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*** Current through the 2012 Regular Session ***
Annotations current through January 25, 2013 for the Tennessee Supreme Court

Title 35 Fiduciaries And Trust Estates
Chapter 15 Tennessee Uniform Trust Code
Part 1 General Provisions and Definitions

GO TO THE TENNESSEE ANNOTATED STATUTES ARCHIVE DIRECTORY

Tenn. Code Ann. § 35-15-101 (2012)

35-15-101. Short title.

This chapter shall be known and may be cited as the "Tennessee Uniform Trust Code."

HISTORY: Acts 2004, ch. 537, § 2.

NOTES: Compiler's Notes.

Acts 2004, ch. 537, § 95 provided that the Tennessee Code Commission is requested to publish in the Tennessee Code Annotated the revised official comments that are filed with the executive secretary of the Tennessee Code Commission within 30 days of July 1, 2004.

Law Reviews.

Can't Trust a Trust? Decant (Dan W. Holbrook), 40 No. 8 *Tenn. B.J.* 20 (2004).

Exploring the Tennessee Uniform Trust Code (C. Shawn O'Donnell), 38 *U. Mem. L. Rev.* 489 (2008).

Tennessee Uniform Trust Code: New Formulation for a Trusty Tool (Marshall H. Peterson), 41 No. 1 *Tenn. B.J.* 24 (2005).

Comparative Legislation.

Uniform Trust Code:

Ala. Code § 19-3B-101 et seq.

Ark. Code § 1/228-73-101 et seq.

Mo. Rev. Stat. § 456.1-101 et seq.

N.C. Gen. Stat. § 36C-1-101 et seq.

Va. Code § 55-541.01 et seq.

LexisNexis 50 State Surveys, Legislation & Regulations

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Cited:

Manning v. Snyder, -- S.W.3d --, 2009 Tenn. App. LEXIS 120 (Tenn. Ct. App. Mar. 26, 2009); *Duke v. Simmons*, -- S.W.3d --, 2009 Tenn. App. LEXIS 174 (Tenn. Ct. App. Apr. 30, 2009); *Acree v. Acree*, -- S.W.3d --, 2012 Tenn. App. LEXIS 808 (Tenn. Ct. App. Nov. 20, 2012).

Collateral References.

Trusts 3.

COMMENTS TO OFFICIAL TEXT

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 [*T.C.A. § 35-15-105*], a drafter is free to override a substantial majority of the Code's provisions. The exceptions are scheduled in subsection 105(b) [*T.C.A. § 35-15-105(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) [*T.C.A. § 35-15-105*], the inclusion of a comprehensive part on representation of beneficiaries (part 3) [*T.C.A. § 35-15-301 -- 35-15-305*], rules on trust modification and termination that will enhance flexibility (sections 410-417) [*T.C.A. §§ 35-15-410 -- 35-15-417*], and the inclusion of a part collecting the special rules pertaining to revocable trusts (part 6) [*T.C.A. §§ 35-15-601 -- 35-15-604*].

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 (§§ 15000 et seq.), which was used by the drafting committee as its initial model.

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 (UPC) Article VII. Originally approved in 1969, Article VII has been enacted in about fifteen (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 part 2 [*T.C.A. §§ 35-15-201 -- 35-15-204*] of the Code, and its provision on trustee liability to persons other than beneficiaries are replaced by section 1010 [*T.C.A. § 35-15-1010*].

Uniform Prudent Investor Act (1994) [*T.C.A. §§ 35-11-101 et seq.*]. This Act has been enacted in thirty-five (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 part 9 [*T.C.A. § 35-15-901*].

Uniform Trustee Powers Act (1964). This Act has been enacted in sixteen (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 [*T.C.A. §§ 35-15-815, 35-15-816, and 35-15-1012*]. 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 (6) 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 [*T.C.A. §§ 35-4-101 et seq.*]. Originally approved in 1938, this Act has been enacted in thirty-four (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 subsection 802(f) [*T.C.A. § 35-15-802(f)* now repealed].

Uniform Custodial Trust Act (1987). This Act has been enacted in fourteen (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) [*T.C.A. § 35-10-101 et seq.*]. This Act has been enacted in forty-seven (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) [*T.C.A. § 35-6-101 et seq.*]. 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 Tennessee Uniform Trust Code or as part of its probate laws.

