiary. While some beneficiaries will be definitely ascertained as of the trust's creation, subsection (b) recognizes that others may be ascertained in the future as long as this occurs within the applicable perpetuities period. The definite beneficiary requirement does not prevent a settlor from making a disposition in favor of a class of persons. Class designations are valid as long as the membership of the class will be finally determined within the applicable perpetuities period. For background on the definite beneficiary requirement, see Restatement (Third) of Trusts §§ 44-46 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts §§ 112-122 (1959).

Subsection (a)(4) recites standard doctrine that a trust is created only if the trustee has duties to perform. *See* Restatement (Third) of Trusts § 2 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 2 (1959). Trustee duties are usually active, but a validating duty may also be passive, implying only that the trustee has an obligation not to interfere with the trustee's enjoyment of the trust property. Such passive trusts, while valid under this Code, may be terminable under the enacting jurisdiction's Statute of Uses. *See* Restatement (Third) of Trusts § 6 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 67-72 (1959).

Subsection (a)(5) addresses the doctrine of merger, which, as traditionally stated, provides that a trust is not created if the settlor is the sole trustee and sole beneficiary of *all* beneficial interests. The doctrine of merger has been inappropriately applied by the courts in some jurisdictions to invalidate self-declarations of trust in which the settlor is the sole life beneficiary but other persons are designated as beneficiaries of the remainder. The doctrine of merger is properly applicable only if all beneficial interests, both life interests and remainders, are vested in the same person, whether in the settlor or someone else.

An example of a trust to which the doctrine of merger would apply is a trust of which the settlor is sole trustee, sole beneficiary for life, and with the remainder payable to the settlor's probate estate. On the doctrine of merger generally, see Restatement (Third) of Trusts § 69 (Tentative Draft No. 3, 2001); Restatement (Second) of Trusts § 341 (1959).

Subsection (c) allows a settlor to empower the trustee to select the beneficiaries even if the class from whom the selection may be made cannot be ascertained. Such a provision would fail under traditional doctrine; it is an imperative power with no designated beneficiary capable of enforcement. Such a provision is valid, however, under both this Code and the Restatement, if there is at least one person who can meet the description. If the trustee does not exercise the power within a reasonable time, the power fails and the property will pass by resulting trust. *See* Restatement (Third) of Trusts § 46 (Tentative Draft No. 2, approved 1999). *See also* Restatement (Second) of Trusts § 122 (1959); Restatement (Second) of Property: Donative Transfers § 12.1 cmt. e (1986).

Comment to Section 403
(Trusts Created in Other Jurisdictions)

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

Comment to Section 404
(Trust Purposes)

For an explication of the requirement that a trust must not have a purpose that is unlawful or against public policy, see Restatement (Third) of Trusts §§ 27-30 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts §§ 59-65 (1959). A trust with a purpose that is unlawful or against public policy is invalid. Depending on when the violation occurred, the trust may be invalid at its inception or it may become invalid at a later date. The invalidity may also affect only particular provisions. Generally, a trust has a purpose which is illegal if (1) its performance involves the commission of a criminal or tortious act by the trustee; (2) the settlor's purpose in creating the trust was to defraud creditors or others; or (3) the consideration for the creation of the trust was illegal. *See* Restatement (Third) of Trusts § 28 cmt. a (Tentative Draft No. 2, approved 1999);

Restatement (Second) of Trusts § 60 cmt. a (1959). Purposes violative of public policy include those that tend to encourage criminal or tortious conduct, that interfere with freedom to marry or encourage divorce, that limit religious freedom, or which are frivolous or capricious. *See* Restatement (Third) of Trusts § 29 cmt. d-h (Tentative Draft No. 2, 1999); Restatement (Second) of Trusts § 62 (1959).

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

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

Comment to Section 405
(Charitable Purposes; Enforcement)

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

Charitable trusts are subject to the restriction in Section 404 that a trust purpose must be legal and not contrary to public policy. This would include trusts

that involve invidious discrimination. *See* Restatement (Third) of Trusts § 28 cmt. f (Tentative Draft No. 3, 2001).

Under subsection (b), a trust that states a general charitable purpose does not fail if the settlor neglected to specify a particular charitable purpose or organization to receive distributions. The court may instead validate the trust by specifying particular charitable purposes or recipients, or delegate to the trustee the framing of an appropriate scheme. *See* Restatement (Second) of Trusts § 397 cmt. d (1959). Subsection (b) of this section is a corollary to Section 413, which states the doctrine of cy pres. Under Section 413(a), a trust failing to state a general charitable purpose does not fail upon failure of the particular means specified in the terms of the trust. The court must instead apply the trust property in a manner consistent with the settlor's charitable purposes to the extent they can be ascertained.

Subsection (b) does not apply to the long-established estate planning technique of delegating to the trustee the selection of the charitable purposes or recipients. In that case, judicial intervention to supply particular terms is not necessary to validate the creation of the trust. The necessary terms instead will be supplied by the trustee. *See* Restatement (Second) of Trusts § 396 (1959). Judicial intervention under subsection (b) will become necessary only if the trustee fails to make a selection. *See* Restatement (Second) of Trusts § 397 cmt. d (1959). Pursuant to Section 110(b), the charitable organizations selected by the trustee would not have the rights of qualified beneficiaries under this Code because they are not expressly designated to receive distributions under the terms of the trust.

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

Comment to Section 406
(Creation of Trust Induced by Fraud, Duress, or Undue Influence)

This section is a specific application of Restatement (Third) of Trusts § 12 (Tentative Draft No. 1, approved 1996), and Restatement (Second) of Trusts § 333 (1959), which provide that a trust can be set aside or reformed on the same grounds as those which apply to a transfer of property not in trust, among which include undue influence, duress, and fraud, and mistake. This section addresses undue influence, duress, and fraud. For reformation of a trust on grounds of mistake, see Section 415. See also Restatement (Third) of Property: Wills and

Other Donative Transfers § 8.3 (Tentative Draft No. 3, 2001), which closely tracks the language above. Similar to a will, the invalidity of a trust on grounds of undue influence, duress, or fraud may be in whole or in part.

Comment to Section 407
(Evidence of Oral Trust)

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. States with statutes of frauds or other provisions requiring that the creation of certain trusts must be evidenced by a writing may wish specifically to cite such provisions.

For the Statute of Frauds generally, see Restatement (Second) of Trusts §§ 40-52 (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).

Comment to Section 408
(Trust for Care of Animal)

This section and the next section of the Code validate so called honorary trusts. Unlike honorary trusts created pursuant to the common law of trusts, which are arguably no more than powers of appointment, the trusts created by this and the next section are valid and enforceable. For a discussion of the common law doctrine, see Restatement (Third) of Trusts § 47 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 124 (1959).

This section addresses a particular type of honorary trust, the trust for the care of an animal. Section 409 specifies the requirements for trusts without ascertainable beneficiaries that are created for other noncharitable purposes. A trust for the care of an animal may last for the life of the animal. While the animal

will ordinarily be alive on the date the trust is created, an animal may be added as a beneficiary after that date as long as the addition is made prior to the settlor's death. Animals in gestation but not yet born at the time of the trust's creation may also be covered by its terms. A trust authorized by this section may be created to benefit one designated animal or several designated animals.

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

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

Subsection (c) addresses the problem of excess funds. If the court determines that the trust property exceeds the amount needed for the intended purpose and that the terms of the trust do not direct the disposition, a resulting trust is ordinarily created in the settlor or settlor's successors in interest. *See* Restatement (Third) of Trusts § 47 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 124 (1959). Successors in interest include the beneficiaries under the settlor's will, if the settlor has a will, or in the absence of an effective will provision, the settlor's heirs. The settlor may also anticipate the problem of excess funds by directing their disposition in the terms of the trust. The disposition of excess funds is within the settlor's control. *See* Section 105(a). While a trust for an animal is usually not created until the settlor's death, subsection (a) allows such a trust to be created during the settlor's lifetime. Accordingly, if the settlor is still living, subsection (c) provides for distribution of excess funds to the settlor, and not to the settlor's successors in interest.

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

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

Comment to Section 409
(Noncharitable Trust Without Ascertainable Beneficiary)

This section authorizes two types of trusts without ascertainable beneficiaries; trusts for general but noncharitable purposes, and trusts for a specific noncharitable purpose other than the care of an animal, on which see Section 408. Examples of trusts for general noncharitable purposes include a bequest of money to be distributed to such objects of benevolence as the trustee might select. Unless such attempted disposition was interpreted as charitable, at common law the disposition was honorary only and did not create a trust. Under this section, however, the disposition is enforceable as a trust for a period of up to 21 years, although that number is placed in brackets to indicate that States may wish to select a different time limit.

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

For the requirement that a trust, particularly the type of trust authorized by this section, must have a purpose that is not capricious, see Section 404 Comment. For examples of the types of trusts authorized by this section, see Restatement (Third) of Trusts § 47 (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts § 62 cmt. w and § 124 (1959). The case law on capricious purposes is collected in 2 Austin W. Scott & William F. Fratcher, The Law of Trusts § 124.7 (4th ed. 1987).

This section is similar to Section 408, although less detailed. Much of the Comment to Section 408 also applies to this section.

Comment to Section 410
(Modification or Termination of Trust; Proceedings for Approval or Disapproval)

Subsection (a) lists the grounds on which trusts typically terminate. For a similar formulation, see Restatement (Third) of Trusts § 61 (Tentative Draft No. 3, 2001). Terminations under subsection (a) may be in either in whole or in part. Other types of terminations, all of which require action by a court, trustee, or beneficiaries, are covered in Sections 411-414, which also address trust modification. Of these sections, all but Section 411 apply to charitable trusts and all but Section 413 apply to noncharitable trusts.

Withdrawal of the trust property is not an event terminating a trust. The trust remains in existence although the trustee has no duties to perform unless and until property is later contributed to the trust.

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

Comment to Section 411
(Modification or Termination of Noncharitable Irrevocable Trust By Consent)

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

Subsection (a) states the test for termination or modification by the beneficiaries with the concurrence of the settlor. Subsection (b) states the test for

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

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

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

The provisions of Article 3 on representation, virtual representation and the appointment and approval of representatives appointed by the court apply to the determination of whether all beneficiaries have signified consent under this section. The authority to consent on behalf of another person, however, does not include authority to consent over the other person's objection. *See* Section 301(b). Regarding the persons who may consent on behalf of a beneficiary, see Sections 302 through 305. A consent given by a representative is invalid to the extent there is a conflict of interest between the representative and the person represented. Given this limitation, virtual representation of a beneficiary's interest by another beneficiary pursuant to Section 304 will rarely be available in a trust termination case, although it should be routinely available in cases involving trust modification, such as a grant to the trustee of additional powers. If virtual or other form of representation is unavailable, Section 305 of the Code permits the court to appoint a representative who may give the necessary consent to the proposed modification or termination on behalf of the minor, incapacitated, unborn, or unascertained beneficiary. The ability to use virtual and other forms of representation to consent on a beneficiary's behalf to a trust termination or modification has not traditionally been part of the law, although there are some notable exceptions. *Compare* Restatement (Second) § 337(1) (1959) (beneficiary must not be under incapacity), *with Hatch v. Riggs National Bank*, 361 F.2d 559 (D.C. Cir. 1966) (guardian ad litem authorized to consent on beneficiary's behalf).

Subsection (a) also addresses the authority of an agent, conservator, or guardian to act on a settlor's behalf. Consistent with Section 602 on revocation or modification of a revocable trust, the section assumes that a settlor, in granting an

agent general authority, did not intend for the agent to have authority to consent to the termination or modification of a trust, authority that could be exercised to radically alter the settlor's estate plan. In order for an agent to validly consent to a termination or modification of the settlor's revocable trust, such authority must be expressly conveyed either in the power or in the terms of the trust.

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

Subsection (a) is similar to Restatement (Third) of Trusts § 65(2) (Tentative Draft No. 3, 2001), and Restatement (Second) of Trusts § 338(2) (1959), both of which permit termination upon joint action of the settlor and beneficiaries. Unlike termination by the beneficiaries alone under subsection (b), termination with the concurrence of the settlor does not require a finding that the trust no longer serves a material purpose. No finding of failure of material purpose is required because all parties with a possible interest in the trust's continuation, both the settlor and beneficiaries, agree there is no further need for the trust. Restatement Third goes further than subsection (b) of this section and Restatement Second, however, in also allowing the beneficiaries to compel termination of a trust that still serves a material purpose if the reasons for termination outweigh the continuing material purpose.

Subsection (b), similar to Restatement Third but not Restatement Second, allows modification by beneficiary action. The beneficiaries may modify any term of the trust if the modification is not inconsistent with a material purpose of the trust. Restatement Third, though, goes further than this Code in also allowing the beneficiaries to use trust modification as a basis for removing the trustee if removal would not be inconsistent with a material purpose of the trust. Under the Code, however, Section 706 is the exclusive provision on removal of trustees. Section 706(b)(4) recognizes that a request for removal upon unanimous agreement of the qualified beneficiaries is a factor for the court to consider, but before removing the trustee the court must also find that such action best serves the interests of all the beneficiaries, that removal is not inconsistent with a material purpose of the trust, and that a suitable cotrustee or successor trustee is

available. *Compare* Section 706(b)(4), *with* Restatement (Third) § 65 cmt. f (Tentative Draft No. 3, 2001).

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

> Material purposes are not readily to be inferred. A finding of such a purpose generally requires some showing of a particular concern or objective on the part of the settlor, such as concern with regard to the beneficiary's management skills, judgment, or level of maturity. Thus, a court may look for some circumstantial or other evidence indicating that the trust arrangement represented to the settlor more than a method of allocating the benefits of property among multiple beneficiaries, or a means of offering to the beneficiaries (but not imposing on them) a particular advantage. Sometimes, of course, the very nature or design of a trust suggests its protective nature or some other material purpose.

Restatement (Third) of Trusts § 65 cmt. d (Tentative Draft No. 3, 2001).

Subsection (c) of this section deals with the effect of a spendthrift provision on the right of a beneficiary to concur in a trust termination or modification. Spendthrift terms have sometimes been construed to constitute a material purpose without inquiry into the intention of the particular settlor. For examples, see Restatement (Second) of Trusts § 337 (1959); George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 1008 (Rev. 2d ed. 1983); and 4 Austin W. Scott & William F. Fratcher, The Law of Trusts § 337 (4th ed. 1989). This result is troublesome because spendthrift provisions are often added to instruments with little thought. Subsection (c), similar to Restatement (Third) of Trusts § 65 cmt. e (Tentative Draft No. 3, 2001), does not negate the possibility that continuation of a trust to assure spendthrift protection might have been a material purpose of the particular settlor. The question of whether that was the intent of a particular settlor is instead a matter of fact to be determined on the totality of the circumstances.

Subsection (d) recognizes that the beneficiaries' power to compel termination of the trust includes the right to direct how the trust property is to be distributed. While subsection (a) requires the settlor's consent to terminate an irrevocable trust, the settlor does not control the subsequent distribution of the

trust property. Once termination has been approved, how the trust property is to be distributed is solely for the beneficiaries to decide.

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

Comment to Section 412
(Modification or Termination Because of Unanticipated Circumstances or Inability to Administer Trust Effectively)

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

Subsection (b) broadens the court's ability to modify the administrative terms of a trust. The standard under subsection (b) is similar to the standard for applying cy pres to a charitable trust. *See* Section 413(a). Just as a charitable trust may be modified if its particular charitable purpose becomes impracticable or

wasteful, so can the administrative terms of any trust, charitable or noncharitable. Subsections (a) and (b) are not mutually exclusive. Many situations justifying modification of administrative terms under subsection (a) will also justify modification under subsection (b). Subsection (b) is also an application of the requirement in Section 404 that a trust and its terms must be for the benefit of its beneficiaries. *See also* Restatement (Third) of Trusts § 27(2) and cmt. b (Tentative Draft No. 2, approved 1999). Although the settlor is granted considerable latitude in defining the purposes of the trust, the principle that a trust have a purpose which is for the benefit of its beneficiaries precludes unreasonable restrictions on the use of trust property. An owner's freedom to be capricious about the use of the owner's own property ends when the property is impressed with a trust for the benefit of others. *See* Restatement (Second) of Trusts § 124 cmt. g (1959). Thus, attempts to impose unreasonable restrictions on the use of trust property will fail. *See* Restatement (Third) of Trusts § 27 Reporter's Notes to cmt. b (Tentative Draft No. 2, approved 1999). Subsection (b), unlike subsection (a), does not have a direct precedent in the common law, but various States have insisted on such a measure by statute. *See, e.g.*, Mo. Rev. Stat. §456.590.1.

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

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

Comment to Section 413
(Cy Pres)

Subsection (a) codifies the court's inherent authority to apply cy pres. The power may be applied to modify an administrative or dispositive term. The court may order the trust terminated and distributed to other charitable entities. Partial termination may also be ordered if the trust property is more than sufficient to satisfy the trust's current purposes. Subsection (a), which is similar to Restatement (Third) of Trusts § 67 (Tentative Draft No. 3, 2001), modifies the doctrine of cy pres by presuming that the settlor had a general charitable intent when a particular charitable purpose becomes impossible or impracticable to achieve. Traditional doctrine did not supply that presumption, leaving it to the courts to determine whether the settlor had a general charitable intent. If such an intent is found, the trust property is applied to other charitable purposes. If not, the charitable trust

fails. *See* Restatement (Second) of Trusts § 399 (1959). In the great majority of cases the settlor would prefer that the property be used for other charitable purposes. Courts are usually able to find a general charitable purpose to which to apply the property, no matter how vaguely such purpose may have been expressed by the settlor. Under subsection (a), if the particular purpose for which the trust was created becomes impracticable, unlawful, impossible to achieve, or wasteful, the trust does not fail. The court instead must either modify the terms of the trust or distribute the property of the trust in a manner consistent with the settlor's charitable purposes.

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

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

For the definition of charitable purpose, see Section 405(a). Pursuant to Sections 405(c) and 410(b), a petition requesting a court to enforce a charitable trust or to apply cy pres may be maintained by a settlor. Such actions can also be maintained by a cotrustee, the state attorney general, or by a person having a special interest in the charitable disposition. *See* Restatement (Second) of Trusts § 391 (1959).

Comment to Section 414
(Modification or Termination of Uneconomic Trust)

Subsection (a) assumes that a trust with a value of $50,000 or less is sufficiently likely to be inefficient to administer that a trustee should be able to terminate it without the expense of a judicial termination proceeding. The amount has been placed in brackets to signal to enacting jurisdictions that they may wish to designate a higher or lower figure. Because subsection (a) is a default rule, a settlor is free to set a higher or lower figure or to specify different procedures or to prohibit termination without a court order. *See* Section 105 and Article 4 General Comment.

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

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

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

Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the "trustee" could constitute a breach of trust. The drafters of the Uniform Trust Code concluded that easements for conservation or preservation are sufficiently different from the typical cash and securities found in small trusts that they should be excluded from this section, and subsection (d) so provides. Most creators of such easements, it was surmised, would prefer that the easement be continued

unchanged even if the easement, and hence the trust, has a relatively low market value. For the law of conservation easements, see Restatement (Third) of Property: Servitudes §1.6 (2000).

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

Because termination of a trust under this section is initiated by the trustee or ordered by the court, termination is not precluded by a spendthrift provision.