Uniform Statutory Rule Against Perpetuities. Originally approved in 1986, this Act has been enacted in twenty-seven (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 twenty four (24) enactments; and the 1991 Act, with twenty (20) enactments through 1999. As its name suggests, this Act validates pour-over 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 eleven (11) parts. The substance of the Code is focused in the first ten (10) parts; part 11 is primarily an effective date provision.

Part 1. General Provisions and Definitions.

In addition to definitions, this part 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 Tennessee Uniform Trust 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.

Part 2. Judicial Proceedings.

This part addresses selected issues involving judicial proceedings concerning trusts, particularly trusts having contacts with more than one (1) 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 part 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.

Part 3. Representation.

This part 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 part 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 part 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.

Part 4. Creation, Validity, Modification and Termination of Trust.

This part specifies the requirements for creating, modifying and terminating trusts. Most of the requirements relating to creation of trusts (sections 401 through 409 [*T.C.A. §§ 35-15-401 -- 35-15-409*]) 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 Tennessee Uniform Trust 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 [*T.C.A. §§ 35-15-410 -- 35-15-417*] 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.

Part 5. Creditor's Claims; Spendthrift and Discretionary Trusts.

This part 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 part 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.

Part 6. Revocable Trusts.

This short part deals with issues of significance not totally settled under current law. The basic policy of this part and of the Uniform Trust Code in general is to treat the revocable trust as the functional equivalent of a will. The part 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.

Part 7. Office of Trustee.

This part 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 (1) 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.

Part 8. Duties and Powers of Trustee.

This part 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 part 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 part also addresses a trustee's duties regarding distributions to beneficiaries.

Part 9. Uniform Prudent Investor Act.

This part 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 part.

Part 10. Liability of Trustees and Rights of Persons Dealing With Trustees.

Sections 1001 through 1009 [*T.C.A. §§ 35-15-1001 -- 35-15-1009*] 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 [*T.C.A. §§ 35-15-1010 -- 35-15-1013*] 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.

Part 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.

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 subsection 105(b) [*T.C.A. § 35-15-105(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 part specifies the scope of the Code (section 102) [*T.C.A. § 35-15-102*], provides definitions (section 103) [*T.C.A. § 35-15-103*], and collects provisions of importance not amenable to codification elsewhere in the Uniform Trust Code. Sections 106 and 107 [*T.C.A. §§ 35-15-106 and 35-15-107*] focus on the sources of law that will govern a trust. Section 106 [*T.C.A. § 35-15-106*] 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 [*T.C.A. § 35-15-107*] 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 [*T.C.A. § 35-15-108*]. The trustee, following notice to the "qualified beneficiaries," defined in subdivision 103(12) [*T.C.A. § 35-15-103(13)*], 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 [*T.C.A. §§ 35-15-104, and 35-15-109 -- 35-15-111*] address procedural issues. Section 104 [*T.C.A. § 35-15-104*] specifies when persons, particularly persons who work in organizations, are deemed to have acquired knowledge of a fact. Section 109 [*T.C.A. § 35-15-109*] 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 [*T.C.A. § 35-15-110*] 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 [which provisions were not adopted in Tennessee].

Section 111 [*T.C.A. § 35-15-111*] 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 [*T.C.A. § 35-15-112*] 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.



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GO TO THE TENNESSEE ANNOTATED STATUTES ARCHIVE DIRECTORY

Tenn. Code Ann. § 35-15-102 (2012)

35-15-102. Scope.

This chapter 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.

HISTORY: Acts 2004, ch. 537, § 3.

NOTES:

COMMENTS TO OFFICIAL TEXT

Section Comment.

The Tennessee 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 [§§ 35-15-401 and 35-15-402]. The Tennessee Uniform Trust 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 Tennessee 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 Tennessee Uniform Trust 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).

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Tenn. Code Ann. § 35-15-103 (2012)

35-15-103. Chapter definitions.

As used in this chapter, unless the context otherwise requires:

- (1) "Action" with respect to an act of a trustee, includes a failure to act;
- (2) "Ascertainable standard" means a standard relating to an individual's health, education, support or maintenance within the meaning of § 2041(b)(1)(A) or § 2514(c)(1) of the Internal Revenue Code of 1986, as in effect on July 1, 2004, or as later amended;
- (3) "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;
- (4) "Charitable trust" means a trust, or portion of a trust, created for a charitable purpose described in § 35-15-405(a);
- (5) "Conservator" has the same meaning as in § 34-1-101;
- (6) "Environmental law" means a federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment;
- (7) "Guardian" has the same meaning as in § 34-1-101. The term does not include a guardian ad litem;
- (8) "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust;
- (9) "Jurisdiction" with respect to a geographic area, includes a state or country;
- (10) "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;
- (11) "Power of withdrawal" means a presently exercisable general power of appointment other than a power:
 - (A) Exercisable by a trustee and limited by an ascertainable standard; or
 - (B) Exercisable by another person only upon consent of the trustee or a person holding an adverse interest;

(12) "Property" means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein;

(13) "Qualified beneficiary" means a beneficiary who, assuming the nonexercise of all powers of appointment and the nonoccurrence of any event not reasonably expected to occur, 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 subdivision (12)(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;

(14) "Revocable" as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest;

(15) "Settlor" means a person, including a testator, who creates, or contributes property to, a trust. If more than one (1) 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;

(16) "Spendthrift provision" means a term of a trust which restrains both voluntary and involuntary transfer of a beneficiary's interest;

(17) "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;

(18) "Successors in interest" means 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 at law;

(19) "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;

(20) "Trust instrument" means an instrument executed by the settlor that contains terms of the trust, including any amendments thereto; and

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

HISTORY: Acts 2004, ch. 537, § 4; 2007, ch. 24, §§ 1-3; 2007, ch. 477, § 1.

NOTES: Amendments.

The 2007 amendment by ch. 24 added the definition of "ascertainable standard"; in the definition of "power of withdrawal", deleted "exercisable only upon consent of the trustee or a person holding an adverse interest" at the end of the introductory paragraph and added (A) and (B); and inserted "assuming the nonexercise of all powers of appointment and the nonoccurrence of any event not reasonably expected to occur" in the definition of "Qualified beneficiary".

The 2007 amendment by ch. 477 amended the definition of "power of withdrawal", as added by Acts 2007, ch. 24, by adding "upon consent of the trustee or a person holding an adverse interest" to the end.

Effective Dates.

Acts 2007, ch. 24, § 35. April 12, 2007.

Acts 2007, ch. 477, § 2. June 21, 2007.

Section to Section References.

This section is referred to in §§ 32-3-113, 35-6-108, 35-15-108, 35-15-708.

COMMENTS TO OFFICIAL TEXT

Section Comment.

A definition of "action" (subdivision (1) [§ 35-15-103(1)]) is included for drafting convenience, to avoid having to clarify in the numerous places in the Tennessee Uniform Trust Code where reference is made to an "action" by the trustee that the term includes a failure to act.

"Beneficiary" (subdivision (3)) [T.C.A. § 35-15-103(3)] refers only to a beneficiary of a trust as defined in the Tennessee Uniform Trust Code. In addition to living and ascertained individuals, beneficiaries may be unborn or unascertained. Pursuant to section 402(b) [T.C.A. § 35-15-402(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 Tennessee 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 Tennessee Uniform Trust 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 Tennessee Uniform Trust Code elsewhere makes distinctions among types of powers. Under Section 302 [T.C.A. § 35-15-302], the holder of a testamentary general power of appointment may represent and bind persons whose interests are subject to the power. A "power of withdrawal" (subdivision (10) [§ 35-15-103(11)]) is defined as a presently exercisable general power of appointment other than a power exercisable by a trustee and limited by an ascertainable standard, or a power which is exercisable by another person only upon consent of the trustee or a person holding an adverse interest. The exception for a power exercisable by a trustee that is limited by an ascertainable standard was added in 2007. For a discussion of this amendment, see the comment on the 2007 Amendment to Section 504 [T.C.A. § 35-15-504], which made a related change.

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) [T.C.A. § 35-15-405(a)]), persons receiving distributions from a charitable trust are not beneficiaries as that term is defined in this Tennessee Uniform Trust Code. However, pursuant to section 110(a) [T.C.A. § 35-15-110(a)], also granted rights of a qualified beneficiary under the Code are charitable organizations expressly designated to receive distributions under the terms of a charitable trust, but only if there are beneficial interests sufficient to satisfy the definition of qualified beneficiary for a noncharitable trust.