Comment to Section 415
(Reformation to Correct Mistakes)

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

This section applies whether the mistake is one of expression or one of inducement. A mistake of expression occurs when the terms of the trust misstate the settlor's intention, fail to include a term that was intended to be included, or include a term that was not intended to be excluded. A mistake in the inducement occurs when the terms of the trust accurately reflect what the settlor intended to be included or excluded but this intention was based on a mistake of fact or law. *See* Restatement (Third) of Property: Donative Transfers § 12.1 cmt. i (Tentative Draft No. 1, approved 1995). Mistakes of expression are frequently caused by scriveners' errors while mistakes of inducement often trace to errors of the settlor.

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

In determining the settlor's original intent, the court may consider evidence relevant to the settlor's intention even though it contradicts an apparent plain meaning of the text. The objective of the plain meaning rule, to protect against fraudulent testimony, is satisfied by the requirement of clear and

convincing proof. *See* Restatement (Third) of Property: Donative Transfers § 12.1 cmt. d and Reporter's Notes (Tentative Draft No. 1, approved 1995). *See also* John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. Pa. L. Rev. 521 (1982).

For further discussion of the rule of this section and its application to illustrative cases, see Restatement (Third) of Property: Donative Transfers § 12.1 cmts. and Reporter's Notes (Tentative Draft No. 1, approved 1995).

Comment to Section 416
(Modification To Achieve Settlor's Tax Objectives)

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

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

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

Comment to Section 417
(Combination and Division of Trusts)

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

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

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

This section authorizes a trustee to divide a trust even if the trusts that result are dissimilar. Conflicts among beneficiaries, including differing investment objectives, often invite such a division, although as in the case with a proposed combination of trusts, the more the terms of the divided trusts diverge

from the original plan, the less likely it is that the settlor's purposes would be achieved and that the division could be approved.

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

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

Numerous States have enacted statutes authorizing division of trusts, either by trustee action or upon court order. For a list of these statutes, see Restatement (Third) Property: Donative Transfers § 12.2 Statutory Note (Tentative Draft No. 1, approved 1995). Combination or division has also been authorized by the courts in the absence of authorizing statute. *See, e.g.*, *In re Will of Marcus*, 552 N.Y.S. 2d 546 (Surr. Ct.1990) (combination); *In re Heller Inter Vivos Trust*, 613 N.Y.S. 2d 809 (Surr. Ct. 1994) (division); and *BankBoston v. Marlow*, 701 N.E. 2d 304 (Mass. 1998) (division).

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

Article 5
Creditor's Claims; Spendthrift and Discretionary Trusts

General Comment

This article addresses the validity of a spendthrift provision and the rights of creditors, both of the settlor and beneficiaries, to reach a trust to collect a debt. Sections 501 and 502 state the general rules. To the extent that a trust is protected by a spendthrift provision, a beneficiary's creditor may not reach the beneficiary's interest until distribution is made by the trustee. To the extent not protected by a spendthrift provision, however, the creditor can reach the beneficiary's interest subject to the court's power to limit the relief. Section 503 lists the categories of

creditors whose claims are not subject to a spendthrift restriction. Sections 504 through 507 address special categories in which the rights of a beneficiary's creditors are the same whether or not the trust contains a spendthrift provision. Section 504 deals with discretionary trusts and trusts for which distributions are subject to a standard. Section 505 covers creditor claims against a settlor, whether the trust is revocable or irrevocable, and if revocable, whether the claim is made during the settlor's lifetime or incident to the settlor's death. Section 506 provides a creditor with a remedy if a trustee fails to make a mandated distribution within a reasonable time. Section 507 clarifies that although the trustee holds legal title to trust property, that property is not subject to the trustee's personal debts.

The provisions of this article relating to the validity and effect of a spendthrift provision and the rights of certain creditors and assignees to reach the trust may not be modified by the terms of the trust. *See* Section 105(b)(5).

This article does not supersede state exemption statutes nor an enacting jurisdiction's Uniform Fraudulent Transfers Act which, when applicable, invalidates any type of gratuitous transfer, including transfers into trust.

Comment to Section 501
(Rights of Beneficiary's Creditor or Assignee)

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

A creditor typically will pursue a claim by serving an order on the trustee attaching the beneficiary's interest. Assuming that the validity of the order cannot be contested, the trustee will then pay to the creditor instead of to the beneficiary any payments the trustee would otherwise be required to make to the beneficiary, as well as discretionary distributions the trustee decides to make. The creditor may also, in theory, force a judicial sale of a beneficiary's interest.

Because proceedings to satisfy a claim are equitable in nature, the second sentence of this section ratifies the court's discretion to limit the award as

appropriate under the circumstances. In exercising its discretion to limit relief, the court may appropriately consider the support needs of a beneficiary and the beneficiary's family. *See* Restatement (Third) of Trusts § 56 cmt. e (Tentative Draft No. 2, approved 1999).

Comment to Section 502
(Spendthrift Provision)

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

For a spendthrift provision to be effective under this Code, it must prohibit both the voluntary and involuntary transfer of the beneficiary's interest, that is, a settlor may not allow a beneficiary to assign while prohibiting a beneficiary's creditor from collecting, and vice versa. *See* Restatement (Third) of Trusts § 58 cmt. b (Tentative Draft No. 2, approved 1999). *See also* Restatement (Second) of Trusts § 152(2) (1959). A spendthrift provision valid under this Code will also be recognized as valid in a federal bankruptcy proceeding. *See* 11 U.S.C. § 541(c)(2).

Subsection (b), which is derived from Texas Property Code § 112.035(b), allows a settlor to provide maximum spendthrift protection simply by stating in the instrument that all interests are held subject to a "spendthrift trust" or words of similar effect.

A disclaimer, because it is a refusal to accept ownership of an interest and not a transfer of an interest already owned, is not affected by the presence or absence of a spendthrift provision. Most disclaimer statutes expressly provide that the validity of a disclaimer is not affected by a spendthrift protection. *See, e.g.*, Uniform Probate Code § 2-801(a). Releases and exercises of powers of appointment are also not affected because they are not transfers of property. *See* Restatement (Third) of Trusts § 58 cmt. c (Tentative Draft No. 2, approved 1999).

A spendthrift provision is ineffective against a beneficial interest retained by the settlor. *See* Restatement (Third) of Trusts §58(2), approved 1999. This is a necessary corollary to Section 505(a)(2), which allows a creditor or assignee of the settlor to reach the maximum amount that can be distributed to or for the

settlor's benefit. This right to reach the trust applies whether or not the trust contains a spendthrift provision.

A valid spendthrift provision makes it impossible for a beneficiary to make a legally binding transfer, but the trustee may choose to honor the beneficiary's purported assignment. The trustee may recommence distributions to the beneficiary at anytime. The beneficiary, not having made a binding transfer, can withdraw the beneficiary's direction but only as to future payments. *See* Restatement (Third) of Trusts § 58 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 152 cmt. i (1959).

Comment to Section 503
(Exceptions to Spendthrift Provision)

This section exempts the claims of certain categories of creditors from the effects of a spendthrift restriction.

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

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

The definition of "child" in subsection (a) accommodates the differing approaches States take to defining the class of individuals eligible for child support, including such issues as whether support can be awarded to stepchildren. However the State making the award chooses to define "child" will be recognized under this Code, whether the order sought to be enforced was entered in the same or different State.

The exception in subsection (b) for a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust is in accord with Restatement (Third) of Trusts § 59(b) (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts § 157(c) (1959). This exception allows a beneficiary of modest means to overcome an obstacle preventing the beneficiary's obtaining services essential to the protection or enforcement of the beneficiary's rights under the trust. *See* Restatement (Third) of Trusts § 59 cmt. d (Tentative Draft No. 2, approved 1999).

Subsection (c), which is similar to Restatement (Third) of Trusts § 59 cmt. a (Tentative Draft No. 2, approved 1999), exempts certain governmental claims from a spendthrift restriction. Federal preemption guarantees that certain federal claims, such as claims by the Internal Revenue Service, may bypass a spendthrift provision no matter what this Code might say. The case law and relevant Internal Revenue Code provisions on the exception for federal tax claims are collected in George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 224 (Rev. 2d ed. 1992); and 2A Austin W. Scott & William F. Fratcher, The Law of Trusts § 157.4 (4th ed. 1987). Regarding claims by state governments, this subsection recognizes that States take a variety of approaches with respect to collection, depending on whether the claim is for unpaid taxes, for care provided at an institution, or for other charges. Acknowledging this diversity, subsection (c) does not prescribe a rule, but refers to other statutes of the State on whether particular claims are subject to or exempted from spendthrift provisions.

Unlike Restatement (Third) of Trusts § 59(2) (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts § 157(b) (1959), this Code does not create an exception to the spendthrift restriction for creditors who have furnished necessary services or supplies to the beneficiary. Most of these cases involve claims by governmental entities, which the drafters concluded are better handled by the enactment of special legislation as authorized by subsection (c). The drafters also declined to create an exception for tort claimants. For a discussion of the exception for tort claims, which has not generally been recognized, see Restatement (Third) of Trusts § 59 Reporter's Notes to cmt. a (Tentative Draft No. 2, approved 1999). For a discussion of other exceptions to a spendthrift restriction, recognized in some States, see George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 224 (Rev. 2d ed. 1992); and 2A Austin W. Scott & William F. Fratcher, The Law of Trusts §§ 157-157.5 (4th ed. 1987).

Comment to Section 504
(Discretionary Trusts; Effect of Standard)

This section addresses the ability of a beneficiary's creditor to reach the beneficiary's discretionary trust interest, whether or not the exercise of the trustee's discretion is subject to a standard. This section, similar to the Restatement, eliminates the distinction between discretionary and support trusts, unifying the rules for all trusts fitting within either of the former categories. *See* Restatement (Third) of Trusts § 60 Reporter's Notes to cmt. a (Tentative Draft No. 2, approved 1999).

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

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

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

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

Comment to Section 505
(Creditor's Claim Against Settlor)

Subsection (a)(1) states what is now a well accepted conclusion, that a revocable trust is subject to the claims of the settlor's creditors while the settlor is living. *See* Restatement (Third) of Trusts § 25 cmt. e (Tentative Draft No. 1, approved 1996). Such claims were not allowed at common law, however. *See* Restatement (Second) of Trusts § 330 cmt. o (1959). Because a settlor usually also retains a beneficial interest that a creditor may reach under subsection (a)(2), the common law rule, were it retained in this Code, would be of little significance. *See* Restatement (Second) of Trusts § 156(2) (1959).

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

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

Subsection (a)(3) recognizes that a revocable trust is usually employed as a will substitute. As such, the trust assets, following the death of the settlor, should be subject to the settlor's debts and other charges. However, in accordance with traditional doctrine, the assets of the settlor's probate estate must normally first be exhausted before the assets of the revocable trust can be reached. This section does not attempt to address the procedural issues raised by the need first to exhaust the decedent's probate estate before reaching the assets of the revocable trust. Nor does this section address the priority of creditor claims or liability of the

decedent's other nonprobate assets for the decedent's debts and other charges. Subsection (a)(3), however, does ratify the typical pourover will, revocable trust plan. As long as the rights of the creditor or family member claiming a statutory allowance are not impaired, the settlor is free to shift liability from the probate estate to the revocable trust. Regarding other issues associated with potential liability of nonprobate assets for unpaid claims, see Section 6-102 of the Uniform Probate Code, which was added to that Code in 1998.

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

Upon the lapse, release, or waiver of a power of withdrawal, the property formerly subject to the power will normally be subject to the claims of the power holder's creditors and assignees the same as if the power holder were the settlor of a now irrevocable trust. Pursuant to subsection (a)(2), a creditor or assignee of the power holder generally may reach the power holder's entire beneficial interest in the trust, whether or not distribution is subject to the trustee's discretion. However, following the lead of Arizona Revised Statutes § 14-7705(g) and Texas Property Code § 112.035(e), subsection (b)(2) creates an exception for trust property which was subject to a Crummey or five and five power. Upon the lapse, release, or waiver of a power of withdrawal, the holder is treated as the settlor of the trust only to the extent the value of the property subject to the power at the time of the lapse, release, or waiver exceeded the greater of the amounts specified in IRC §§ 2041(b)(2) or 2514(e) [greater of 5% or $5,000], or IRC § 2503(b) [$10,000 in 2001].

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

Comment to Section 506
(Overdue Distribution)

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

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

2001 Amendment. By amendment in 2001, "designated distribution date" was substituted for "required distribution date." The amendment conforms the language of this section to terminology used elsewhere in the Code.

Comment to Section 507
(Personal Obligations of Trustee)

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

The exemption of the trust property from the personal obligations of the trustee is the most significant feature of Anglo-American trust law by comparison with the devices available in civil law countries. A principal objective of the

Hague Convention on the Law Applicable to Trusts and on their Recognition is to protect the Anglo-American trust with respect to transactions in civil law countries. *See* Hague Convention art. 11. *See also* Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. Rev. 434 (1998); John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J. 165, 179-80 (1997).

Article 6
Revocable Trusts

General Comment

This article deals with issues of significance not totally settled under prior law. Because of the widespread use in recent years of the revocable trust as an alternative to a will, this short article is one of the more important articles of the Code. This article and the other articles of the Code treat the revocable trust as the functional equivalent of a will. Section 601 provides that the capacity standard for wills applies in determining whether the settlor had capacity to create a revocable trust. Section 602, after providing that a trust is presumed revocable unless stated otherwise, prescribes the procedure for revocation or amendment, whether the trust contains one or several settlors. Section 603 provides that while a trust is revocable and the settlor has capacity, the rights of the beneficiaries are subject to the settlor's control. Section 604 prescribes a statute of limitations on contest of revocable trusts.

Sections 601 and 604, because they address requirements relating to creation and contest of trusts, are not subject to alteration or restriction in the terms of the trust. *See* Section 105. Sections 602 and 603, by contrast, are not so limited and are fully subject to the settlor's control.

Comment to Section 601
(Capacity of Settlor of Revocable Trust)

This section is patterned after Restatement (Third) of Trusts § 11(1) (Tentative Draft No. 1, approved 1996). The revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property upon the settlor's death. To solidify the use of the revocable trust as a device for transferring property at death, the settlor usually also executes a pourover will. The use of a pourover will assures that property not transferred to the trust during life will be combined with the property the settlor did manage to convey. Given this primary use of the revocable trust as a device for disposing of property at death, the capacity standard for wills rather than that

for lifetime gifts should apply. The application of the capacity standard for wills does not mean that the revocable trust must be executed with the formalities of a will. There are no execution requirements under this Code for a trust not created by will, and a trust not containing real property may be created by an oral statement. *See* Section 407 and Comment.

The Uniform Trust Code does not explicitly spell out the standard of capacity necessary to create other types of trusts, although Section 402 does require that the settlor have capacity. This section includes a capacity standard for creation of a revocable trust because of the uncertainty in the case law and the importance of the issue in modern estate planning. No such uncertainty exists with respect to the capacity standard for other types of trusts. To create a testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have the capacity that would be needed to transfer the property free of trust. *See generally* Restatement (Third) of Trusts § 11 (Tentative Draft No. 1, approved 1996); Restatement (Third) of Property: Wills and Other Donative Transfers § 8.1 (Tentative Draft No. 3, 2001).

Comment to Section 602
(Revocation or Amendment of Revocable Trust)

Subsection (a), which provides that a settlor may revoke or modify a trust unless the terms of the trust expressly state that the trust is irrevocable, changes the common law. Most States follow the rule that a trust is presumed irrevocable absent evidence of contrary intent. *See* Restatement (Second) of Trusts § 330 (1959). California , Iowa, Montana, Oklahoma, and Texas presume that a trust is revocable. The Uniform Trust Code endorses this minority approach, but only for trusts created after its effective date. This Code presumes revocability when the instrument is silent because the instrument was likely drafted by a nonprofessional, who intended the trust as a will substitute. The most recent revision of the Restatement of Trusts similarly reverses the former approach. A trust is presumed revocable if the settlor has retained a beneficial interest. *See* Restatement (Third) of Trusts § 63 cmt. c (Tentative Draft No. 3, 2001). Because professional drafters habitually spell out whether or not a trust is revocable, subsection (a) will have limited application.

A power of revocation includes the power to amend. An unrestricted power to amend may also include the power to revoke a trust. *See* Restatement (Third) of Trusts § 63 cmt. g (Tentative Draft No. 3, 2001); Restatement (Second) of Trusts § 331 cmt. g and h (1959).

Subsection (b), which is similar to Restatement (Third) of Trusts § 63 cmt. k (Tentative Draft No. 3, 2001), provides default rules for revocation or amendment of a trust having several settlors. The settlor's authority to revoke or

modify the trust depends on whether the trust contains community property. To the extent the trust contains community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses. The purpose of this provision, and the reason for the use of joint trusts in community property States, is to preserve the community character of property transferred to the trust. While community property does not prevail in a majority of States, contributions of community property to trusts created in noncommunity property States does occur. This is due to the mobility of settlors, and the fact that community property retains its community character when a couple move from a community to a noncommunity State. For this reason, subsection (b), and its provision on contributions of community property, should be enacted in all States, whether community or noncommunity.

With respect to separate property contributed to the trust, or all property of the trust if none of the trust property consists of community property, subsection (b) provides that each settlor may revoke or amend the trust as to the portion of the trust contributed by that settlor. The inclusion of a rule for contributions of separate property does not mean that the drafters of this Code concluded that the use of joint trusts should be encouraged. The rule is included because of the widespread use of joint trusts in noncommunity property States in recent years. Due to the desire to preserve the community character of trust property, joint trusts are a necessity in community property States. Unless community property will be contributed to the trust, no similarly important reason exists for the creation of a joint trust in a noncommunity property State. Joint trusts are often poorly drafted, confusing the dispositive provisions of the respective settlors. Their use can also lead to unintended tax consequences. *See* Melinda S. Merk, *Joint Revocable Trusts for Married Couples Domiciled in Common-Law Property States*, 32 Real Prop. Prob. & Tr. J. 345 (1997).

Subsection (b) does not address the many technical issues that can arise in determining the settlors' proportionate contribution to a joint trust. Most problematic are contributions of jointly-owned property. In the case of joint tenancies in real estate, each spouse would presumably be treated as having made an equal contribution because of the right to sever the interest and convert it into a tenancy in common. This is in contrast to joint accounts in financial institutions, ownership of which in most States is based not on fractional interest but on actual dollar contribution. *See*, *e.g.*, Uniform Probate Code § 6-211. Most difficult may be determining a contribution rule for entireties property. In *Holdener v. Fieser*, 971 S.W. 2d 946 (Mo. Ct. App. 1998), the court held that a surviving spouse could revoke the trust with respect to the entire interest but did not express a view as to revocation rights while both spouses were living

This section does not explicitly require that the other settlor or settlors be notified if a joint trust is revoked by less than all of the settlors, but such notice

would be required pursuant to Section 603. While a trust is revocable and the settlor has capacity, Section 603(a) provides that the duties of the trustee, including the duty to keep the beneficiaries informed of administrative developments, are owed exclusively to the settlor. With respect to trusts having several settlors, Section 603(c) clarifies that the trustee's duties, including the duty to keep the beneficiaries informed of developments, are owed to *all* settlors having capacity. Notifying the other settlor or settlors of the revocation or amendment will place them in a better position to protect their interests. If the revocation or amendment by less than all of the settlors breaches an implied agreement not to revoke or amend the trust, those harmed by the action can sue for breach of contract. If the trustee fails to notify the other settlor or settlors of the revocation or amendment, the parties aggrieved by the trustee's failure can sue the trustee for breach of trust.