The Tennessee 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 Tennessee Uniform Trust Code, when a trust has both charitable and noncharitable beneficiaries only the charitable portion qualifies as a "charitable trust" (subdivision (3) [§ 35-103(4)]). The great majority of the Tennessee Uniform Trust 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 [*T.C.A.* §§ 35-15-405 and 35-15-413], 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 [*T.C.A.* § 35-15-411] allows a noncharitable trust to in certain instances be terminated by its beneficiaries while charitable 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.

To encourage trustees to accept and administer trusts containing real property, the Tennessee Uniform Trust Code contains several provisions designed to limit exposure to possible liability for violation of "environmental law" (subdivision (5) [§ 35-103(6)]). Section 701(c)(2) [*T.C.A.* § 35-15-701(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) [*T.C.A.* § 35-15-816(b)(13)] grants a trustee comprehensive and detailed powers to deal with property involving environmental risks. Section 1010(b) [*T.C.A.* § 35-15-1010(b), now repealed] immunizes a trustee from personal liability for violation of environmental law arising from the ownership and control of trust property.

Under the Tennessee Uniform Trust Code, a "guardian" (subdivision (7)) [*T.C.A.* § 35-15-103(7)] makes decisions with respect to personal care; a "conservator" (subdivision (5)) [*T.C.A.* § 35-15-103(5)] 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" (subdivision (8)) [*T.C.A.* § 35-15-103(8)] is used with some frequency in the Tennessee 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 [*T.C.A.* § 35-15-108] 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) [*T.C.A.* § 35-15-706(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 [*T.C.A.* § 35-15-801] requires the trustee to administer the trust in the interests of the beneficiaries, and section 802 [*T.C.A.* § 35-15-802] makes clear that a trustee may not place its own interests above those of the beneficiaries. Section 808(d) [*T.C.A.* § 35-15-808(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) [*T.C.A.* 35-15-1002(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 [*T.C.A.* § 35-15-1008] 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" (subdivision (9)) [*T.C.A.* § 35-15-103(9)], 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 [*T.C.A.* §§ 35-15-107 and 35-15-403] to refer to the place whose law will govern the trust. The term is used in section 108 [*T.C.A.* § 35-15-108] to refer to the trust's principal place of administration. The term is used in section 816 [*T.C.A.* § 35-15-816] 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" (subdivision (12)) [*T.C.A.* § 35-15-103(12)] 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 Section Comment [*T.C.A.* § 35-15-401].

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 Tennessee Uniform Trust Code uses the concept of "qualified beneficiary" (subdivision (12) [§ 35-103(13)]) 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 [T.C.A. § 35-15-705] to define the class to whom notice must be given of a trustee resignation. The term is used in section 813 [T.C.A. § 35-15-813] to define the class to be kept informed of the trust's administration. Section 417 [T.C.A. § 35-15-417] 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 [T.C.A. § 35-15-704]. Prior to transferring a trust's principal place of administration, section 108(d) [T.C.A. § 35-15-108(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 part 3 [T.C.A. §§ 35-15-301 -- 35-15-305] 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. Nor would the term include the objects of an unexercised inter vivos power.

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 [T.C.A. § 35-15-110] expands the definition of qualified beneficiaries to encompass this wider group. Section 110(a) [T.C.A. § 35-15-110(a)] grants the rights of qualified beneficiaries to charitable organizations expressly designated to receive distributions under the terms of a charitable trust and whose beneficial interests are sufficient to satisfy the definition of qualified beneficiary for a noncharitable trust. Section 110(c) [T.C.A. § 35-15-110(c)] also grants the rights of qualified beneficiaries to a person appointed by the terms of the trust or by the court to enforce a trust created for an animal or other noncharitable purpose. Section 110(b) [T.C.A. § 35-15-110(b)] grants the rights of a qualified beneficiary with respect to a charitable trust to the attorney general of Tennessee.

The definition of "revocable" (subdivision (13)) [T.C.A. § 35-15-103(14)] clarifies that revocable trusts include only trusts whose revocation is substantially within the settlor's control. The fact that the settlor becomes incapacitated does not convert a revocable trust into an irrevocable trust. The trust remains revocable until the settlor's death or the power of revocation is released. The consequences of classifying a trust as revocable are many. The Tennessee Uniform Trust Code contains provisions relating to liability of a revocable trust for payment of the settlor's debts (section 505) [T.C.A. § 35-15-505], the standard of capacity for creating a revocable trust (section 601) [T.C.A. § 35-15-601], the procedure for revocation (section 602) [T.C.A. § 35-15-602], the subjecting of the beneficiaries' rights to the settlor's control (section 603) [T.C.A. § 35-15-603], the period for contesting a revocable trust (section 604) [T.C.A. § 35-15-604], the power of the settlor of a revocable trust to direct the actions of a trustee (section 808(a)) [T.C.A. § 35-15-808(a)], notice to the qualified beneficiaries upon the settlor's death (section 813(b)) [T.C.A. § 35-15-813 (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)) [T.C.A. § 35-15-1011(d)].