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

This Code tries to effectuate the settlor's intent to the maximum extent possible while at the same time protecting a trustee against inadvertent liability. While notice to the trustee of a revocation is good practice, this section does not make the giving of such notice a prerequisite to a trust's revocation. To protect a trustee who has not been notified of a revocation or amendment, subsection (g) provides that a trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust, as unamended, was still in effect. However, to honor the settlor's intent, subsection (c) generally honors a settlor's clear expression of intent even if inconsistent with stated formalities in the terms of the trust.

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

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

Revocation or amendment by will is mentioned in subsection (c) not to encourage the practice but to make clear that it is not precluded by omission. *See* Restatement (Third) of Property: Will and Other Donative Transfers § 7.2 cmt. e (Tentative Draft No. 3, 2001), which validates revocation or amendment of will substitutes by later will. Situations do arise, particularly in death-bed cases, where revocation by will may be the only practicable method. In such cases, a will, a solemn document executed with a high level of formality, may be the most reliable method for expressing intent. A revocation in a will ordinarily becomes effective only upon probate of the will following the testator's death. For the cases, see Restatement (Third) of Trusts § 63 Reporter's Notes to cmt. h-i (Tentative Draft No. 3, 2001).

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

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

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

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

Subsection (f) addresses the authority of a conservator or guardian to revoke or amend a revocable trust. Under the Uniform Trust Code, a "conservator" is appointed by the court to manage the ward's party, a "guardian" to make decisions with respect to the ward's personal affairs. *See* Section 103. Consequently, subsection (f) authorizes a guardian to exercise a settlor's power to revoke or amend a trust only if a conservator has not been appointed.

Many state conservatorship statutes authorize a conservator to exercise the settlor's power of revocation with the prior approval of the court supervising the conservatorship. *See, e.g.*, Uniform Probate Code § 411(a)(4). Subsection (f) ratifies this practice. Under the Code, a conservator may exercise a settlor's power of revocation, amendment, or right to withdraw trust property upon approval of the court supervising the conservatorship. Because a settlor often creates a revocable trust for the very purpose of avoiding conservatorship, this power should be exercised by the court reluctantly. Settlors concerned about revocation by a conservator may wish to deny a conservator a power to revoke. However, while such a provision in the terms of the trust is entitled to considerable weight, the court may override the restriction if it concludes that the action is necessary in the interests of justice. *See* Section 105(b)(13).

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

If a conservator has not been appointed, subsection (f) authorizes a guardian to exercise a settlor's power to revoke or amend the trust upon approval of the court supervising the guardianship. The court supervising the guardianship will need to determine whether it can grant a guardian authority to revoke a revocable trust under local law or whether it will be necessary to appoint a conservator for that purpose.

2001 Amendment. By amendment in 2001, revocation by "executing a later will or codicil" in subsection (c)(2)(A) was changed to revocation by a "later will or codicil" to avoid an implication that the trust is revoked immediately upon execution of the will or codicil and not at the testator's death.

Comment to Section 603
(Settlor's Powers; Powers of Withdrawal)

This section has the effect of postponing the enjoyment of the rights of the beneficiaries of a revocable trust until the death or incapacity of the settlor or other person holding the power to revoke the trust. This section thus recognizes that the settlor of a revocable trust is in control of the trust and should have the right to enforce the trust.

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

If the settlor loses capacity, subsection (b) clarifies that the rights of the beneficiaries are no longer subject to the settlor's control. The beneficiaries are entitled to request information concerning the trust and the trustee must provide the beneficiaries with annual trustee reports and whatever other information may be required under Section 813. However, because this section may be freely overridden in the terms of the trust, a settlor is free to deny the beneficiaries these rights, even to the point of directing the trustee not to inform them of the existence of the trust. Also, should an incapacitated settlor later regain capacity, the beneficiaries' rights will again be subject to the settlor's control. The cessation of the settlor's control upon the settlor's incapacity or death does not mean that the beneficiaries may reopen transactions the settlor approved while having capacity.

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

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

2001 Amendment. By a 2001 amendment, former subsection (b) was deleted. Former subsection (b) provided: "While a trust is revocable and the settlor does not have capacity to revoke the trust, rights of the beneficiaries are held by the beneficiaries." No substantive change was intended by this amendment. Former subsection (b) was superfluous. Rights of the beneficiaries are always held by the beneficiaries unless taken away by some other provision. Subsection (a) grants these rights to the settlor of a revocable trust while the settlor has capacity. Upon a settlor's loss of capacity, these rights are held by the beneficiaries with or without former subsection (b).

Comment to Section 604
(Limitation on Action Contesting Validity of Revocable Trust; Distribution of Trust Property)

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

A trust can be contested on a variety of grounds. For example, the contestant may allege that no trust was created due to lack of intent to create a trust or lack of capacity (see Section 402), that undue influence, duress, or fraud was involved in the trust's creation (see Section 406), or that the trust had been revoked or modified (see Section 602). A "contest" is an action to invalidate all or part of the terms of the trust or of property transfers to the trustee. An action against a beneficiary or other person for intentional interference with an inheritance or gift, not being a contest, is not subject to this section. For the law on intentional interference, see Restatement (Second) of Torts § 774B (1979). Nor does this section preclude an action to determine the validity of a trust that is brought during the settlor's lifetime, such as a petition for a declaratory judgment, if such action is authorized by other law. See Section 106 (Uniform Trust Code supplemented by common law of trusts and principles of equity).

This section applies only to a revocable trust that becomes irrevocable by reason of the settlor's death. A trust that became irrevocable by reason of the settlor's lifetime release of the power to revoke is outside its scope. A revocable trust does not become irrevocable upon a settlor's loss of capacity. Pursuant to Section 602, the power to revoke may be exercised by the settlor's agent,

conservator, or guardian, or personally by the settlor if the settlor regains capacity.

Subsection (a) specifies a time limit on when a contest can be brought. A contest is barred upon the first to occur of two possible events. The maximum possible time for bringing a contest is three years from the settlor's death. This should provide potential contestants with ample time in which to determine whether they have an interest that will be affected by the trust, even if formal notice of the trust is lacking. The three-year period is derived from Section 3-108 of the Uniform Probate Code. Three years is the maximum limit under the UPC for contesting a nonprobated will. Enacting jurisdictions prescribing shorter or longer time limits for contest of a nonprobated will should substitute their own time limit. To facilitate this process, the "three-year" period has been placed in brackets.

A trustee who wishes to shorten the contest period may do so by giving notice. Drawing from California Probate Code § 16061.7, subsection (a)(2) bars a contest by a potential contestant 120 days after the date the trustee sent that person a copy of the trust instrument and informed the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a contest. The reference to "120" days is placed in brackets to suggest to the enacting jurisdiction that it substitute its statutory time period for contesting a will following notice of probate. The 120 day period in subsection (a)(2) is subordinate to the three-year bar in subsection (a)(1). A contest is automatically barred three years after the settlor's death even if notice is sent by the trustee less than 120 days prior to the end of that period.

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

Even though a distribution in compliance with subsection (b) discharges the trustee from potential liability, subsection (c) makes the beneficiaries of what later turns out to have been an invalid trust liable to return any distribution received. Issues as to whether the distribution must be returned with interest, or

with income earned or profit made are not addressed in this section but are left to the law of restitution.

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

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

Article 7
Office Of Trustee

General Comment

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

Except for the court's authority to order bond, all of the provisions of this article are subject to modification in the terms of the trust. *See* Section 105.

Comment to Section 701
(Accepting or Declining Trusteeship)

This section, which specifies the requirements for a valid acceptance of the trusteeship, implicates many of the same issues that arise in determining whether a trust has been revoked. Consequently, the two provisions track each other closely. *Compare* Section 701(a), *with* Section 602(c) (procedure for revoking or modifying trust). Procedures specified in the terms of the trust are

recognized, but only substantial, not literal compliance is required. A failure to meet technical requirements, such as notarization of the trustee's signature, does not result in a failure to accept. Ordinarily, the trustee will indicate acceptance by signing the trust instrument or signing a separate written instrument. However, this section validates any other method demonstrating the necessary intent, such as by knowingly exercising trustee powers, unless the terms of the trust make the specified method exclusive. This section also does not preclude an acceptance by estoppel. For general background on issues relating to trustee acceptance and rejection, see Restatement (Third) of Trusts § 35 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 102 (1959). Consistent with Section 201(b), which emphasizes that continuing judicial supervision of a trust is the rare exception, not the rule, the Uniform Trust Code does not require that a trustee qualify in court.

To avoid the inaction that can result if the person designated as trustee fails to communicate a decision either to accept or to reject the trusteeship, subsection (b) provides that a failure to accept within a reasonable time constitutes a rejection of the trusteeship. What will constitute a reasonable time depends on the facts and circumstances of the particular case. A major consideration is possible harm that might occur if a vacancy in a trusteeship is not filled in a timely manner. A trustee's rejection normally precludes a later acceptance but does not cause the trust to fail. *See* Restatement (Third) of Trusts § 35 cmt. c (Tentative Draft No. 2, approved 1999). Regarding the filling of a vacancy in the event of a rejection, see Section 704.

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

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

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

Comment to Section 702
(Trustee's Bond)

This provision is consistent with the Restatement Third and with the bonding provisions of the Uniform Probate Code. *See* Restatement (Third) of Trusts § 34(3) and cmt. a (Tentative Draft No. 2, approved 1999); Uniform Probate Code §§ 3-604 (personal representatives), 5-415 (conservators), and 7-304 (trustees). Because a bond is required only if the terms of the trust require bond or a bond is found by the court to be necessary to protect the interests of beneficiaries, bond should rarely be required under this Code.

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

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

Subsection (c) clarifies that a regulated financial-service institution need not provide bond for individual trusts. Such institutions must meet detailed financial responsibility requirements in order to do trust business in the State, thereby obviating the need to post bonds in individual trusts. Subsection (c) is placed in brackets because the enacting jurisdiction may have already dealt with the subject in separate legislation, such as in its statutes on regulation of financial institutions. Instead of the phrase "regulated financial-service institution," enacting jurisdictions may wish to substitute their own term for institutions qualified to engage in trust business in the State.

Comment to Section 703
(Cotrustees)

This section contains most but not all of the Code's provisions on cotrustees. Other provisions relevant to cotrustees include Sections 704 (vacancy in trusteeship need not be filled if cotrustee remains in office), 705 (notice of resignation must be given to cotrustee), 706 (lack of cooperation among cotrustees as ground for removal), 707 (obligations of resigning or removed trustee), 813 (reporting requirements upon vacancy in trusteeship), and 1013 (authority of cotrustees to authenticate documents.

Cotrustees are appointed for a variety of reasons. Having multiple decision-makers serves as a safeguard against eccentricity or misconduct. Cotrustees are often appointed to gain the advantage of differing skills, perhaps a financial institution for its permanence and professional skills, and a family member to maintain a personal connection with the beneficiaries. On other occasions, cotrustees are appointed to make certain that all family lines are represented in the trust's management.

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

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

Subsection (a) is in accord with Restatement (Third) of Trusts § 39 (Tentative Draft No. 2, approved 1999), which rejects the common law rule, followed in earlier Restatements, requiring unanimity among the trustees of a private trust. *See* Restatement (Second) of Trusts § 194 (1959). This section is consistent with the prior Restatement rule applicable to charitable trusts, which allowed for action by a majority of trustees. *See* Restatement (Second) of Trusts § 383 (1959).

Under subsection (b), a majority of the remaining trustees may act for the trust when a vacancy occurs in a cotrusteeship. Section 704 provides that a

vacancy in a cotrusteeship need be filled only if there is no trustee remaining in office.

Pursuant to subsection (c), a cotrustee must participate in the performance of a trustee function unless the cotrustee has properly delegated performance to another cotrustee, or the cotrustee is unable to participate due to temporary incapacity or disqualification under other law. Other laws under which a cotrustee might be disqualified include federal securities law and the ERISA prohibited transactions rules. Subsection (d) authorizes a cotrustee to assume some or all of the functions of another trustee who is unavailable to perform duties as provided in subsection (c).

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

By permitting the trustees to act by a majority, this section contemplates that there may be a trustee or trustees who might dissent. Trustees who dissent from the acts of a cotrustee are in general protected from liability. Subsection (f) protects trustees who refused to join in the action. Subsection (h) protects a dissenting trustee who joined the action at the direction of the majority, such as to satisfy a demand of the other side to a transaction, if the trustee expressed the dissent to a cotrustee at or before the time of the action in question. However, the protections provided by subsections (f) and (h) no longer apply if the action constitutes a serious breach of trust. In that event, subsection (g) may impose liability against a dissenting trustee for failing to take reasonable steps to rectify the improper conduct. The responsibility to take action against a breaching cotrustee codifies the substance of Sections 184 and 224 of the Restatement (Second) of Trusts (1959).

Comment to Section 704
(Vacancy in Trusteeship; Appointment of Successor)

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

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

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

Absent an effective provision in the terms of the trust, subsection (c)(2) permits a vacancy in the trusteeship to be filled, without the need for court approval, by a person selected by unanimous agreement of the qualified beneficiaries. Pursuant to Section 705(a)(1), the qualified beneficiaries may also receive the trustee's resignation. If a trustee resigns following notice to the qualified beneficiaries as provided in Section 705, the trust may be transferred to a successor appointed pursuant to subsection (c)(2) of this section, all without court involvement. A nonqualified beneficiary who is displeased with the choice of the qualified beneficiaries may petition the court for removal of the trustee under Section 706.

If the qualified beneficiaries fail to make an appointment, subsection (c)(3) authorizes the court to fill the vacancy. In making the appointment, the court should consider the objectives and probable intention of the settlor, the promotion of the proper administration of the trust, and the interests and wishes of the beneficiaries. *See* Restatement (Third) of Trusts § 34 cmt. f (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 108 cmt. d (1959).

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

2001 Amendment. Subsection (d), which creates a procedure for the filling of a vacancy in the trusteeship of a charitable trust, was added by a 2001 amendment.

Comment to Section 705
(Resignation of Trustee)

This section rejects the common law rule that a trustee may resign only with permission of the court, and goes further than the Restatements, which allow a trustee to resign with the consent of the beneficiaries. *See* Restatement (Third) of Trusts § 36 (Tentative Draft No.2, approved 1999); Restatement (Second) of Trusts § 106 (1959). Concluding that the default rule ought to approximate standard drafting practice, the Drafting Committee provided in subsection (a) that a trustee may resign by giving notice to the qualified beneficiaries and any cotrustee. A resigning trustee may also follow the traditional method and resign with approval of the court.

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

Regarding the residual responsibilities of a resigning trustee until the trust property is delivered to a successor trustee, see Section 707.

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

2001 Amendment. By a 2001 amendment, subsection (a)(1) was amended to require that notice of a trustee's resignation be given to a living settlor. Previously, notice to a living settlor was required for a revocable but not irrevocable trust. Notice to the settlor of a revocable trust was required because the rights of the qualified beneficiaries, including the right to receive a trustee's resignation, are subject to the settlor's exclusive control. *See* Section 603.

Comment to Section 706
(Removal of Trustee)

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

Trustee removal may be regulated by the terms of the trust. *See* Section 105. In fashioning a removal provision for an irrevocable trust, the drafter should be cognizant of the danger that the trust may be included in the settlor's federal gross estate if the settlor retains the power to be appointed as trustee or to appoint someone who is not independent. *See* Rev. Rul. 95-58, 1995-2 C.B. 191.

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

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

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

Subsection (b)(2) deals only with lack of cooperation among cotrustees, not with friction between the trustee and beneficiaries. Friction between the trustee and beneficiaries is ordinarily not a basis for removal. However, removal might be justified if a communications breakdown is caused by the trustee or appears to be incurable. *See* Restatement (Third) of Trusts § 37 cmt. e (Tentative Draft No. 2, approved 1999).

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

It has traditionally been more difficult to remove a trustee named by the settlor than a trustee named by the court, particularly if the settlor at the time of the appointment was aware of the trustee's failings. *See* Restatement (Third) of Trusts § 37 cmt. f (Tentative Draft No.2, approved 1999); Restatement (Second) of Trusts § 107 cmt. f-g (1959). Because of the discretion normally granted to a trustee, the settlor's confidence in the judgment of the particular person whom the settlor selected to act as trustee is entitled to considerable weight. This deference to the settlor's choice can weaken or dissolve if a substantial change in the trustee's circumstances occurs. To honor a settlor's reasonable expectations, subsection (b)(4) lists a substantial change of circumstances as a possible basis for removal of the trustee. Changed circumstances justifying removal of a trustee might include a substantial change in the character of the service or location of the trustee. A corporate reorganization of an institutional trustee is not itself a change

of circumstances if it does not affect the service provided the individual trust account. Before removing a trustee on account of changed circumstances, the court must also conclude that removal is not inconsistent with a material purpose of the trust, that it will best serve the interests of the beneficiaries, and that a suitable cotrustee or successor trustee is available.

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

Subsection (c) authorizes the court to intervene pending a final decision on a request to remove a trustee. Among the relief that the court may order under Section 1001(b) is an injunction prohibiting the trustee from performing certain acts and the appointment of a special fiduciary to perform some or all of the trustee's functions. Pursuant to Section 1004, the court may also award attorney's fees as justice and equity may require.

Comment to Section 707
(Delivery of Property by Former Trustee)

This section addresses the continuing authority and duty of a resigning or removed trustee. Subject to the power of the court to make other arrangements or unless a cotrustee remains in office, a resigning or removed trustee has continuing authority until the trust property is delivered to a successor. If a cotrustee remains in office, there is no reason to grant a resigning or removed trustee any continuing authority, and none is granted under this section. In addition, if a cotrustee remains in office, the former trustee need not submit a final trustee's report. *See* Section 813(c).

There is ample authority in the Uniform Trust Code for the appointment of a special fiduciary, an appointment which can avoid the need for a resigning or removed trustee to exercise residual powers until a successor can take office. *See* Sections 704(d) (court may appoint additional trustee or special fiduciary whenever court considers appointment necessary for administration of trust), 705(b) (in approving resignation, court may impose conditions necessary for protection of trust property), 706(c) (pending decision on petition for removal, court may order appropriate relief), and 1001(b)(5) (to remedy breach of trust,

court may appoint special fiduciary as necessary to protect trust property or interests of beneficiary).

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

Comment to Section 708
(Compensation of Trustee)

Subsection (a) establishes a standard of reasonable compensation. Relevant factors in determining this compensation, as specified in the Restatement, include the custom of the community; the trustee's skill, experience, and facilities; the time devoted to trust duties; the amount and character of the trust property; the degree of difficulty, responsibility and risk assumed in administering the trust, including in making discretionary distributions; the nature and costs of services rendered by others; and the quality of the trustee's performance. *See* Restatement (Third) of Trusts § 38 cmt. c (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 242 cmt. b (1959).

In setting compensation, the services actually performed and responsibilities assumed by the trustee should be closely examined. A downward adjustment of fees may be appropriate if a trustee has delegated significant duties to agents, such as the delegation of investment authority to outside managers. *See* Section 807 (delegation by trustee). On the other hand, a trustee with special skills, such as those of a real estate agent, may be entitled to extra compensation for performing services that would ordinarily be delegated. *See* Restatement (Third) of Trusts § 38 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 242 cmt. d (1959).