Because under section 603(c) [T.C.A. § 35-15-603(c)] the holder of a power of withdrawal has the rights of a settlor of a revocable trust, the definition of "power of withdrawal" (subdivision (10) [§ 35-103(11)]), and "revocable" (subdivision (13) [§ 35-103(14)]) are similar. Both exclude individuals who can exercise their power only with the consent of the trustee or person having an adverse interest although the definition of "power of withdrawal" excludes powers subject to an ascertainable standard, a limitation which is not present in the definition of "revocable."

The definition of "settlor" (subdivision (14)) [T.C.A. § 35-15-103(15)] 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 [T.C.A. § 35-15-401]. 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) [T.C.A. § 35-15-602(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(c) [T.C.A. § 35-15-603(c)], 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* subdivisions 505(a)(1), (3) [T.C.A. § 35-15-505(a)(1), (5)] (creditor claims against settlor of revocable trust), section 602 [T.C.A. § 35-15-602] (revocation or modification of revocable trust), and section 604 [T.C.A. § 35-15-604] (limitation on contest of revocable trust). It is also important for determining rights of creditors in irrevocable trusts. *See* subdivision 505(a)(2) [T.C.A. § 35-15-505(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 [T.C.A. § 35-15-411] to terminate the trust with the beneficiaries' consent, the Tennessee 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* subsection 405(c) [T.C.A. § 35-15-405(c)] (standing to enforce charitable trust), section 413 [T.C.A. § 35-15-413] (doctrine of cy pres), and section 706 [T.C.A. § 35-15-706] (removal of trustee).

"Spendthrift provision" (subdivision (15)) [T.C.A. § 35-15-103(16)] 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 Tennessee 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 [T.C.A. § 35-15-502]. 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 [T.C.A. § 35-15-411], although the Tennessee Uniform Trust Code does not presume this result.

"Terms of a trust" (subdivision (18)) [T.C.A. § 35-15-103(19)] is a defined term used frequently in the Tennessee 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 [T.C.A. § 35-15-407] of this Tennessee Uniform Trust 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" (subdivision (19)) [T.C.A. § 35-15-103(20)] is a subset of the definition of "terms of a trust" (subdivision (18)) [T.C.A. § 35-15-103(19)], referring to only such terms as are found in an instrument executed by the settlor. Section 403 [T.C.A. § 35-15-403] 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 subdivision 604(a)(2) [T.C.A. § 35-15-604(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. Subdivision 813(b)(1) [T.C.A. § 35-15-813(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 [T.C.A. § 35-15-1006] protects a trustee from liability to the extent a breach of trust resulted from reasonable reliance on those terms. Section 1013 [T.C.A. § 35-15-1013] 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) [T.C.A. § 35-15-11056(a)(4)] provides that unless there is a clear indication of a contrary intent, rules of construction and presumptions provided in the Tennessee Uniform Trust Code apply to trust instruments executed before the effective date of the Code.

The definition of "trustee" (subdivision (19)) [T.C.A. § 35-15-103(21)] 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 Tennessee 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.

2007 Amendment.

Section 103(22) [T.C.A. § 35-15-103(21)] adds a definition of "ascertainable standard." The term was formerly used only in Section 814 [T.C.A. § 35-15-814]. Other 2007 amendments add the term to Sections 103(10) [T.C.A. § 35-15-103(11)] and 504 [T.C.A. § 35-15-504]. The amendment moves into this section the definition previously found in Section 814 [T.C.A. § 35-15-814], thereby making it apply generally throughout the Code.

Section 103(10) [T.C.A. § 35-15-103(11)], the definition of "power of withdrawal," is amended to exclude a possible inference that the term includes a discretionary power in a trustee to make distributions for the trustee's own benefit which is limited by an ascertainable standard. For an explanation of the reason for this amendment, see the comment to the 2007 amendment to Section 504 [T.C.A. § 35-15-504], which addresses a related issue.