Because "trustee" as defined in Section 103(19) includes not only an individual trustee but also cotrustees, each trustee, including a cotrustee, is entitled to reasonable compensation under the circumstances. The fact that a trust has more than one trustee does not mean that the trustees together are entitled to more compensation than had either acted alone. Nor does the appointment of more than one trustee mean that the trustees are eligible to receive the compensation in equal shares. The total amount of the compensation to be paid and how it will be divided depend on the totality of the circumstances. Factors to

be considered include the settlor's reasons for naming more than one trustee and the level of responsibility assumed and exact services performed by each trustee. Often the fees of cotrustees will be in the aggregate higher than the fees for a single trustee because of the duty of each trustee to participate in administration and not delegate to a cotrustee duties the settlor expected the trustees to perform jointly. *See* Restatement (Third) of Trusts § 38 cmt. i (Tentative Draft No. 2, approved 1999). The trust may benefit in such cases from the enhanced quality of decision-making resulting from the collective deliberations of the trustees.

Financial institution trustees normally base their fees on published fee schedules. Published fee schedules are subject to the same standard of reasonableness under the Uniform Trust Code as are other methods for computing fees. The courts have generally upheld published fee schedules but this is not automatic. Among the more litigated topics is the issue of termination fees. Termination fees are charged upon termination of the trust and sometimes upon transfer of the trust to a successor trustee. Factors relevant to whether the fee is appropriate include the actual work performed; whether a termination fee was authorized in the terms of the trust; whether the fee schedule specified the circumstances in which a termination fee would be charged; whether the trustee's overall fees for administering the trust from the date of the trust's creation, including the termination fee, were reasonable; and the general practice in the community regarding termination fees. Because significantly less work is normally involved, termination fees are less appropriate upon transfer to a successor trustee than upon termination of the trust. For representative cases, see *Cleveland Trust Co. v. Wilmington Trust Co.*, 258 A.2d 58 (Del. 1969); *In re Trusts Under Will of Dwan*, 371 N.W. 2d 641 (Minn. Ct. App. 1985); *Mercer v. Merchants National Bank*, 298 A.2d 736 (N.H. 1972); *In re Estate of Payson*, 562 N.Y.S. 2d 329 (Surr. Ct. 1990); *In re Indenture Agreement of Lawson*, 607 A. 2d 803 (Pa. Super. Ct. 1992); *In re Estate of Ischy*, 415 A.2d 37 (Pa. 1980); *Memphis Memorial Park v. Planters National Bank*, 1986 Tenn. App. LEXIS 2978 (May 7, 1986); *In re Trust of Sensenbrenner*, 252 N.W. 2d 47 (Wis. 1977).

This Code does not take a specific position on whether dual fees may be charged when a trustee hires its own law firm to represent the trust. The trend is to authorize dual compensation as long as the overall fees are reasonable. For a discussion, see Ronald C. Link, *Developments Regarding the Professional Responsibility of the Estate Administration Lawyer: The Effect of the Model Rules of Professional Conduct*, 26 Real Prop. Prob. & Tr. J. 1, 22-38 (1991)

Subsection (b) permits the terms of the trust to override the reasonable compensation standard, subject to the court's inherent equity power to make adjustments downward or upward in appropriate circumstances. Compensation provisions should be drafted with care. Common questions include whether a provision in the terms of the trust setting the amount of the trustee's compensation

is binding on a successor trustee, whether a dispositive provision for the trustee in the terms of the trust is in addition to or in lieu of the trustee's regular compensation, and whether a dispositive provision for the trustee is conditional on the person performing services as trustee. *See* Restatement (Third) of Trusts § 38 cmt. e (Tentative Draft No.2, approved 1999); Restatement (Second) of Trusts § 242 cmt. f (1959).

Compensation may be set by agreement. A trustee may enter into an agreement with the beneficiaries for lesser or increased compensation, although an agreement increasing compensation is not binding on a nonconsenting beneficiary. *See* Section 111(d) (matters that may be the resolved by nonjudicial settlement). *See also* Restatement (Third) of Trusts § 38 cmt. f (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 242 cmt. i (1959). A trustee may also agree to waive compensation and should do so prior to rendering significant services if concerned about possible gift and income taxation of the compensation accrued prior to the waiver. *See* Rev. Rul. 66-167, 1966-1 C.B. 20. *See also* Restatement (Third) of Trusts § 38 cmt. g (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 242 cmt. j (1959).

Section 816(15) grants the trustee authority to fix and pay its compensation without the necessity of prior court review, subject to the right of a beneficiary to object to the compensation in a later judicial proceeding. Allowing the trustee to pay its compensation without prior court approval promotes efficient trust administration but does place a significant burden on a beneficiary who believes the compensation is unreasonable. To provide a beneficiary with time to take action, and because of the importance of trustee's fees to the beneficiaries' interests, Section 813(b)(4) requires a trustee to provide the qualified beneficiaries with advance notice of any change in the method or rate of the trustee's compensation. Failure to provide such advance notice constitutes a breach of trust, which, if sufficiently serious, would justify the trustee's removal under Section 706.

Under Sections 501-502 of the Uniform Principal and Income Act (1997), one-half of a trustee's regular compensation is charged to income and the other half to principal. Chargeable to principal are fees for acceptance, distribution, or termination of the trust, and fees charged on disbursements made to prepare property for sale.

Comment to Section 709
(Reimbursement of Expenses)

A trustee has the authority to expend trust funds as necessary in the administration of the trust, including expenses incurred in the hiring of agents. *See*

Sections 807 (delegation by trustee) and 816(15) (trustee to pay expenses of administration from trust).

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

As provided in subsection (a)(2), a trustee is entitled to reimbursement for unauthorized expenses only if the unauthorized expenditures benefitted the trust The purpose of this provision, which is derived from Restatement (Second) of Trusts § 245 (1959), is not to ratify the unauthorized conduct of the trustee, but to prevent unjust enrichment of the trust. Given this purpose, a court, on appropriate grounds, may delay or even deny reimbursement for expenses which benefitted the trust. Appropriate grounds include: (1) whether the trustee acted in bad faith in incurring the expense; (2) whether the trustee knew that the expense was inappropriate; (3) whether the trustee reasonably believed the expense was necessary for the preservation of the trust estate; (4) whether the expense has resulted in a benefit; and (5) whether indemnity can be allowed without defeating or impairing the purposes of the trust. *See* Restatement (Second) of Trusts § 245 cmt. g (1959).

Subsection (b) implements Section 802(h)(5), which creates an exception to the duty of loyalty for advances by the trustee for the protection of the trust if the transaction is fair to the beneficiaries.

Reimbursement under this section may include attorney's fees and expenses incurred by the trustee in defending an action. However, a trustee is not ordinarily entitled to attorney's fees and expenses if it is determined that the trustee breached the trust. *See* 3A Austin W. Scott & William F. Fratcher, The Law of Trusts § 245 (4th ed. 1988).

Article 8
Duties and Powers of Trustee

General Comment

This article states the fundamental duties of a trustee and lists the trustee's powers. The duties listed are not new, but how the particular duties are formulated and applied has changed over the years. This article was drafted where possible to

conform with the 1994 Uniform Prudent Investor Act, which has been enacted in approximately two thirds of the States. The Uniform Prudent Investor Act prescribes a trustee's responsibilities with respect to the management and investment of trust property. The Uniform Trust Code also addresses a trustee's duties with respect to distribution to beneficiaries.

Because of the widespread adoption of the Uniform Prudent Investor Act, it was decided not to disassemble and fully integrate the Prudent Investor Act into the Uniform Trust Code. Instead, States enacting the Uniform Trust Code are encouraged to recodify their version of the Prudent Investor Act by reenacting it as Article 9 of this Code rather than leaving it elsewhere in their statutes. Where the Uniform Trust Code and Uniform Prudent Investor Act overlap, States should enact the provisions of this article and not enact the duplicative provisions of the Prudent Investor Act. Sections of this article which overlap with the Prudent Investor Act are Sections 802 (duty of loyalty), 803 (impartiality), 805 (costs of administration), 806 (trustee's skills), and 807 (delegation). For more complete instructions on how to enact the Uniform Prudent Investor Act as part of this Code, see the General Comment to Article 9.

All of the provisions of this article may be overridden in the terms of the trust except for certain aspects of the trustee's duty to keep the beneficiaries informed of administration (*see* Section 105(b)(8)-(9)), and the trustee's fundamental obligation to act in good faith, in accordance with the purposes of the trust, and for the benefit of the beneficiaries (*see* Section 105(b)(2)-(3)).

Comment to Section 801
(Duty to Administer Trust)

This section confirms that a primary duty of a trustee is to follow the terms and purposes of the trust and to do so in good faith. Only if the terms of a trust are silent or for some reason invalid on a particular issue does this Code govern the trustee's duties. This section also confirms that a trustee does not have a duty to act until the trustee has accepted the trusteeship. For the procedure for accepting a trusteeship, see Section 701.

In administering the trust, the trustee must not only comply with this section but also with the other duties specified in this article, particularly the obligation not to place the interests of others above those of the beneficiaries (Section 802), the duty to act with prudence (Section 804), and the duty to keep the qualified beneficiaries reasonably informed about the administration of the trust (Section 813).

While a trustee generally must administer a trust in accordance with its terms and purposes, the purposes and particular terms of the trust can on occasion

conflict. If such a conflict occurs because of circumstances not anticipated by the settlor, it may be appropriate for the trustee to petition under Section 412 to modify or terminate the trust. Pursuant to Section 404, the trustee is not required to perform a duty prescribed by the terms of the trust if performance would be impossible, illegal or contrary to public policy.

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

Comment to Section 802
(Duty of Loyalty)

This section addresses the duty of loyalty, perhaps the most fundamental duty of the trustee. Subsection (a) states the general principle, which is copied from Restatement (Second) of Trusts § 170(1) (1959). A trustee owes a duty of loyalty to the beneficiaries, a principle which is sometimes expressed as the obligation of the trustee not to place the trustee's own interests over those of the beneficiaries. Most but not all violations of the duty of loyalty concern transactions involving the trust property, but breaches of the duty can take other forms. For a discussion of the different types of violations, see George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 543 (Rev. 2d ed. 1993); and 2A Austin W. Scott & William F. Fratcher, The Law of Trusts §§ 170-170.24 (4th ed. 1987). The "interests of the beneficiaries" to which the trustee must be loyal are the beneficial interests as provided in the terms of the trust. *See* Section 103(7).

The duty of loyalty applies to both charitable and noncharitable trusts, even though the beneficiaries of charitable trusts are indefinite. In the case of a charitable trust, the trustee must administer the trust solely in the interests of effectuating the trust's charitable purposes. *See* Restatement (Second) of Trusts § 379 cmt. a (1959).

Duty of loyalty issues often arise in connection with the settlor's designation of the trustee. For example, it is not uncommon that the trustee will also be a beneficiary. Or the settlor will name a friend or family member who is an officer of a company in which the settlor owns stock. In such cases, settlors should be advised to consider addressing in the terms of the trust how such conflicts are to be handled. Section 105 authorizes a settlor to override an otherwise applicable duty of loyalty in the terms of the trust. Sometimes the override is implied. The grant to a trustee of authority to make a discretionary distribution to a class of beneficiaries that includes the trustee implicitly authorizes the trustee to make distributions for the trustee's own benefit.

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

The rule is less severe with respect to transactions involving trust property entered into with persons who have close business or personal ties with the trustee. Under subsection (c), a transaction between a trustee and certain relatives and business associates is presumptively voidable, not void. Also presumptively voidable are transactions with corporations or other enterprises in which the trustee, or a person who owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment. The presumption is rebutted if the trustee establishes that the transaction was not affected by a conflict between personal and fiduciary interests. Among the factors tending to rebut the presumption are whether the consideration was fair and whether the other terms of the transaction are similar to those that would be transacted with an independent party.

Even where the presumption under subsection (c) does not apply, a transaction may still be voided by a beneficiary if the beneficiary proves that a conflict between personal and fiduciary interests existed and that the transaction was affected by the conflict. The right of a beneficiary to void a transaction affected by a conflict of interest is optional. If the transaction proves profitable to the trust and unprofitable to the trustee, the beneficiary will likely allow the transaction to stand. For a comparable provision regulating fiduciary investments by national banks, see 12 C.F.R. § 9.12(a).

As provided in subsection (b), no breach of the duty of loyalty occurs if the transaction was authorized by the terms of the trust or approved by the court, or if the beneficiary failed to commence a judicial proceeding within the time allowed or chose to ratify the transaction, either prior to or subsequent to its occurrence. In determining whether a beneficiary has consented to a transaction, the principles of representation from Article 3 may be applied.

Subsection (b)(5), which is derived from Section 3-713(1) of the Uniform Probate Code, allows a trustee to implement a contract or pursue a claim that the trustee entered into or acquired before the person became or contemplated becoming trustee. While this subsection allows the transaction to proceed without

automatically being voidable by a beneficiary, the transaction is not necessarily free from scrutiny. In implementing the contract or pursuing the claim, the trustee must still complete the transaction in a way that avoids a conflict between the trustee's fiduciary and personal interests. Because avoiding such a conflict will frequently be difficult, the trustee should consider petitioning the court to appoint a special fiduciary, as authorized by subsection (i), to work out the details and complete the transaction.

Subsection (d) creates a presumption that a transaction between a trustee and a beneficiary not involving trust property is an abuse by the trustee of a confidential relationship with the beneficiary. This subsection has limited scope. If the trust has terminated, there must be proof that the trustee's influence with the beneficiary remained. Furthermore, whether or not the trust has terminated, there must be proof that the trustee obtained an advantage from the relationship. The fact the trustee profited is insufficient to show an abuse if a third party would have similarly profited in an arm's length transaction. Subsection (d) is based on Cal. Prob. Code §16004(c). *See also* 2A Austin W. Scott & William F. Fratcher § 170.25 (4th ed. 1987), which states the same principle in a slightly different form: "Where he deals directly with the beneficiaries, the transaction may stand, but only if the trustee makes full disclosure and takes no advantage of his position and the transaction is in all respects fair and reasonable."

Subsection (e), which allows a beneficiary to void a transaction entered into by the trustee that involved an opportunity belonging to the trust, is based on Restatement (Second) of Trusts § 170 cmt. k (1959). While normally associated with corporations and with their directors and officers, what is usually referred to as the corporate opportunity doctrine also applies to other types of fiduciary. The doctrine prohibits the trustee's pursuit of certain business activities, such as entering into a business in direct competition with a business owned by the trust, or the purchasing of an investment that the facts suggest the trustee was expected to purchase for the trust. For discussion of the corporate opportunity doctrine, see Kenneth B. Davis, Jr., *Corporate Opportunity and Comparative Advantage*, 84 Iowa L. Rev. 211 (1999); and Richard A. Epstein, *Contract and Trust in Corporate Law: The Case of Corporate Opportunity*, 21 Del. J. Corp. L. 5 (1996). *See also* Principles of Corporate Governance: Analysis and Recommendations § 5.05 (American Law Inst. 1994).

Subsection (f) creates an exception to the no further inquiry rule for trustee investment in mutual funds. This exception applies even though the mutual fund company pays the financial-service institution trustee a fee for providing investment advice and other services, such as custody, transfer agent, and distribution, that would otherwise be provided by agents of the fund. Mutual funds offer several advantages for fiduciary investing. By comparison with common trust funds, mutual fund shares may be distributed in-kind when trust

interests terminate, avoiding liquidation and the associated recognition of gain for tax purposes. Mutual funds commonly offer daily pricing, which gives trustees and beneficiaries better information about performance. Because mutual funds can combine fiduciary and nonfiduciary accounts, they can achieve larger size, which can enhance diversification and produce economies of scale that can lower investment costs.

Mutual fund investment also has a number of potential disadvantages. It adds another layer of expense to the trust, and it causes the trustee to lose control over the nature and timing of transactions in the fund. Trustee investment in mutual funds sponsored by the trustee, its affiliate, or from which the trustee receives extra fees has given rise to litigation implicating the trustee's duty of loyalty, the duty to invest with prudence, and the right to receive only reasonable compensation. Because financial institution trustees ordinarily provide advisory services to and receive compensation from the very funds in which they invest trust assets, the contention is made that investing the assets of individual trusts in these funds is imprudent and motivated by the effort to generate additional fee income. Because the financial institution trustee often will also charge its regular fee for administering the trust, the contention is made that the financial institution trustee's total compensation, both direct and indirect, is excessive.

Subsection (f) attempts to retain the advantages of mutual funds while at the same time making clear that such investments are subject to traditional fiduciary responsibilities. Nearly all of the States have enacted statutes authorizing trustees to invest in funds from which the trustee might derive additional compensation. Portions of subsection (f) are based on these statutes. Subsection (f) makes clear that such dual investment-fee arrangements are not automatically presumed to involve a conflict between the trustee's personal and fiduciary interests, but subsection (f) does not otherwise waive or lessen a trustee's fiduciary obligations. The trustee, in deciding whether to invest in a mutual fund, must not place its own interests ahead of those of the beneficiaries. The investment decision must also comply with the enacting jurisdiction's prudent investor rule. To obtain the protection afforded by subsection (f), the trustee must disclose at least annually to the beneficiaries entitled to receive a copy of the trustee's annual report the rate and method by which the additional compensation was determined. Furthermore, the selection of a mutual fund, and the resulting delegation of certain of the trustee's functions, may be taken into account under Section 708 in setting the trustee's regular compensation. *See also* Uniform Prudent Investor Act §§ 7 and 9 and Comments; Restatement (Third) of Trusts: Prudent Investor Rule § 227 cmt. m (1992).

Subsection (f) applies whether the services to the fund are provided directly by the trustee or by an affiliate. While the term "affiliate" is not used in subsection (c), the individuals and entities listed there are examples of affiliates.

The term is also used in the regulations under ERISA. An "affiliate" of a fiduciary includes (1) any person who directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with the fiduciary; (2) any officer, director, partner, employee, or relative of the fiduciary, and any corporation or partnership of which the fiduciary is an officer, director or partner. *See* 29 C.F.R. § 2510.3-21(e).

Subsection (g) addresses an overlap between trust and corporate law. It is based on Restatement of Trusts (Second) § 193 cmt. a (1959), which provides that "[i]t is the duty of the trustee in voting shares of stock to use proper care to promote the interest of the beneficiary," and that the fiduciary responsibility of a trustee in voting a control block "is heavier than where he holds only a small fraction of the shares." Similarly, the Department of Labor construes ERISA's duty of loyalty to make share voting a fiduciary function. *See* 29 C.F.R. §2509.94-2. When the trust owns the entirety of the shares of a corporation, the corporate assets are in effect trust assets that the trustee determines to hold in corporate form. The trustee may not use the corporate form to escape the fiduciary duties of trust law. Thus, for example, a trustee whose duty of impartiality would require the trustee to make current distributions for the support of current beneficiaries may not evade that duty by holding assets in corporate form and pleading the discretion of corporate directors to determine dividend policy. Rather, the trustee must vote for corporate directors who will follow a dividend policy consistent with the trustee's trust-law duty of impartiality.