Clarifying language is added to Section 103(12) [T.C.A. § 35-15-103(13)], the definition of "qualified beneficiary," to make clear that the second category in the definition refers to termination of an interest that is not associated with termination of the trust." The elimination as a qualified beneficiary of a person who might become a beneficiary on the exercise of a power of appointment or the occurrence of a possible but unlikely event, the intent is to clarify that the persons whose participation in decisions about the administration of a trust are those persons who are currently receiving benefits or persons who will clearly succeed to an interest in the trust.

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*** Current through the 2012 Regular Session ***
Annotations current through January 25, 2013 for the Tennessee Supreme Court

Title 35 Fiduciaries And Trust Estates
Chapter 15 Tennessee Uniform Trust Code
Part 1 General Provisions and Definitions

GO TO THE TENNESSEE ANNOTATED STATUTES ARCHIVE DIRECTORY

Tenn. Code Ann. § 35-15-104 (2012)

35-15-104. 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.

HISTORY: Acts 2004, ch. 537, § 5.

NOTES:

COMMENTS TO OFFICIAL TEXT

Section Comment.

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 [*T.C.A. § 35-15-109*] (methods and waiver of notice), section 305 [*T.C.A. § 35-15-305*] (appointment of representative), subsection 604(b) [*T.C.A. § 35-15-604(b)*] (limitation on contest of revocable trust), section 812 [*T.C.A. § 35-15-812*] (collecting trust property), section 1009 [*T.C.A. § 35-15-1009*] (nonliability of trustee upon beneficiary's consent, release, or ratification), and section 1012 [*T.C.A. § 35-15-1012*] (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 [*T.C.A. § 35-15-1005*] (limitation of action against trustee following report of trustee).

This section is based on *Uniform Commercial Code § 1-202* [*T.C.A. § 47-1-201*] (2000 Annual Meeting Draft).

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*** Current through the 2012 Regular Session ***
 Annotations current through January 25, 2013 for the Tennessee Supreme Court

Title 35 Fiduciaries And Trust Estates
 Chapter 15 Tennessee Uniform Trust Code
 Part 1 General Provisions and Definitions

GO TO THE TENNESSEE ANNOTATED STATUTES ARCHIVE DIRECTORY

Tenn. Code Ann. § 35-15-105 (2012)

35-15-105. Default and mandatory rules.

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

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

(1) The requirements for creating a trust;

(2) The duty of a trustee to act in accordance with the terms and purposes of the trust and the interests of the beneficiaries;

(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 to modify or terminate a trust under §§ 35-15-410 -- 35-15-416;

(5) The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in part 5 of this chapter;

(6) The power of the court under § 35-15-702 to require, dispense with, or modify or terminate a bond;

(7) The power of the court under § 35-15-708(b) to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;

(8) The effect of an exculpatory term under § 35-15-1008;

(9) The rights under §§ 35-15-1010 -- 35-15-1013 of a person other than a trustee or beneficiary;

(10) Periods of limitation for commencing a judicial proceeding;

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

(12) The subject matter jurisdiction of the court and venue for commencing a proceeding as provided in §§ 35-15-203 and 35-15-204.

HISTORY: Acts 2004, ch. 537, § 6; 2007, ch. 24, §§ 4, 5.

NOTES: Amendments.

see new table

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(c)

The 2007 amendment substituted "the terms and purposes of the trust and the interests of the beneficiaries" for "the purposes of the trust" in (b)(2) and deleted "of the court" following "The power" in (b)(4).

Effective Dates.

Acts 2007, ch. 24, § 35. April 12, 2007.

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Trusts

NOTES TO DECISIONS

1. Bad Faith Or Reckless Indifference.

1. Bad Faith Or Reckless Indifference.

Grant of summary judgment in favor of the bank in the decedent's daughter's action against it was appropriate pursuant to *T.C.A. § 35-15-105(b)(8)* and *T.C.A. § 35-15-1008(a)(1)* because nothing in the record indicated that the bank acted in bad faith or with reckless indifference; therefore, the terms of the will exonerating the bank, as trustee, prevailed in the case and the trial court was correct in so holding. *Wood v. Lowery*, 238 S.W.3d 747, 2007 Tenn. App. LEXIS 119 (Tenn. Ct. App. Mar. 6, 2007), appeal denied, -- S.W.3d --, 2007 Tenn. LEXIS 695 (Tenn. Aug. 13, 2007).