Subsection (h) contains several exceptions to the general duty of loyalty, which apply if the transaction was fair to the beneficiaries. Subsection (h)(1)-(2) clarify that a trustee is free to contract about the terms of appointment and rate of compensation. Consistent with Restatement (Second) of Trusts § 170 cmt. r (1959), subsection (h)(3) authorizes a trustee to engage in a transaction involving another trust of which the trustee is also trustee, a transaction with a decedent's estate or a conservatorship estate of which the trustee is personal representative or conservator, or a transaction with another trust or other fiduciary relationship in which a beneficiary of the trust has an interest. The authority of a trustee to deposit funds in a financial institution operated by the trustee, as provided in subsection (h)(4), is recognized in Restatement (Second) of Trusts § 170 cmt. m (1959). The power to deposit funds in its own institution does not negate the trustee's responsibility to invest prudently, including the obligation to earn a reasonable rate of interest on deposits. Subsection (h)(5) authorizes a trustee to advance money for the protection of the trust. Such advances usually are of small amounts and are made in emergencies or as a matter of convenience. Pursuant to Section 709(b), the trustee has a lien against the trust property for any advances made.

Comment to Section 803
(Impartiality)

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

The duty to act impartially does not mean that the trustee must treat the beneficiaries equally. Rather, the trustee must treat the beneficiaries equitably in light of the purposes and terms of the trust. A settlor who prefers that the trustee, when making decisions, generally favor the interests of one beneficiary over those of others should provide appropriate guidance in the terms of the trust. *See* Restatement (Second) of § 183 cmt. a (1959).

Comment to Section 804
(Prudent Administration)

The duty to administer a trust with prudence is a fundamental duty of the trustee. This duty does not depend on whether the trustee receives compensation. The duty may be altered by the terms of the trust. *See* Section 105. This section is similar to Section 2(a) of the Uniform Prudent Investor Act and Restatement (Third) of Trusts: Prudent Investor Rule § 227 (1992).

The language of this section diverges from the language of the previous Restatement. The prior Restatement can be read as applying the same standard - "man of ordinary prudence would exercise in dealing with his own property" - regardless of the type or purposes of the trust. *See* Restatement (Second) of Trusts § 174 cmt. a (1959). This section appropriately bases the standard on the purposes and other circumstances of the particular trust.

A settlor who wishes to modify the standard of care specified in this section is free to do so, but there is a limit. Section 1008 prohibits a settlor from exculpating a trustee from liability for breach of trust committed in bad faith or

with reckless indifference to the purposes of the trust or to the interests of the beneficiaries.

Comment to Section 805
(Costs of Administration)

This section is similar to Section 7 of the Uniform Prudent Investor Act and is consistent with the rules concerning costs in Restatement (Third) of Trusts: Prudent Investor Rule § 227(c)(3) (1992). For related rules concerning compensation and reimbursement of trustees, see Sections 708 and 709. The duty not to incur unreasonable costs applies when a trustee decides whether and how to delegate to agents, as well as to other aspects of trust administration. In deciding whether and how to delegate, the trustee must be alert to balancing projected benefits against the likely costs. To protect the beneficiary against excessive costs, the trustee should also be alert to adjusting compensation for functions which the trustee has delegated to others. The obligation to incur only necessary or appropriate costs of administration has long been part of the law of trusts. *See* Restatement (Second) of Trusts § 188 (1959).

Comment to Section 806
(Trustee's Skills)

This section is similar to Section 7-302 of the Uniform Probate Code, Restatement (Second) of Trusts § 174 (1959), and Section 2(f) of the Uniform Prudent Investor Act.

Comment to Section 807
(Delegation by Trustee)

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

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

This section applies only to delegation to agents, not to delegation to a cotrustee. For the provision regulating delegation to a cotrustee, see Section 703(e).

Comment to Section 808
(Powers to Direct)

Subsection (a) is an application of Section 603(a), which provides that a revocable trust is subject to the settlor's exclusive control as long as the settlor has capacity. Because of the settlor's degree of control, subsection (a) of this section authorizes a trustee to rely on a written direction from the settlor even if it is contrary to the terms of the trust. The written direction of the settlor might be regarded as an amendment of the trust. Subsection (a) has limited application upon a settlor's incapacity. An agent, conservator, or guardian has authority to give the trustee instructions contrary to the terms of the trust only if the agent, conservator, or guardian succeeds to the settlor's powers with respect to revocation, amendment, or distribution as provided in Section 602(e).

Subsections (b)-(d) ratify the use of trust protectors and advisers. Subsections (b) and (d) are based in part on Restatement (Second) of Trusts § 185 (1959). Subsection (c) is similar to Restatement (Third) of Trusts § 64(2) (Tentative Draft No. 3, 2001). "Advisers" have long been used for certain trustee functions, such as the power to direct investments or manage a closely-held business. "Trust protector," a term largely associated with offshore trust practice, is more recent and usually connotes the grant of greater powers, sometimes including the power to amend or terminate the trust. Subsection (c) ratifies the recent trend to grant third persons such broader powers.

A power to direct must be distinguished from a veto power. A power to direct involves action initiated and within the control of a third party. The trustee usually has no responsibility other than to carry out the direction when made. But if a third party holds a veto power, the trustee is responsible for initiating the decision, subject to the third party's approval. A trustee who administers a trust subject to a veto power occupies a position akin to that of a cotrustee and is responsible for taking appropriate action if the third party's refusal to consent would result in a serious breach of trust. *See* Restatement (Second) of Trusts § 185 cmt. g (1959); Section 703(g)(duties of cotrustees).

Frequently, the person holding the power is directing the investment of the holder's own beneficial interest. Such self-directed accounts are particularly prevalent among trusts holding interests in employee benefit plans or individual retirement accounts. *See* ERISA § 404(c) (29 U.S.C. § 1104(c)). But for the type of donative trust which is the primary focus of this Code, the holder of the power to direct is frequently acting on behalf of others. In that event and as provided in

subsection (d), the holder is presumptively acting in a fiduciary capacity with respect to the powers granted and can be held liable if the holder's conduct constitutes a breach of trust, whether through action or inaction. Like a trustee, liability cannot be imposed if the holder has not accepted the grant of the power either expressly or informally through exercise of the power. *See* Section 701.

Powers to direct are most effective when the trustee is not deterred from exercising the power by fear of possible liability. On the other hand, the trustee does have overall responsibility for seeing that the terms of the trust are honored. For this reason, subsection (b) imposes only minimal oversight responsibility on the trustee. A trustee must generally act in accordance with the direction. A trustee may refuse the direction only if the attempted exercise would be manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty owed by the holder of the power to the beneficiaries of the trust.

The provisions of this section may be altered in the terms of the trust. *See* Section 105. A settlor can provide that the trustee must accept the decision of the power holder without question. Or a settlor could provide that the holder of the power is not to be held to the standards of a fiduciary. A common technique for assuring that a settlor continues to be taxed on all of the income of an irrevocable trust is for the settlor to retain a nonfiduciary power of administration. *See* I.R.C. § 675(4).

Comment to Section 809
(Control and Protection of Trust Property)

This section codifies the substance of Sections 175 and 176 of the Restatement (Second) of Trusts (1959). The duty to take control of and safeguard trust property is an aspect of the trustee's duty of prudent administration as provided in Section 804. *See also* Sections 816(1) (power to collect trust property), 816(11) (power to insure trust property), and 816(12) (power to abandon trust property). The duty to take control normally means that the trustee must take physical possession of tangible personal property and securities belonging to the trust, and must secure payment of any choses in action. *See* Restatement (Second) of Trusts § 175 cmt. a, c and d (1959). This section, like the other sections in this part, is subject to alteration by the terms of the trust. *See* Section 105. For example, the settlor may provide that the spouse may occupy the settlor's former residence rent free, in which event the spouse's occupancy would prevent the trustee from taking possession.

Comment to Section 810
(Recordkeeping And Identification Of Trust Property)

The duty to keep adequate records stated in subsection (a) is implicit in the duty to act with prudence (Section 804) and the duty to report to beneficiaries (Section 813). For an application, see *Green v. Lombard*, 343 A. 2d 905, 911 (Md. Ct. Spec. App. 1975). *See also* Restatement (Second) of Trusts §§ 172, 174 (1959).

The duty to earmark trust assets and the duty of a trustee not to mingle the assets of the trust with the trustee's own are closely related. Subsection (b), which addresses the duty not to mingle, is derived from Section 179 of the Restatement (Second) of Trusts (1959). Subsection (c) makes the requirement that assets be earmarked more precise than that articulated in Restatement (Second) § 179 by requiring that the interest of the trust must appear in the records of a third party, such as a bank, brokerage firm, or transfer agent. Because of the serious risk of mistake or misappropriation even if disclosure is made to the beneficiaries, showing the interest of the trust solely in the trustee's own internal records is insufficient. Section 816(7)(B), which allows a trustee to hold securities in nominee form, is not inconsistent with this requirement. While securities held in nominee form are not specifically registered in the name of the trustee, they are properly earmarked because the trustee's holdings are indicated in the records maintained by an independent party, such as in an account at a brokerage firm.

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

Subsection (d), following the lead of a number of state statutes, allows a trustee to use the property of two or more trusts to make joint investments, even though under traditional principles a joint investment would violate the duty to earmark. A joint investment frequently is more economical than attempting to invest the funds of each trust separately. Also, the risk of misappropriation or mistake is less when the trust property is invested jointly with the property of another trust than when pooled with the property of the trustee or other person.

Comment to Section 811
(Enforcement and Defense of Claims)

This section codifies the substance of Sections 177 and 178 of the Restatement (Second) of Trusts (1959). It may not be reasonable to enforce a claim depending upon the likelihood of recovery and the cost of suit and enforcement. It might also be reasonable to settle an action or suffer a default rather than to defend an action. *See also* Section 816(14) (power to pay, contest, settle, or release claims).

Comment to Section 812
(Collecting Trust Property)

This section is a specific application of Section 811 on the duty to enforce claims, which includes a claim for trust property held by a former trustee or others, and a claim against a predecessor trustee for breach of trust. The duty imposed by this section is not absolute. Pursuit of a claim is not required if the amount of the claim, costs of suit and enforcement, and likelihood of recovery, make such action uneconomic. Unlike Restatement (Second) of Trusts § 223 (1959), this section only requires a successor trustee to redress breaches of trust "known" to have been committed by the predecessor. For the definition of "know," see Section 104. Limiting the successor's obligation to known breaches is a common feature of state trust statutes. *See, e.g.*, Mo. Rev. Stat. § 456.187.2.

As authorized by Section 1009, the beneficiaries may relieve the trustee from potential liability for failing to pursue a claim against a predecessor trustee or other person holding trust property. The obligation to pursue a successor trustee can also be addressed in the terms of the trust. *See* Section 105.

Comment to Section 813
(Duty to Inform and Report)

The duty to keep the beneficiaries reasonably informed of the administration of the trust is a fundamental duty of a trustee. For the common law duty to keep the beneficiaries informed, see Restatement (Second) of Trusts § 173 (1959). This section makes the duty to keep the beneficiaries informed more precise by limiting it to the qualified beneficiaries. For the definition of qualified beneficiary, see Section 103(12). The result of this limitation is that the information need not be furnished to beneficiaries with remote remainder interests unless they have filed a specific request with the trustee. *See* Section 110(a) (request for notice).

For the extent to which a settlor may waive the requirements of this section in the terms of the trust, see Section 105(b)(8)-(9).

The trustee is under a duty to communicate to a qualified beneficiary information about the administration of the trust that is reasonably necessary to enable the beneficiary to enforce the beneficiary's rights and to prevent or redress a breach of trust. *See* Restatement (Second) of Trusts § 173 cmt. c (1959). Ordinarily, the trustee is not under a duty to furnish information to a beneficiary in the absence of a specific request for the information. *See* Restatement (Second) of Trusts § 173 cmt. d (1959). Thus, the duty articulated in subsection (a) is ordinarily satisfied by providing the beneficiary with a copy of the annual report mandated by subsection (c). However, special circumstances may require that the trustee provide additional information. For example, if the trustee is dealing with the beneficiary on the trustee's own account, the trustee must communicate material facts relating to the transaction that the trustee knows or should know. *See* Restatement (Second) of Trusts § 173 cmt. d (1959). Furthermore, to enable the beneficiaries to take action to protect their interests, the trustee may be required to provide advance notice of transactions involving real estate, closely-held business interests, and other assets that are difficult to value or to replace. *See In re Green Charitable Trust*, 431 N.W. 2d 492 (Mich. Ct. App. 1988); *Allard v. Pacific National Bank*, 663 P.2d 104 (Wash. 1983). The trustee is justified in not providing such advance disclosure if disclosure is forbidden by other law, as under federal securities laws, or if disclosure would be seriously detrimental to the interests of the beneficiaries, for example, when disclosure would cause the loss of the only serious buyer.

Subsection (a) provides a different standard if a beneficiary, whether qualified or not, makes a request for information. In that event, the trustee must promptly comply with the beneficiary's request unless unreasonable under the circumstances. Further supporting the principle that a beneficiary should be allowed to make an independent assessment of what information is relevant to protecting the beneficiary's interest, subsection (b)(1) requires the trustee on request to furnish a beneficiary with a complete copy of the trust instrument and not merely with those portions the trustee deems relevant to the beneficiary's interest. For a case reaching the same result, see *Fletcher v. Fletcher*, 480 S.E. 2d 488 (Va. Ct. App. 1997). Subsection (b)(1) is contrary to Section 7-303(b) of the Uniform Probate Code, which provides that "[u]pon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest. . . ."

The drafters of this Code decided to leave open for further consideration by the courts the extent to which a trustee may claim attorney-client privilege against a beneficiary seeking discovery of attorney-client communications between the trustee and the trustee's attorney. The courts are split because of the important values that are in tension on this question. "The [attorney-client] privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by

the client." *Upjohn Co. v. United States*, 449 U.S. 383 (1981). On the other hand, subsection (a) of this section requires that a trustee keep the qualified beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests, which could include facts that the trustee has revealed only to the trustee's attorney. There is authority for the view that the trustee is estopped from pleading attorney-client privilege in such circumstances. In the leading case, *Riggs National Bank v. Zimmer*, 355 A.2d 709, 713 (Del. Ch. 1976), the court reasoned that the beneficiary, not the trustee, is the attorney's client: "As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client . . . ." This beneficiary-as-client theory has been criticized on the ground that it conflicts with the trustee's fiduciary duty to implement the intentions of the settlor, which are sometimes in tension with the wishes of one or more beneficiaries. *See* Louis H. Hamel, Jr., *Trustee's Privileged Counsel: A Rebuttal*, 21 ACTEC Notes 156 (1995); Charles F. Gibbs & Cindy D. Hanson, *The Fiduciary Exception to a Trustee's Attorney/Client Privilege*, 21 ACTEC Notes 236 (1995). Prominent decisions in California and Texas have refused to follow Delaware in recognizing an exception for the beneficiary against the trustee's attorney-client privilege. *Wells Fargo Bank v. Superior Court (Boltwood)*, 990 P.2d 591 (Cal. 2000); *Huie v. De Shazo*, 922 S.W. 2d 920 (Tex. 1996). The beneficiary-as-client theory continues to be applied to ERISA trusts. *See, e.g., United States v. Mett*, 178 F.3d 1058, 1062-64 (9th Cir. 1999). However, in a pension trust the beneficiaries are the settlors of their own trust because the trust is funded with their own earnings. Accordingly, in ERISA attorney-client cases "[t]here are no competing interests such as other stockholders or the intentions of the Settlor." Gibbs & Hanson, 21 ACTEC Notes at 238. For further discussion of the attorney-client privilege and whether there is a duty to disclose to the beneficiaries, see ACTEC Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.2 (3d ed. 1999); Rust E. Reid et al., *Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary*, 30 Real Prop. Prob. & Tr. J. 541 (1996).

To enable beneficiaries to protect their interests effectively, it is essential that they know the identity of the trustee. Subsection (b)(2) requires that a trustee inform the qualified beneficiaries within 60 days of the trustee's acceptance of office and of the trustee's name, address and telephone number. Similar to the obligation imposed on a personal representative following admission of the will to probate, subsection (b)(3) requires the trustee of a revocable trust to inform the qualified beneficiaries of the trust's existence within 60 days after the settlor's death. These two duties can overlap. If the death of the settlor happens also to be the occasion for the appointment of a successor trustee, the new trustee of the formerly revocable trust would need to inform the qualified beneficiaries both of the trustee's acceptance and of the trust's existence.

Subsection (b)(4) deals with the sensitive issue of changes, usually increases, in trustee compensation. Changes can include changes in a periodic base fee, rate of percentage compensation, hourly rate, termination fee, or transaction charge. Regarding the standard for setting trustee compensation, see Section 708 and Comment.

Subsection (c) requires the trustee to furnish the current beneficiaries and other beneficiaries who request it with a copy of a trustee's report at least annually and upon termination of the trust. Unless a cotrustee remains in office, the former trustee also must provide a report to all of the qualified beneficiaries upon the trustee's resignation or removal. If the vacancy occurred because of the former trustee's death or adjudication of incapacity, a report may, but need not be provided by the former trustee's personal representative, conservator, or guardian.

The Uniform Trust Code employs the term "report" instead of "accounting" in order to negate any inference that the report must be prepared in any particular format or with a high degree of formality. The reporting requirement might even be satisfied by providing the beneficiaries with copies of the trust's income tax returns and monthly brokerage account statements if the information on those returns and statements is complete and sufficiently clear. The key factor is not the format chosen but whether the report provides the beneficiaries with the information necessary to protect their interests. For model account forms, together with practical advice on how to prepare reports, see Robert Whitman, Fiduciary Accounting Guide (2d ed. 1998).

Subsection (d) allows trustee reports and other required information to be waived by a beneficiary. A beneficiary may also withdraw a consent. However, a waiver of a trustee's report or other information does not relieve the trustee from accountability and potential liability for matters that the report or other information would have disclosed.

Comment to Section 814
(Discretionary Powers; Tax Savings)

Despite the breadth of discretion purportedly granted by the wording of a trust, no grant of discretion to a trustee, whether with respect to management or distribution, is ever absolute. A grant of discretion establishes a range within which the trustee may act. The greater the grant of discretion, the broader the range. Pursuant to subsection (a), a trustee's action must always be in good faith, with regard to the purposes of the trust, and in accordance with the trustee's other duties, including the obligation to exercise reasonable skill, care and caution. *See* Sections 801 (duty to administer trust) and 804 (duty to act with prudence). The standard stated in subsection (a) applies only to powers which are to be exercised in a fiduciary as opposed to a nonfiduciary capacity. Regarding the standards for

exercising discretion and construing particular language of discretion, see Restatement (Third) of Trusts § 50 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 187 (1959). *See also* Edward C. Halbach, Jr., *Problems of Discretion in Discretionary Trusts*, 61 Colum. L. Rev. 1425 (1961). An abuse by the trustee of the discretion granted in the terms of the trust is a breach of trust that can result in surcharge. *See* Section 1001(b) (remedies for breach of trust).

Subsections (b) through (d) rewrite the terms of a trust that might otherwise result in adverse estate and gift tax consequences to a beneficiary-trustee. This Code does not generally address the subject of tax curative provisions. These are provisions that automatically rewrite the terms of trusts that might otherwise fail to qualify for probable intended tax benefits. Such provisions, because they apply to all trusts using or failing to use specified language, are often overbroad, applying not only to trusts intended to qualify for tax benefits but also to smaller trust situations where taxes are not a concern. Enacting tax-curative provisions also requires special diligence by state legislatures to make certain that these provisions are periodically amended to account for the frequent changes in federal tax law. Furthermore, many failures to draft with sufficient care may be correctable by including a tax savings clause in the terms of the trust or by seeking modification of the trust using one or more of the methods authorized by Sections 411-417. Notwithstanding these reasons, the unintended inclusion of the trust in the beneficiary-trustee's gross estate is a frequent enough occurrence that the drafters concluded that it is a topic that this Code should address. It is also a topic on which numerous States have enacted corrective statutes.