COMMENTS TO OFFICIAL TEXT

Section Comment.

Subsection (a) emphasizes that the Tennessee 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).

Subdivision (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 [§§ 35-15-401 -- 35-15-409]. Subdivision (b)(12) [*T.C.A. § 35-15-105(b)(12)*] makes clear that the settlor may not reduce any otherwise applicable period of limitations for commencing a judicial proceeding. See sections 604 [*T.C.A. § 35-15-604*] (period of limitations for contesting validity of revocable trust), and 1005 [*T.C.A. § 35-15-1005*] (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 accordance with the terms and purposes of the trust and the interests of the beneficiaries. For this duty, see Sections 801 and 814(a) [§§ 35-15-801 and 35-15-814(a)]. However, the settlor may provide a standard other than good faith, (e.g., the Trustee's sole and absolute discretion) to govern the Trustee's actions. Subdivisions (b)(2)- (b)(3) are echoed in section 404 [*T.C.A. § 35-15-404*] (trust and its terms must be for benefit of beneficiaries; trust must have a purpose that is lawful, not contrary to public policy, and possible to achieve), section 801 [*T.C.A. § 35-15-801*] (trustee must administer trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries), subsection 802(a) [*T.C.A. § 35-15-802(a)*] (trustee must administer trust solely in interests of the beneficiaries), section 814 [*T.C.A. § 35-15-814*] (trustee must exercise discretionary power in good faith and in accordance with its terms and purposes and the interests of the beneficiaries), and section 1008 [*T.C.A. § 35-15-1008*] (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. Subdivisions (b)(6), (b)(11) [*T.C.A. § 35-15-105(b)(6), (b)(11)*]. Addition-

ally, should the jurisdiction adopting this Code enact the optional provisions on subject matter jurisdiction and venue, subdivision (b)(12) [*T.C.A. § 35-15-105(b)(12)*] 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 [*T.C.A. §§ 35-15-410 -- 35-15-416*] is not subject to variation in the terms of the trust. Subdivision (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.

In conformity with traditional doctrine, the Tennessee 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 [*T.C.A. § 35-15-1008*]. Subdivision (b)(8) [*T.C.A. § 35-15-105(b)(8)*] of this section provides a cross-reference. Similarly, subdivision (b)(7) provides a cross-reference to section 708(b) [*T.C.A. § 35-15-708(b)*], which limits the binding effect of a provision specifying the trustee's compensation.

Finally, subdivision (b)(9) [*T.C.A. § 35-15-105(b)(9)*] clarifies that a settlor is not free to limit the rights of third persons, such as purchasers of trust property. Subdivision (b)(5) [*T.C.A. § 35-15-105(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 part 5 [*T.C.A. §§ 35-15-501 -- 35-15-506*].

2007 Amendment.

Subsection (b)(2) is revised to make the language consistent with the corresponding duties in Sections 801 and 814(a), which require that a trustee act in accordance with the terms and purposes of the trust and the interests of the beneficiaries. Previously, subsection (b)(2) provided that the settlor could not waive the duty of a trustee to act in accordance with the purposes of the trust. The amendment adds that the settlor cannot waive the obligation to act in accordance with the terms of the trust and the interests of the beneficiaries.

The purpose of the amendment is to make the language consistent, not to change the substance of the section. Absent some other restriction, a settlor is always free to specify the trust's terms to which the trustee must comply. Also, "interests of the beneficiaries" is a defined term in Section 103(8) [*§ 35-15-103(8)*] meaning the beneficial interests as provided in the terms of the trust, which the settlor is also free to specify.



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Tenn. Code Ann. § 35-15-106 (2012)

35-15-106. Common law of trusts -- Principles of equity.

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 state.

HISTORY: Acts 2004, ch. 537, § 7.

NOTES:

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Cited:

Tenn. Div. of the United Daughters of the Confederacy v. Vanderbilt Univ., 174 S.W.3d 98, 2005 Tenn. App. LEXIS 272 (Tenn. Ct. App. 2005); *Duke v. Simmons*, -- S.W.3d --, 2009 Tenn. App. LEXIS 174 (Tenn. Ct. App. Apr. 30, 2009).

COMMENTS TO OFFICIAL TEXT

Section Comment.