A tax curative provision differs from a statute such as Section 416 of this Code, which allows a court to modify a trust to achieve an intended tax benefit. Absent Congressional or regulatory authority authorizing the specific modification, a lower court decree in state court modifying a trust is controlling for federal estate tax purposes only if the decree was issued before the taxing event, which in the case of the estate tax would be the decedent's death. *See* Rev. Rul. 73-142, 1973-1 C.B. 405. There is specific federal authority authorizing modification of trusts for a number of reasons (*see* Comment to Section 416) but not on the specific issues addressed in this section. Subsections (b) through (d), by interpreting the original language of the trust instrument in a way that qualifies for intended tax benefits, obviates the need to seek a later modification of the trust.

Subsection (b)(1) states the main rule. Unless the terms of the trust expressly indicate that the rule in this subsection is not to apply, the power to make discretionary distributions to a beneficiary-trustee is automatically limited by the requisite ascertainable standard necessary to avoid inclusion of the trust in the trustee's gross estate or result in a taxable gift upon the trustee's release or

exercise of the power. Trusts of which the trustee-beneficiary is also a settlor are not subject to this subsection. In such a case, limiting the discretion of a settlor-trustee to an ascertainable standard would not be sufficient to avoid inclusion of the trust in the settlor's gross estate. *See generally* John J. Regan, Rebecca C. Morgan & David M. English, Tax, Estate and Financial Planning for the Elderly § 17.07[2][h]. Furthermore, the inadvertent inclusion of a trust in a settlor-trustee's gross estate is a far less frequent and better understood occurrence than is the inadvertent inclusion of the trust in the estate of a nonsettlor trustee-beneficiary.

Subsection (b)(2) addresses a common trap, the trustee who is not a beneficiary but who has power to make discretionary distributions to those to whom the trustee owes a legal obligation of support. Discretion to make distributions to those to whom the trustee owes a legal obligation of support, such as to the trustee's minor children, results in inclusion of the trust in the trustee's gross estate even if the power is limited by an ascertainable standard. The applicable regulation provides that the ascertainable standard exception applies only to distributions for the benefit of the decedent, not to distributions to those to whom the decedent owes a legal obligation of support. *See* Treas. Reg. § 20.2041-1(c)(2).

Subsection (c) deals with cotrustees and adopts the common planning technique of granting the broader discretion only to the independent trustee. Cotrustees who are beneficiaries of the trust or who have a legal obligation to support a beneficiary may exercise the power only as limited by subsection (b). If all trustees are so limited, the court may appoint a special fiduciary to make a decision as to whether a broader exercise is appropriate.

Subsection (d) excludes certain trusts from the operation of this section. Trusts qualifying for the marital deduction will be includable in the surviving spouse's gross estate regardless of whether this section applies. Consequently, if the spouse is acting as trustee, there is no need to limit the power of the spouse-trustee to make discretionary distributions for the spouse's benefit. Similar reasoning applies to the revocable trust, which, because of the settlor's power to revoke, is automatically includable in the settlor's gross estate even if the settlor is not named as a beneficiary.

QTIP marital trusts are subject to this section, however. QTIP trusts qualify for the marital deduction only if so elected on the federal estate tax return. Excluding a QTIP for which an election has been made from the operation of this section would allow the terms of the trust to be modified after the settlor's death. By not making the QTIP election, an otherwise unascertainable standard would be limited. By making the QTIP election, the trustee's discretion would not be curtailed. This ability to modify a trust depending on elections made on the

federal estate tax return could itself constitute a taxable power of appointment resulting in inclusion of the trust in the surviving spouse's gross estate.

The exclusion of the Section 2503(c) minors trust is necessary to avoid loss of gift tax benefits. While preventing a trustee from distributing trust funds in discharge of a legal obligation of support would keep the trust out of the trustee's gross estate, such a restriction might result in loss of the gift tax annual exclusion for contributions to the trust, even if the trustee were otherwise granted unlimited discretion. *See* Rev. Rul. 69-345, 1969-1 C.B. 226.

Comment to Section 815
(General Powers of Trustee)

This section is intended to grant trustees the broadest possible powers, but to be exercised always in accordance with the duties of the trustee and any limitations stated in the terms of the trust. This broad authority is denoted by granting the trustee the powers of an unmarried competent owner of individually owned property, unlimited by restrictions that might be placed on it by marriage, disability, or cotenancy.

The powers conferred elsewhere in this Code that are subsumed under this section include all of the specific powers listed in Section 816 as well as other powers described elsewhere in this Code. *See* Sections 108(c) (transfer of principal place of administration), 414(a) (termination of uneconomic trust with value less than $50,000), 417 (combination and division of trusts), 703(e) (delegation to cotrustee), 802(h) (exception to duty of loyalty), 807 (delegation to agent of powers and duties), 810(d) (joint investments), and Article 9 (Uniform Prudent Investor Act). The powers conferred by this Code may be exercised without court approval. If court approval of the exercise of a power is desired, a petition for court approval should be filed.

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

Comment to Section 816
(Specific Powers of Trustee)

This section enumerates specific powers commonly included in trust instruments and in trustee powers legislation. All the powers listed are subject to alteration in the terms of the trust. *See* Section 105. The powers listed are also subsumed under the general authority granted in Section 815(a)(2) to exercise all

powers over the trust property which an unmarried competent owner has over individually owned property, and any other powers appropriate to achieve the proper management, investment, and distribution of the trust property. The powers listed add little of substance not already granted by Section 815 and powers conferred elsewhere in the Code, which are listed in the Comment to Section 815. While the Committee drafting this Code discussed dropping the list of specific powers, it concluded that the demand of third parties to see language expressly authorizing specific transactions justified retention of a detailed list.

As provided in Section 815(b), the exercise of a power is subject to fiduciary duties except as modified in the terms of the trust. The fact that the trustee has a power does not imply a duty that the power must be exercised.

Many of the powers listed in this section are similar to the powers listed in Section 3 of the Uniform Trustees' Powers Act (1964). Several are new, however, and other powers drawn from that Act have been updated. The powers enumerated in this section may be divided into categories. Certain powers, such as the powers to acquire or sell property, borrow money, and deal with real estate, securities, and business interests, are powers that any individual can exercise. Other powers, such as the power to collect trust property, are by their very nature only applicable to trustees. Other specific powers, particularly those listed in other sections of the Uniform Trust Code, modify a trustee duty that would otherwise apply. *See, e.g.*, Sections 802(h) (exceptions to duty of loyalty) and 810(d) (joint investments as exception to earmarking requirement).

Paragraph (1) authorizes a trustee to collect trust property and collect or decline additions to the trust property. The power to collect trust property is an incident of the trustee's duty to administer the trust as provided in Section 801. The trustee has a duty to enforce claims as provided in Section 811, the successful prosecution of which can result in collection of trust property. Pursuant to Section 812, the trustee also has a duty to collect trust property from a former trustee or other person holding trust property. For an application of the power to reject additions to the trust property, see Section 816(13) (power to decline property with possible environmental liability).

Paragraph (2) authorizes a trustee to sell trust property, for cash or on credit, at public or private sale. Under the Restatement, a power of sale is implied unless limited in the terms of the trust. Restatement (Third) of Trusts: Prudent Investor Rule § 190 (1992). In arranging a sale, a trustee must comply with the duty to act prudently as provided in Section 804. This duty may dictate that the sale be made with security.

Paragraph (4) authorizes a trustee to deposit funds in an account in a regulated financial-service institution. This includes the right of a financial

institution trustee to deposit funds in its own banking department as authorized by Section 802(h)(4).

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

Paragraph (6) authorizes the trustee to continue, contribute additional capital to, or change the form of a business. Any such decision by the trustee must be made in light of the standards of prudent investment stated in Article 9.

Paragraph (7), regarding powers with respect to securities, codifies and amplifies the principles of Restatement (Second) of Trusts § 193 (1959).

Paragraph (9), authorizing the leasing of property, negates the older view, reflected in Restatement (Second) of Trusts § 189 cmt. c (1959), that a trustee could not lease property beyond the duration of the trust. Whether a longer term lease is appropriate is judged by the standards of prudence applicable to all investments.

Paragraph (10), authorizing a trustee to grant options with respect to sales, leases or other dispositions of property, negates the older view, reflected in Restatement (Second) of Trusts § 190 cmt. k (1959), that a trustee could not grant another person an option to purchase trust property. Like any other investment decision, whether the granting of an option is appropriate is a question of prudence under the standards of Article 9.

Paragraph (11), authorizing a trustee to purchase insurance, empowers a trustee to implement the duty to protect trust property. *See* Section 809. The trustee may also insure beneficiaries, agents, and the trustee against liability, including liability for breach of trust.

Paragraph (13) is one of several provisions in the Uniform Trust Code designed to address trustee concerns about possible liability for violations of environmental law. This paragraph collects all the powers relating to environmental concerns in one place even though some of the powers, such as the powers to pay expenses, compromise claims, and decline property, overlap with other paragraphs of this section (decline property, paragraph (1); compromise claims, paragraph (14); pay expenses, paragraph (15)). Numerous States have legislated on the subject of environmental liability of fiduciaries. For a representative state statute, see Tex. Prop. Code Ann. § 113.025. *See also*

Sections 701(c)(2) (designated trustee may inspect property to determine potential violation of environmental or other law or for any purpose) and 1010(b) (trustee not personally liable for violation of environmental law arising from ownership or control of trust property).

Paragraph (14) authorizes a trustee to pay, contest, settle, or release claims. Section 811 requires that a trustee need take only "reasonable" steps to enforce claims, meaning that a trustee may release a claim not only when it is uncollectible, but also when collection would be uneconomic. *See* Restatement (Second) of Trusts § 192 (1959) (power to compromise, arbitrate and abandon claims).

Paragraph (15), among other things, authorizes a trustee to pay compensation to the trustee and agents without prior approval of court. Regarding the standard for setting trustee compensation, see Section 708. *See also* Section 709 (repayment of trustee expenditures). While prior court approval is not required, Section 813(b)(4) requires the trustee to inform the qualified beneficiaries in advance of a change in the method or rate of compensation.

Paragraph (16) authorizes a trustee to make elections with respect to taxes. The Uniform Trust Code leaves to other law the issue of whether the trustee, in making such elections, must make compensating adjustments in the beneficiaries' interests.

Paragraph (17) authorizes a trustee to take action with respect to employee benefit or retirement plans, or annuities or life insurance payable to the trustee. Typically, these will be beneficiary designations which the settlor has made payable to the trustee, but this Code also allows the trustee to acquire ownership of annuities or life insurance.

Paragraphs (18) and (19) allow a trustee to make loans to a beneficiary or to guarantee loans of a beneficiary upon such terms and conditions as the trustee considers fair and reasonable. The determination of what is fair and reasonable must be made in light of the fiduciary duties of the trustee and the purposes of the trust. Frequently, a trustee will make loans to a beneficiary which might be considered less than prudent in an ordinary commercial sense although of great benefit to the beneficiary and which help carry out the trust purposes. If the trustee requires security for the loan to the beneficiary, adequate security under this paragraph may consist of a charge on the beneficiary's interest in the trust. *See* Restatement (Second) of Trusts § 255 (1959). However, the interest of a beneficiary subject to a spendthrift restraint may not be pledged as security for a loan. *See* Section 502.

Paragraph (20) authorizes the appointment of ancillary trustees in jurisdictions in which the regularly appointed trustee is unable or unwilling to act. Normally, an ancillary trustee will be appointed only when there is a need to manage real estate located in another jurisdiction. This paragraph allows the regularly appointed trustee to select the ancillary trustee and to confer on the ancillary trustee such powers and duties as may be necessary. The appointment of ancillary trustees is a topic which a settlor may wish to address in the terms of the trust.

Paragraph (21) authorizes a trustee to make payments to another person for the use or benefit of a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated. Although an adult relative or other person receiving funds is required to spend it on the beneficiary's behalf, it is preferable that the trustee make the distribution to a person having more formal fiduciary responsibilities. For this reason, payment may be made to an adult relative only if the trustee does not know of a conservator, guardian, custodian, or custodial trustee capable of acting for the beneficiary.

Paragraph (22) authorizes a trustee to make non-pro-rata distributions and allocate particular assets in proportionate or disproportionate shares. This power provides needed flexibility and lessens the risk that a non-pro-rata distribution will be treated as a taxable sale.

Paragraph (23) authorizes a trustee to resolve disputes through mediation or arbitration. The drafters of this Code encourage the use of such alternate methods for resolving disputes. Arbitration is a form of nonjudicial settlement agreement authorized by Section 111. In representing beneficiaries and others in connection with arbitration or mediation, the representation principles of Article 3 may be applied. Settlors wishing to encourage use of alternate dispute resolution may draft to provide it. For sample language, see American Arbitration Association, Arbitration Rules for Wills and Trusts (1995).

Paragraph (24) authorizes a trustee to prosecute or defend an action. As to the propriety of reimbursement for attorney's fees and other expenses of an action or judicial proceeding, see Section 709 and Comment. *See also* Section 811 (duty to defend actions).

Paragraph (26), which is similar to Section 344 of the Restatement (Second) of Trusts (1959), clarifies that even though the trust has terminated, the trustee retains the powers needed to wind up the administration of the trust and distribute the remaining trust property.

Comment to Section 817
(Distribution Upon Termination)

This section contains several provisions governing distribution upon termination. Other provisions of the Uniform Trust Code relevant to distribution upon termination include Section 816(26) (powers upon termination to windup administration and distribution), and 1005 (limitation of action against trustee).

Subsection (a) is based on Section 3-906(b) of the Uniform Probate Code. It addresses the dilemma that sometimes arises when the trustee is reluctant to make distribution until the beneficiary approves but the beneficiary is reluctant to approve until the assets are in hand. The procedure made available under subsection (a) facilitates the making of non-pro-rata distributions. However, whenever practicable it is normally better practice to obtain the advance written consent of the beneficiaries to a proposed plan of distribution.

Subsection (b) recognizes that upon an event terminating or partially terminating a trust, expeditious distribution should be encouraged to the extent reasonable under the circumstances. However, a trustee is entitled to retain a reasonable reserve for payment of debts, expenses, and taxes. Sometimes these reserves must be quite large, for example, upon the death of the beneficiary of a QTIP trust that is subject to federal estate tax in the beneficiary's estate. Not infrequently, a substantial reserve must be retained until the estate tax audit is concluded several years after the beneficiary's death.

Subsection (c) is an application of Section 1009. Section 1009 addresses the validity of any type of release that a beneficiary might give. Subsection (c) is more limited, dealing only with releases given upon termination of the trust. Factors affecting the validity of a release include adequacy of disclosure, whether the beneficiary had a legal incapacity, and whether the trustee engaged in any improper conduct. *See* Restatement (Second) of Trusts § 216 (1959).

Article 9
Uniform Prudent Investor Act

General Comment

Because of the widespread adoption of the Uniform Prudent Investor Act, no effort has been made to disassemble and integrate the Uniform Prudent Investor Act into the Uniform Trust Code. States adopting the Uniform Trust Code that have previously enacted the Prudent Investor Act are encouraged to reenact their version of the Prudent Investor Act as Article 9 of the Uniform Trust Code. Reenacting the Uniform Prudent Investor Act as a unit will preserve

uniformity with States that have enacted the Uniform Prudent Investor Act in free-standing form.

The Uniform Prudent Investor Act prescribes a series of duties relevant to the *investment* and *management* of trust property. The Uniform Trust Code, Article 8 contains duties and powers of a trustee relevant to the *investment*, *administration*, and *distribution* of trust property. There is therefore significant overlap between Article 8 and the Prudent Investor Act. Where the Uniform Prudent Investor Act and Uniform Trust Code are duplicative, enacting jurisdictions are encouraged to enact the Uniform Prudent Investor Act in this article but *without* the provisions already addressed in Article 8 of the Uniform Trust Code. The duplicative provisions of the Uniform Prudent Investor Act and Article 8 of this Code are as follows:

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

Deleting these duplicative provisions leaves the following sections of the Uniform Prudent Investor Act for enactment in this article:

Section 1	Prudent Investor Rule
Section 2 (a)-(e)	Standard of Care; Portfolio Strategy; Risk and Return Objectives
Section 3	Diversification
Section 4	Duties at Inception of Trusteeship
Section 8	Reviewing Compliance
Section 10	Language Invoking Standard of [Act]

Article 10
Liability of Trustees and Rights of Persons Dealing with Trustee

General Comment

Sections 1001 through 1009 identify the remedies for breach of trust, describe how money damages are to be determined, and specify potential defenses. Section 1001 lists the remedies for breach of trust and specifies when a breach of trust occurs. A breach of trust occurs when the trustee breaches one of the duties contained in Article 8 or elsewhere in the Code. The remedies for

breach of trust in Section 1001 are broad and flexible. Section 1002 provides how money damages for breach of trust are to be determined. The standard for determining money damages rests on two principles: (1) the trust should be restored to the position it would have been in had the harm not occurred; and (2) the trustee should not be permitted to profit from the trustee's own wrong. Section 1003 holds a trustee accountable for profits made from the trust even in the absence of a breach of trust. Section 1004 reaffirms the court's power in equity to award costs and attorney's fees as justice requires.

Sections 1005 through 1009 deal with potential defenses. Section 1005 provides a statute of limitations on actions against a trustee. Section 1006 protects a trustee who acts in reasonable reliance on the terms of a written trust instrument. Section 1007 protects a trustee who has exercised reasonable care to ascertain the happening of events that might affect distribution, such as a beneficiary's marriage or death. Section 1008 describes the effect and limits on the use of an exculpatory clause. Section 1009 deals with the standards for recognizing beneficiary approval of acts of the trustee that might otherwise constitute a breach of trust.

Sections 1010 through 1013 address trustee relations with persons other than beneficiaries. The emphasis is on encouraging third parties to engage in commercial transactions to the same extent as if the property were not held in trust. Section 1010 negates personal liability on contracts entered into by the trustee if the fiduciary capacity was properly disclosed. The trustee is also relieved from liability for torts committed in the course of administration unless the trustee was personally at fault. Section 1011 negates personal liability for contracts entered into by partnerships in which the trustee is a general partner as long as the fiduciary capacity was disclosed in the contract or partnership certificate. Section 1012 protects persons other than beneficiaries who deal with a trustee in good faith and without knowledge that the trustee is exceeding or improperly exercising a power. Section 1013 permits a third party to rely on a certification of trust, thereby reducing the need for a third party to request a copy of the complete trust instrument.

Much of this article is not subject to override in the terms of the trust. The settlor may not limit the rights of persons other than beneficiaries as provided in Sections 1010 through 1013, nor interfere with the court's ability to take such action to remedy a breach of trust as my be necessary in the interests of justice. *See* Section 105.

Comment to Section 1001
(Remedies for Breach of Trust)

This section codifies the remedies available to rectify or to prevent a breach of trust for violation of a duty owed to a beneficiary. The duties that a trust might breach include those contained in Article 8 in addition to those specified elsewhere in the Code.

This section identifies the available remedies but does not attempt to cover the refinements and exceptions developed in case law. The availability of a remedy in a particular circumstance will be determined not only by this Code but also by the common law of trusts and principles of equity. *See* Section 106.

Beneficiaries and cotrustees have standing to bring a petition to remedy a breach of trust. Following a successor trustee's acceptance of office, a successor trustee has standing to sue a predecessor for breach of trust. *See* Restatement (Second) of Trusts § 200 (1959). A person who may represent a beneficiary's interest under Article 3 would have standing to bring a petition on behalf of the person represented. In the case of a charitable trust, those with standing include the state attorney general, a charitable organization expressly entitled to receive benefits under the terms of the trust, and other persons with a special interest. *See* Section 110 & Restatement (Second) of Trusts § 391 (1959). A person appointed to enforce a trust for an animal or a trust for a noncharitable purpose would have standing to sue for a breach of trust. *See* Sections 110(b), 408, 409.

Traditionally, remedies for breach of trust at law were limited to suits to enforce unconditional obligations to pay money or deliver chattels. *See* Restatement (Second) of Trusts § 198 (1959). Otherwise, remedies for breach of trust were exclusively equitable, and as such, punitive damages were not available and findings of fact were made by the judge and not a jury. *See* Restatement (Second) of Trusts § 197 (1959). The Uniform Trust Code does not preclude the possibility that a particular enacting jurisdiction might not follow these norms.

The remedies identified in this section are derived from Restatement (Second) of Trusts § 199 (1959). The reference to payment of money in subsection (b)(3) includes liability that might be characterized as damages, restitution, or surcharge. For the measure of liability, see Section 1002. Subsection (b)(5) makes explicit the court's authority to appoint a special fiduciary, also sometimes referred to as a receiver. *See* Restatement (Second) of Trusts § 199(d) (1959). The authority of the court to appoint a special fiduciary is not limited to actions alleging breach of trust but is available whenever the court, exercising its equitable jurisdiction, concludes that an appointment would promote administration of the trust. *See* Section 704(d) (special fiduciary may be

appointed whenever court considers such appointment necessary for administration).

Subsection (b)(8), which allows the court to reduce or deny compensation, is in accord with Restatement (Second) of Trusts § 243 (1959). For the factors to consider in setting a trustee's compensation absent breach of trust, see Section 708 and Comment. In deciding whether to reduce or deny a trustee compensation, the court may wish to consider (1) whether the trustee acted in good faith; (2) whether the breach of trust was intentional; (3) the nature of the breach and the extent of the loss; (4) whether the trustee has restored the loss; and (5) the value of the trustee's services to the trust. *See* Restatement (Second) of Trusts § 243 cmt. c (1959).

The authority under subsection (b)(9) to set aside wrongful acts of the trustee is a corollary of the power to enjoin a threatened breach as provided in subsection (b)(2). However, in setting aside the wrongful acts of the trustee the court may not impair the rights of bona fide purchasers protected under Section 1012. *See* Restatement (Second) of Trusts § 284 (1959).

Comment to Section 1002
(Damages for Breach of Trust)

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

For extensive commentary on the determination of damages, traditionally known as trustee surcharge, with numerous specific applications, see Restatement (Third) of Trusts: Prudent Investor Rule §§ 205-213 (1992). For the use of benchmark portfolios to determine damages, see Restatement (Third) of Trusts: Prudent Investor Rule Reporter's Notes to §§ 205 and 208-211 (1992). On the authority of a court of equity to reduce or excuse damages for breach of trust, see Restatement (Second) of Trusts § 205 cmt. g (1959).

For purposes of this section and Section 1003, "profit" does not include the trustee's compensation. A trustee who has committed a breach of trust is entitled to reasonable compensation for administering the trust unless the court reduces or denies the trustee compensation pursuant to Section 1001(b)(8).

Subsection (b) is based on Restatement (Second) of Trusts § 258 (1959). Cotrustees are jointly and severally liable for a breach of trust if there was joint participation in the breach. Joint and several liability also is imposed on a nonparticipating cotrustee who, as provided in Section 703(g), failed to exercise reasonable care (1) to prevent a cotrustee from committing a serious breach of trust, or (2) to compel a cotrustee to redress a serious breach of trust. Joint and several liability normally carries with it a right in any trustee to seek contribution from a cotrustee to the extent the trustee has paid more than the trustee's proportionate share of the liability. Subsection (b), consistent with Restatement (Second) of Trusts § 258 (1959), creates an exception. A trustee who was substantially more at fault or committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries is not entitled to contribution from the other trustees.

Determining degrees of comparative fault is a question of fact. The fact that one trustee was more culpable or more active than another does not necessarily establish that this trustee was substantially more at fault. Nor is a trustee substantially less at fault because the trustee did not actively participate in the breach. *See* Restatement (Second) of Trusts § 258 cmt. e (195). Among the factors to consider: (1) Did the trustee fraudulently induce the other trustee to join in the breach? (2) Did the trustee commit the breach intentionally while the other trustee was at most negligent? (3) Did the trustee, because of greater experience or expertise, control the actions of the other trustee? (4) Did the trustee alone commit the breach with liability imposed on the other trustee only because of an improper delegation or failure to properly monitor the actions of the cotrustee? *See* Restatement (Second) of Trusts § 258 cmt. d (1959).

Comment to Section 1003
(Damages in Absence of Breach)

The principle on which a trustee's duty of loyalty is premised is that a trustee should not be allowed to use the trust as a means for personal profit other than for routine compensation earned. While most instances of personal profit involve situations where the trustee has breached the duty of loyalty, not all cases of personal profit involve a breach of trust. Subsection (a), which holds a trustee accountable for any profit made, even absent a breach of trust, is based on Restatement (Second) of Trusts § 203 (1959). A typical example of a profit is receipt by the trustee of a commission or bonus from a third party for actions relating to the trust's administration. *See* Restatement (Second) of Trusts § 203 cmt. a (1959).

A trustee is not an insurer. Similar to Restatement (Second) of Trusts § 204 (1959), subsection (b) provides that absent a breach of trust a trustee is not

liable for a loss or depreciation in the value of the trust property or for failure to make a profit.

Comment to Section 1004
(Attorney's Fees and Costs)

This section, which is based on Massachusetts General Laws chapter 215, § 45, codifies the court's historic authority to award costs and fees, including reasonable attorney's fees, in judicial proceedings grounded in equity. The court may award a party its own fees and costs from the trust. The court may also charge a party's costs and fees against another party to the litigation. Generally, litigation expenses were at common law chargeable against another party only in the case of egregious conduct such as bad faith or fraud. With respect to a party's own fees, Section 709 authorizes a trustee to recover expenditures properly incurred in the administration of the trust. The court may award a beneficiary litigation costs if the litigation is deemed beneficial to the trust. Sometimes, litigation brought by a beneficiary involves an allegation that the trustee has committed a breach of trust. On other occasions, the suit by the beneficiary is brought because of the trustee's failure to take action against a third party, such as to recover property properly belonging to the trust. For the authority of a beneficiary to bring an action when the trustee fails to take action against a third party, see Restatement (Second) of Trusts §§ 281-282 (1959). For the case law on the award of attorney's fees and other litigation costs, see 3 Austin W. Scott & William F. Fratcher, The Law of Trusts §§ 188.4 (4th ed. 1988).

Comment to Section 1005
(Limitation of Action Against Trustee)

The one-year and five-year limitations periods under this section are not the only means for barring an action by a beneficiary. A beneficiary may be foreclosed by consent, release, or ratification as provided in Section 1009. Claims may also be barred by principles such as estoppel and laches arising in equity under the common law of trusts. *See* Section 106.

The representative referred to in subsection (a) is the person who may represent and bind a beneficiary as provided in Article 3. During the time that a trust is revocable and the settlor has capacity, the person holding the power to revoke is the one who must receive the report. *See* Section 603(a) (rights of settlor of revocable trust).

This section addresses only the issue of when the clock will start to run for purposes of the statute of limitations. If the trustee wishes to foreclose possible claims immediately, a consent to the report or other information may be obtained

pursuant to Section 1009. For the provisions relating to the duty to report to beneficiaries, see Section 813.

Subsection (a) applies only if the trustee has furnished a report. The one-year statute of limitations does not begin to run against a beneficiary who has waived the furnishing of a report as provided in Section 813(d).

Subsection (c) is intended to provide some ultimate repose for actions against a trustee. It applies to cases in which the trustee has failed to report to the beneficiaries or the report did not meet the disclosure requirements of subsection (b). It also applies to beneficiaries who did not receive notice of the report, whether personally or through representation. While the five-year limitations period will normally begin to run on termination of the trust, it can also begin earlier. If a trustee leaves office prior to the termination of the trust, the limitations period for actions against that particular trustee begins to run on the date the trustee leaves office. If a beneficiary receives a final distribution prior to the date the trust terminates, the limitations period for actions by that particular beneficiary begins to run on the date of final distribution.

If a trusteeship terminates by reason of death, a claim against the trustee's estate for breach of fiduciary duty would, like other claims against the trustee's estate, be barred by a probate creditor's claim statute even though the statutory period prescribed by this section has not yet expired.

This section does not specifically provide that the statutes of limitations under this section are tolled for fraud or other misdeeds, the drafters preferring to leave the resolution of this question to other law of the State.

Comment to Section 1006
(Reliance on Trust Instrument)

It sometimes happens that the intended terms of the trust differ from the apparent meaning of the trust instrument. This can occur because the court, in determining the terms of the trust, is allowed to consider evidence extrinsic to the trust instrument. *See* Section 103(17) (definition of "terms of a trust"). Furthermore, if a trust is reformed on account of mistake of fact or law, as authorized by Section 415, provisions of a trust instrument can be deleted or contradicted and provisions not in the trust instrument may be added. The concept of the "terms of a trust," both as defined in this Code and as used in the doctrine of reformation, is intended to effectuate the principle that a trust should be administered and distributed in accordance with the settlor's intent. However, a trustee should also be able to administer a trust with some dispatch and without concern that a reasonable reliance on the terms of the trust instrument is misplaced. This section protects a trustee who so relies on a trust instrument but

only to the extent the breach of trust resulted from such reliance. This section is similar to Section 1(b) of the Uniform Prudent Investor Act, which protects a trustee from liability to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

This section protects a trustee only if the trustee's reliance is reasonable. For example, a trustee's reliance on the trust instrument would not be justified if the trustee is aware of a prior court decree or binding nonjudicial settlement agreement clarifying or changing the terms of the trust.

Comment to Section 1007
(Event Affecting Administration or Distribution)

This section, which is based on Washington Revised Code § 11.98.100, is designed to encourage trustees to administer trusts expeditiously and without undue concern about liability for failure to ascertain external facts, often of a personal nature, that might affect administration or distribution of the trust. The common law, contrary to this section, imposed absolute liability against a trustee for misdelivery regardless of the trustee's level of care. *See* Restatement (Second) of Trusts § 226 (1959). The events listed in this section are not exclusive. A trustee who has exercised reasonable care to ascertain the occurrence of other events, such as the attainment by a beneficiary of a certain age, is also protected from liability.

Comment to Section 1008
(Exculpation of Trustee)

Even if the terms of the trust attempt to completely exculpate a trustee for the trustee's acts, the trustee must always comply with a certain minimum standard. As provided in subsection (a), a trustee must always act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. Subsection (a) is consistent with the standards expressed in Sections 105 and 814(a), which, similar to this section, place limits on the power of a settlor to negate trustee duties. This section is also similar to Section 222 of the Restatement (Second) of Trusts (1959), except that this Code, unlike the Restatement, allows a settlor to exculpate a trustee for a profit that the trustee made from the trust.

Subsection (b) disapproves of cases such as *Marsman v. Nasca*, 573 N.E.2d 1025 (Mass. App. Ct. 1991), which held that an exculpatory clause in a trust instrument drafted by the trustee was valid because the beneficiary could not prove that the clause was inserted as a result of an abuse of a fiduciary relationship. For a later case where sufficient proof of abuse was present, see *Rutanan v. Ballard*, 678 N.E.2d 133 (Mass. 1997). Subsection (b) responds to the

danger that the insertion of such a clause by the fiduciary or its agent may have been undisclosed or inadequately understood by the settlor. To overcome the presumption of abuse in subsection (b), the trustee must establish that the clause was fair and that its existence and contents were adequately communicated to the settlor. In determining whether the clause was fair, the court may wish to examine: (1) the extent of the prior relationship between the settlor and trustee; (2) whether the settlor received independent advice; (3) the sophistication of the settlor with respect to business and fiduciary matters; (4) the trustee's reasons for inserting the clause; and (5) the scope of the particular provision inserted. *See* Restatement (Second) of Trusts § 222 cmt. d (1959).

The requirements of subsection (b) are satisfied if the settlor was represented by independent counsel. If the settlor was represented by independent counsel, the settlor's attorney is considered the drafter of the instrument even if the attorney used the trustee's form. Because the settlor's attorney is an agent of the settlor, disclosure of an exculpatory term to the settlor's attorney is disclosure to the settlor.

Comment to Section 1009
(Beneficiary's Consent, Release, or Ratification)

This section is based on Sections 216 through 218 of the Restatement (Second) of Trusts (1959). A consent, release, or affirmance under this section may occur either before or after the approved conduct. This section requires an affirmative act by the beneficiary. A failure to object is not sufficient. *See* Restatement (Second) of Trusts § 216 cmt. a (1959). A consent is binding on a consenting beneficiary although other beneficiaries have not consented. *See* Restatement (Second) of Trusts § 216 cmt. g (1959). To constitute a valid consent, the beneficiary must know of the beneficiary's rights and of the material facts relating to the breach. *See* Restatement (Second) of Trusts § 216 cmt. k (1959). If the beneficiary's approval involves a self-dealing transaction, the approval is binding only if the transaction was fair and reasonable. *See* Restatement (Second) of Trusts §§ 170(2), 216(3) and cmt. n (1959).

An approval by the settlor of a revocable trust or by the holder of a presently exercisable power of withdrawal binds all the beneficiaries. *See* Section 603. A beneficiary is also bound to the extent an approval is given by a person authorized to represent the beneficiary as provided in Article 3.

2001 Amendment. By a 2001 amendment, the limitation of this section to beneficiaries "having capacity" was deleted. This limitation was included by mistake. As indicated in the second paragraph of the comment, the drafting committee did not intend to prohibit the use of the representation provisions of

Article 3, several of which address representation of and the giving of a binding consent on behalf of an incapacitated beneficiary.

Comment to Section 1010
(Limitation on Personal Liability of Trustee)

This section is based on Section 7-306 of the Uniform Probate Code. However, unlike the Uniform Probate Code, which requires that the contract both disclose the representative capacity and identify the trust, subsection (a) protects a trustee who reveals the fiduciary relationship either by indicating a signature as trustee or by simply referring to the trust. The protection afforded the trustee by this section applies only to contracts that are properly entered into in the trustee's fiduciary capacity, meaning that the trustee is exercising an available power and is not violating a duty. This section does not excuse any liability the trustee may have for breach of trust.

Subsection (b) addresses trustee liability arising from ownership or control of trust property and for torts occurring incident to the administration of the trust. Liability in such situations is imposed on the trustee personally only if the trustee was personally at fault, either intentionally or negligently. This is contrary to Restatement (Second) of Trusts § 264 (1959), which imposes liability on a trustee regardless of fault, including liability for acts of agents under respondeat superior. Responding to a particular concern of trustees, subsection (b) specifically protects a trustee from personal liability for violations of environmental law such as CERCLA (42 U.S.C. § 9607) or its state law counterparts, unless the trustee was personally at fault. *See also* Sections 701(c)(2) (nominated trustee may investigate trust property to determine potential violation of environmental law without having accepted trusteeship) and 816(13) (trustee powers with respect to possible liability for violation of environmental law).

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

Comment to Section 1011
(Interest as General Partner)

Section 1010 protects a trustee from personal liability on contracts that the trustee enters into on behalf of the trust. Section 1010 also absolves a trustee from liability for torts committed in administering the trust unless the trustee was personally at fault. It does not protect a trustee from personal liability for contracts entered into or torts committed by a general or limited partnership of which the trustee was a general partner. That is the purpose of this section, which is modeled after Ohio Revised Code § 1339.65. Subsection (a) protects the trustee from personal liability for such partnership obligations whether the trustee signed

the contract or it was signed by another general partner. Subsection (b) protects a trustee from personal liability for torts committed by the partnership unless the trustee was personally at fault. Protection from the partnership's contractual obligations is available under subsection (a) only if the other party is on notice of the fiduciary relationship, either in the contract itself or in the partnership certificate on file.

Special protection is not needed for other business interests that the trustee may own, such as an interest as a limited partner, a membership interest in an LLC, or an interest as a corporate shareholder. In these cases the nature of the entity or the interest owned by the trustee carries with it its own limitation on liability.

Certain exceptions apply. The section is not intended to be used as a device for individuals or their families to shield assets from creditor claims. Consequently, subsection (c) excludes from the protections provided by this section trustees who own an interest in the partnership in another capacity or if an interest is owned by the trustee's spouse or the trustee's descendants, siblings, parents, or the spouse of any of them.

Nor can a revocable trust be used as a device for avoiding claims against the partnership. Subsection (d) imposes personal liability on the settlor for partnership contracts and other obligations of the partnership the same as if the settlor were a general partner.

This section has been placed in brackets to alert enacting jurisdictions to consider modifying the section to conform it to the State's specific laws on partnerships and other forms of unincorporated businesses.

Comment to Section 1012
(Protection of Person Dealing with Trustee)

This section is derived from Section 7 of the Uniform Trustee Powers Act.

Subsection (a) protects two different classes; persons other than beneficiaries who assist a trustee with a transaction, and persons other than beneficiaries who deal with the trustee for value. As long as the assistance was provided or the transaction was entered into in good faith and without knowledge, third persons in either category are protected in the transaction even if the trustee was exceeding or improperly exercising the power. For the definition of "know," see Section 104. This Code does not define "good faith" for purposes of this and the next section. Defining good faith with reference to the definition used in the State's commercial statutes would be consistent with the purpose of this section,

which is to treat commercial transactions with trustees similar to other commercial transactions.

Subsection (b) confirms that a third party who is acting in good faith is not charged with a duty to inquire into the extent of a trustee's powers or the propriety of their exercise. The third party may assume that the trustee has the necessary power. Consequently, there is no need to request or examine a copy of the trust instrument. A third party who wishes assurance that the trustee has the necessary authority instead should request a certification of trust as provided in Section 1013. Subsection (b), and the comparable provisions enacted in numerous States, are intended to negate the rule, followed by some courts, that a third party is charged with constructive notice of the trust instrument and its contents. The cases are collected in George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 897 (Rev. 2d ed. 1995); and 4 Austin W. Scott & William F. Fratcher, The Law of Trusts § 297 (4th ed. 1989).

Subsection (c) protects any person, including a beneficiary, who in good faith delivers property to a trustee. The standard of protection in the Restatement is phrased differently although the result is similar. Under Restatement (Second) of Trusts § 321 (1959), the person delivering property to a trustee is liable if at the time of the delivery the person had notice that the trustee was misapplying or intending to misapply the property.

Subsection (d) extends the protections afforded by the section to assistance provided to or dealings for value with a former trustee. The third party is protected the same as if the former trustee still held the office.

Subsection (e) clarifies that a statute relating to commercial transactions controls whenever both it and this section could apply to a transaction. Consequently, the protections provided by this section are superseded by comparable protective provisions of these other laws. The principal statutes in question are the various articles of the Uniform Commercial Code, including Article 8 on the transfer of securities, as well as the Uniform Simplification of Fiduciary Securities Transfer Act.

Comment to Section 1013
(Certification of Trust)

This section, derived from California Probate Code § 18100.5, is designed to protect the privacy of a trust instrument by discouraging requests from persons other than beneficiaries for complete copies of the instrument in order to verify a trustee's authority. Even absent this section, such requests are usually unnecessary. Pursuant to Section 1012(b), a third person proceeding in good faith

is not required to inquire into the extent of the trustee's powers or the propriety of their exercise. This section adds another layer of protection.

Third persons frequently insist on receiving a copy of the complete trust instrument solely to verify a specific and narrow authority of the trustee to engage in a particular transaction. While a testamentary trust, because it is created under a will, is a matter of public record, an inter vivos trust instrument is private. Such privacy is compromised, however, if the trust instrument must be distributed to third persons. A certification of trust is a document signed by a currently acting trustee that may include excerpts from the trust instrument necessary to facilitate the particular transaction. A certification provides the third party with an assurance of authority without having to disclose the trust's dispositive provisions. Nor is there a need for third persons who may already have a copy of the instrument to pry into its provisions. Persons acting in reliance on a certification may assume the truth of the certification even if they have a complete copy of the trust instrument in their possession.

Subsections (a) through (c) specify the required contents of a certification. Subsection (d) clarifies that the certification need not include the trust's dispositive terms. A certification, however, normally will contain the administrative terms of the trust relevant to the transaction. Subsection (e) provides that the third party may make this a condition of acceptance. Subsections (f) and (g) protect a third party who relies on the certification. The third party may assume that the certification is true, and is not charged with constructive knowledge of the terms of the trust instrument even if the third party has a copy.

To encourage compliance with this section, a person demanding a trust instrument after already being offered a certification may be liable under subsection (h) for damages if the refusal to accept the certification is determined not to have been in good faith. A person acting in good faith would include a person required to examine a complete copy of the trust instrument pursuant to due diligence standards or as required by other law. Examples of such due diligence and legal requirements include (1) in connection with transactions to be executed in the capital markets where documentary standards have been established in connection with underwriting concerns; (2) to satisfy documentary requirements established by state or local government or regulatory agency; (3) to satisfy documentary requirements established by a state or local government or regulatory agency; and (4) where the insurance rates or premiums or other expenses of the party would be higher absent the availability of the documentation.

The Uniform Trust Code leaves to other law the issue of how damages for a bad faith refusal are to be computed and whether attorney's fees might be

recoverable. For a discussion of the meaning of "good faith," see Section 1012 Comment.

Article 11
Miscellaneous Provisions

Comment to Section 1102
(Electronic Records and Signatures)

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 Code does not require that any document be in paper form, allowing all documents under this Code to be transmitted in electronic form. A properly directed electronic message is a valid method of notice under the Code as long as it is reasonably suitable under the circumstances and likely to result in receipt of the notice or document. *See* Section 109(a).

Comment to Section 1105
(Repeals)

For the reasons why the above Uniform Acts should be repealed upon enactment of the Uniform Trust Code, see the Prefatory Note. Enacting jurisdictions that have not enacted one or more of the specified Uniform Acts should repeal their comparable legislation. Because of the comprehensive scope of the Uniform Trust Code, many States will have trust provisions not based on any Uniform Act that will need to be repealed upon enactment of this Code. This section does not attempt to list the types of conforming amendments, whether in the enacting State's probate code or elsewhere, that need to be made upon enactment of this Code.

Comment to Section 1106
(Application to Existing Relationships)

The Uniform Trust Code is intended to have the widest possible effect within constitutional limitations. Specifically, the Code applies to all trusts whenever created, to judicial proceedings concerning trusts commenced on or after its effective date, and unless the court otherwise orders, to judicial proceedings in progress on the effective date. In addition, any rules of construction or presumption provided in the Code apply to preexisting trusts

unless there is a clear indication of a contrary intent in the trust's terms. By applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen.

This Code cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this Code. Nor is an act done before the effective date of the Code affected by the Code's enactment.

The Uniform Trust Code contains an additional effective date provision. Pursuant to Section 602(a), prior law will determine whether a trust executed prior to the effective date of the Code is presumed to be revocable or irrevocable. For a comparable uniform law effective date provision, see Uniform Probate Code § 8-101.

UNIFORM TRUST CODE TECHNICAL AMENDMENTS[8]

These following amendments, including preliminary comments, were approved and adopted by the Executive Committee of the National Conference of Commissioners on Uniform State Laws at the 2003 annual meeting.

SECTION 105. DEFAULT AND MANDATORY RULES.

* * *

(b) The terms of a trust prevail over any provision of this [Code] except:

* * *

(8) ~~except for a qualified beneficiary who has not attained 25 years of age,~~ the duty under Section 813(b)(2) and (3) to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports;

* * *

Preliminary Comments

The presence of two "excepts" in the same sentence, the first in the introductory language to subsection (b) and the second at the beginning of subsection (b)(8), has caused considerable confusion. Three of the five states that have enacted the UTC to date have rewritten (b)(8) to eliminate the second "except." The above amendment follows the lead of these states. There is no change in meaning.

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SECTION 411. MODIFICATION OR TERMINATION OF NONCHARITABLE IRREVOCABLE TRUST BY CONSENT.

(a) A noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust. A settlor's power to consent to a trust's modification or termination may be exercised by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust; by the settlor's [conservator] with the approval of the court supervising the [conservatorship] if an agent is not so authorized; or by the settlor's [guardian] with the approval of the court supervising the [guardianship] if an agent is not so authorized and a conservator has not been appointed.

Preliminary Comments

The amendment, which adds the language "modification or" to subsection (a), fixes an inadvertent omission. It was the intent of the drafting committee that a representative of the settlor be able to participate not only in a decision to terminate a trust but also in a decision to modify it.

SECTION 602. REVOCATION OR AMENDMENT OF REVOCABLE TRUST.

* * *

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

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

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

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

* * *

Preliminary Comments

The amendment, which adds a new subsection (b)(3), requires that in the case of a joint trust that is revoked or amended by fewer than all of its settlors, that the trustee must give prompt notice of the change to the other settlors. This new subsection is a substitute for Section 603(b), which is repealed by this amendment.

SECTION 603. SETTLOR'S POWERS; POWERS OF WITHDRAWAL.

* * *

(b) ~~If a revocable trust has more than one settlor, the duties of the trustee are owed to all of the settlors having capacity to revoke the trust.~~

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

Preliminary Comments

The purpose of subsection (b), which is being repealed, was to make certain that upon revocation of amendment of a joint trust by fewer than all of its settlors, that the trustee would notify the nonparticipating settlor or settlors. Explaining how subsection (b) achieved this result, however, required considerable verbiage in the comments. Also, subsection (b) imposed other duties on the trustee. The drafter's original intent is restored, and in a much clearer form, by repealing subsection (b) of this section, and by adding language to Section 602 that states explicitly what subsection (b) was trying to achieve.

SECTION 802. DUTY OF LOYALTY.

* * *

(f) An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment complies with the prudent investor rule of [Article] 9. In addition to its compensation for acting as trustee, ~~The~~ the trustee may be compensated by

the investment company or investment trust for providing those services out of fees charged to the trust. If the trustee receives compensation from the investment company or investment trust for providing investment advisory or investment management services, ~~if~~ the trustee must at least annually ~~notifies~~ notify the persons entitled under Section 813 to receive a copy of the trustee's annual report of the rate and method by which ~~the~~ that compensation was determined.

* * *

Preliminary Comments

This amendment revises subsection (f) to clarify that compensation received from a mutual fund for providing services to the fund is in addition to the trustee's regular compensation. It also clarifies that the trustee obligation to notify certain of the beneficiaries of compensation received from the fund applies only to compensation received for providing investment management or advisory services. The amendment conforms subsection (f) to the drafters' original intent.

SECTION 815. GENERAL POWERS OF TRUSTEE.

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

(1) powers conferred by the terms of the trust; ~~or~~ and

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

* * *

Preliminary Comments

This amendment corrects an inadvertent style glitch. As the comments to this section make clear, the drafters intended that the trustee have both the powers stated in the terms of the trust and the powers specified in this Act, not that they be alternatives.

OTHER PROPOSED AMENDMENTS TO TITLE 20

§ 908. Appeals.

(a) When allowed.--Any party in interest seeking to challenge the probate of a will or who is otherwise aggrieved by a decree of the register, or a fiduciary whose estate or trust is so aggrieved, may appeal therefrom to the court within one year of the decree: Provided, That the executor designated in an instrument shall not by virtue of such designation be deemed a party in interest who may appeal from a decree refusing probate of it. The court, upon petition of a party in interest, may limit the time for appeal to three months.

* * *

Comment: The addition of the phrase "seeking to challenge the probate of a will" in subsection (a) is designed to preserve the intent of the original enactments of this section and § 3138, which was to provide parties in interest with a way to challenge a will that had already been probated by the register, including the ability to offer a later will or codicil even though the period for the register to amend the record under § 3138 has expired. The assertion in footnote five of *In re Estate of Peles*, 739 A.2d 1071, 1074 (Pa. Super. Ct. 1999) that this section "does not govern the time period in which to submit a later codicil for probate" was inconsistent with the intent of this section and § 3138, which set forth alternative and not exclusionary procedures. It brought an unintended result in *Schrader Will*, 21 Fiduc. Rep. 2d 197-98 (Orphans' Ct. Div., Bradford Ct. Com. Pl. 2001). Therefore, the addition of the phrase is intended explicitly to overrule the holding in *Schrader Will* regarding such interpretation of this section. Section 3138 was originally enacted as an additional remedy to the process under § 908. A petitioner who seeks to amend or challenge a probated will may under § 3138 submit a later will or codicil directly to the register within three months of the testator's

death. If the petitioner cannot meet the three-month deadline, the later will or codicil may still be admitted if the one-year statute of limitations period under § 908 has not yet expired.

§ 3534.1. Cost of distribution of tangible personal property.

Except as otherwise provided in the will, if any, the personal representative shall pay as an expense of administration the reasonable expenses of storage, insurance, packing and delivery of tangible personal property to a beneficiary.

Comment: Because practice varies across the Commonwealth, the intent of this section is to provide uniformity regarding the distribution of tangible personal property to a beneficiary.

§ 3543. [Interest or income] Income on distributive shares.

(a) Pecuniary legacy.--A pecuniary legacy bequeathed in trust shall [bear interest] be entitled to income at the rate of 5% per annum from the death of the decedent until the payment of the legacy, and when not in trust [shall bear interest at the rate of 5% per annum] from one year after the death of the decedent until the payment of the legacy.

(b) Specific legacy or devise.--A specific legatee or devisee shall be entitled to the net income from property given to him accrued from the date of the death of the decedent.

(c) Demonstrative legacy.--A demonstrative legacy shall [bear interest] be entitled to income from the death of the decedent until the payment of the legacy at the rate earned by the property out of which it is primarily payable, and to the extent that it is not paid from that source, [shall bear interest] at the rate of 5% per

annum from one year after the death of the decedent until the payment of the legacy.

(d) Residuary legacy or devise.--All income from real and personal estate earned during the period of administration and not payable to others pursuant to the governing instrument or this section shall be distributed pro rata among the income beneficiaries of any trust created out of the residuary estate and the other persons entitled to the residuary estate.

(e) Future date.--A legacy payable at a future date, unless earlier set aside as a separate trust, shall not begin to bear [interest or] income until three months after the date fixed for payment or delivery.

(f) Relationship.--[Interest or income] Income shall be paid on distributive shares with no distinction because of the relationship of the distributee to the decedent.

(g) Testamentary provisions.--All rules set forth in this section are subject to the provisions of the decedent's will.

> **Comment: The term "interest" is replaced with "income" to reflect the rule under this section and § 7799 (formerly 20 Pa.C.S. § 7187) that payments under such provisions constitute a first charge against earned income and, consequently, carry out distributable net income (DNI) as a tier one distribution. Computation at the fixed rate of 5% is retained for simplicity in place of the proration of income suggested by the Uniform Principal and Income Act. Under § 8121(2), if income is insufficient to make the 5% payment, the deficiency is made up from principal.**

§ 7503. Application of chapter.

* * *

(b) Exclusion.--This chapter shall not apply to:

(1) Any trust during the time that the trust is revocable or amendable by its settlor.

(2) A spouse of a decedent or settlor where the spouse is the trustee of a testamentary or inter vivos trust for which a marital deduction has been allowed.

[(3) A trustee who possesses in his individual capacity an unlimited right to withdraw the entire principal of the trust or has a general testamentary power of appointment over the entire principal of the trust.]

(4) A trust under a governing instrument that by specific reference expressly rejects the application of this chapter.

[(5) A trust created under a governing instrument executed on or before March 21, 1999, if no part of the principal of the trust would be included in the gross estate of the trustee for Federal estate tax purposes if the trustee had died on March 21, 1999, without having exercised the power under the governing instrument to make discretionary distributions of principal or income to or for the benefit of the trustee, the trustee's estate or the creditors of either.]

§ 7504. Certain trustee powers not exercisable.

* * *

(c) Exceptions.--This section shall not apply to:

(1) A trustee who possesses in his individual capacity an unlimited right to withdraw the entire principal of the trust or has a general testamentary power of appointment over the entire principal of the trust.

(2) A trust created under a governing instrument executed on or before March 21, 1999, if no part of the principal of the trust would have been included in the gross estate of the trustee for Federal estate tax purposes if the trustee had died on March 21, 1999, without having exercised the power under the governing instrument to make discretionary distributions of principal or income to or for the benefit of the trustee, the trustee's estate or the creditors of either.

Comment: Subsection (c)(1) and (2) are identical to former § 7503(b)(3) and (5) (relating to application of chapter). Because the exceptions do not apply to the entire chapter, they were moved from § 7503 and placed in subsection (c).

§ 7506. Certain powers of beneficiaries not exercisable.

(a) General rule.--No beneficiary of a trust in an individual, trustee or other capacity may appoint himself or herself as trustee or remove a trustee and appoint in place of the trustee so removed a trustee who is related or subordinate to the beneficiary within the meaning of section 672(c) of the Internal Revenue Code of

1986 (Public Law 99-514, 26 U.S.C. § 672(c) [(relating to definitions and rules]) in each case unless:

(1) the trustee's discretionary power to make distributions to or for the beneficiary is limited by an ascertainable standard relating to the beneficiary's health, education, support or maintenance within the meaning of sections 2041 and 2514 of the Internal Revenue Code of 1986 (26 U.S.C. §§ 2041 [(relating to powers of appointment)] and 2514 [(relating to powers of appointment]);

(2) the trustee's discretionary power may not be exercised to satisfy any of the beneficiary's legal obligations for support or other purposes; and

(3) the trustee's discretionary power may not be exercised to grant to the beneficiary a general power to appoint property of the trust to the beneficiary, the beneficiary's estate or the creditors [thereof] of either within the meaning of section 2041 of the Internal Revenue Code of 1986 (26 U.S.C. § 2041).

(b) [Exception] Exceptions.--This section shall not apply:

(1) if the appointment of the trustee by the beneficiary may be made only in conjunction with another person having a substantial interest in the property of the trust subject to the power which is adverse to the exercise of the power in favor of the beneficiary within the meaning of section 2041(b)(1)(C)(ii) (26 U.S.C. § 2041(b)(1)(C)(ii)) or the appointment is in conformity with a procedure governing appointments approved by the court before December 21, 1998[.];

(2) to any beneficiary who possesses in an individual capacity an unlimited right to withdraw the entire principal of the trust or has a general testamentary power of appointment over the entire principal of the trust; or

(3) to a trust created under a governing instrument executed on or before March 21, 1999, if no part of the principal of the trust would have been included in the gross estate of the beneficiary for Federal estate tax purposes if the beneficiary had died on March 21, 1999.

Comment: Subsection (b)(2) and (3) are derived from former § 7503(b)(3) and (5). Because the exceptions do not apply to the entire chapter, they were moved from § 7503, placed in subsection (b) and amended for technical purposes.

§ 8102. Definitions.

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

* * *

"Principal." Property held in trust for distribution to a remainder beneficiary when the trust terminates or property held in trust in perpetuity.

* * *

"Sui juris beneficiary." Includes:

(1) a court-appointed guardian of an incapacitated beneficiary;

(2) an agent for an incompetent beneficiary; and

(3) a court-appointed guardian of a minor beneficiary's estate [or, if none, the parents of the minor beneficiary].

* * *

<u>Comment</u>: The addition of the phrase "or property held in trust in perpetuity" in the definition of principal is intended to carry over the concept found in former Chapter 81, added June 30, 1972, P.L.508, No.164 and repealed May 16, 2002, P.L.330, No.50, that the Pennsylvania Uniform Principal and Income Act, including the power to adjust under § 8104, is applicable to perpetual charitable trusts. The deletion of the phrase "or, if none, the parents of the minor beneficiary" in paragraph (3) of the definition of sui juris beneficiary is intended to make clear that under § 8105, a parent does not represent a minor for purposes of determining whether a court proceeding is required to convert a trust to a unitrust.

§ 8105. Power to convert to unitrust.

(a) Conversion.--Unless expressly prohibited by the governing instrument, a trustee may release the power under section 8104 (relating to trustee's power to adjust) and convert a trust into a unitrust as described in this section if all of the following apply:

* * *

(2) The trustee gives written notice of the trustee's intention to release the power to adjust and to convert the trust into a unitrust and of how the unitrust will operate, including what initial decisions the trustee will make under this section, to all the sui juris beneficiaries who:

(i) are currently eligible to receive income from the trust; [and]

(ii) would be eligible to receive, if no powers of appointment were exercised, income from the trust if the interest of all those eligible to receive income under subparagraph (i) were to terminate immediately prior to the giving of notice; and

(iii) would receive, if no powers of appointment were exercised, a distribution of principal if the trust were to terminate immediately prior to the giving of notice.

(3) There is at least one sui juris beneficiary under paragraph (2)(i) and at least one sui juris beneficiary under either paragraph (2)(ii) or (iii).

* * *

Comment: The notice requirement prior to conversion to a unitrust includes life tenants and remaindermen under subsection (a)(2)(i) and (iii). Subsection (a)(2)(ii) includes secondary life tenants in a case where the trust contains succeeding life estates (for example, "pay income for life to A, then pay income for life to B, then pay the principal to C") and makes it clear that the group of successor income beneficiaries must receive notice. Under subsection (a)(3), there needs to be at least one sui juris beneficiary under either subsection (a)(2)(ii) or (iii), but not necessarily both, to avoid the requirement of court approval of the conversion.

TRANSITIONAL PROVISIONS FOR OTHER PROPOSED AMENDMENTS TO TITLE 20

APPLICABILITY

The addition of 20 Pa.C.S. § 3534.1 shall apply to the estates of decedents who die on or after the effective date of this paragraph.

EFFECTIVE DATES

The following provisions shall take effect in 60 days:

(i) The amendment of 20 Pa.C.S. § 908(a).

(ii) The addition of 20 Pa.C.S. § 3534.1.

(iii) The amendment of 20 Pa.C.S. § 3543.

(iv) The amendment of 20 Pa.C.S. § 7503(b).

(v) The addition of 20 Pa.C.S. § 7504(c).

(vi) The amendment of 20 Pa.C.S. § 7506.

(vii) The amendment of the definitions of "principal" and "sui juris beneficiary" in 20 Pa.C.S. § 8102.

(viii) The amendment of 20 Pa.C.S. § 8105(a)(2).