The Tennessee Uniform Trust Code codifies those portions of the law of express trusts that are most amenable to codification. The Tennessee 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. To determine the common law and principles of equity in a particular state, a court should look first to prior case law in the state and then to more general sources, such as 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 Tennessee 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*

see
 new
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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 Section 52.05 (6th ed. 2000); Jack Davies, Legislative Law and Process in a Nutshell Section 55-4 (2d ed. 1986).



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Tenn. Code Ann. § 35-15-107 (2012)

35-15-107. 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.

HISTORY: Acts 2004, ch. 537, § 8.

NOTES:

COMMENTS TO OFFICIAL TEXT

Section Comment.

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 [*T.C.A. § 35-15-403*].

Subdivision (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.

Subdivision (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

amended

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 subsection 108(a) [*T.C.A. § 35-15-108(a)*].

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Tenn. Code Ann. § 35-15-108 (2012)

35-15-108. Principal place of administration.

amended
 (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.

new (b)
 (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 sixty (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 sixty (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 majority of those qualified beneficiaries described in § 35-15-103 notify 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 § 35-15-704.

HISTORY: Acts 2004, ch. 537, § 9.

NOTES:**COMMENTS TO OFFICIAL TEXT****Section Comment.**

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 Section Comment [*T.C.A. § 35-15-107*].

Because of the difficult and variable situations sometimes involved, the Tennessee 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 Tennessee 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) [*T.C.A. § 35-15-202*], and the rules for locating venue within a particular state (section 204) [*T.C.A. § 35-15-204*]. 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 [*T.C.A. § 35-15-107*]. 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) [*T.C.A. § 35-15-103(8)*], 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 [*T.C.A. § 35-15-105*]. 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 described in subdivision 103 (12)(A) [*T.C.A. § 35-15-103(13)(A)*] sufficient time to review a proposed transfer, the trustee must give the qualified beneficiaries described in subdivision 103(12)(A) [*T.C.A. § 35-15-103(13)(A)*] at least 60 days prior notice of the transfer. Notice must be given not only to qualified beneficiaries as defined in section 103(12) [*T.C.A. § 35-15-103(13)*] but also to those granted the rights of qualified beneficiaries under section 110 [*T.C.A. § 35-15-110*]. To assure that those receiving notice have sufficient information upon which to make a decision, minimum contents of the notice are specified. If a majority of the qualified beneficiary described in subdivision 103(12)(A) [*T.C.A. § 35-15-103(13)(A)*] 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 [T.C.A. § 35-15-704]. Absent an order of succession in the terms of the trust, subsection 704(c) [T.C.A. § 35-15-704(c)] provides the procedure for appointment of a successor trustee of a noncharitable trust, and subsection 704(d) [T.C.A. § 35-15-704(d)] the procedure for appointment of a successor trustee of a charitable trust.

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).

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Tenn. Code Ann. § 35-15-109 (2012)

35-15-109. Methods and waiver of notice.

(a) 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, or a properly directed electronic message.

(b) 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.

(c) Notice under this chapter or the sending of a document under this chapter 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.

HISTORY: Acts 2004, ch. 537, § 10.

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Tenn. Code Ann. § 35-15-110 (2012)

35-15-110. Others treated as qualified beneficiaries.

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

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

(2) Would be a distributee or a permissible distributee of trust income or principal if the interests of other distributees or permissible distributees then receiving or eligible to receive distributions terminated on that date without causing the trust to terminate; or

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

(b) 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.

HISTORY: Acts 2004, ch. 537, § 11; 2007, ch. 24, § 6.

NOTES: Amendments.

The 2007 amendment, in (a), substituted the language beginning with "has the rights of a qualified beneficiary" for "or a person appointed to enforce a trust created for the care of an animal or another noncharitable purpose as provided in § 35-15-408 or § 35-15-409 has the rights of a qualified beneficiary under this chapter." at the end of the introductory paragraph and added (a)(1) through (a)(3).

Effective Dates.

Acts 2007, ch. 24, § 35. April 12, 2007.

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Cited:

In re Estate of Goza, -- S.W.3d --, 2012 Tenn. App. LEXIS 231 (Tenn. Ct. App. Apr. 11, 2012).

NOTES TO DECISIONS

1. Intervention.

1. Intervention.

Where charitable gifts of 101 pieces of art were given to a university subject to a restriction that the pieces could not be sold, the university filed an ex parte declaratory judgment action seeking permission to sell two valuable pieces of the collection. The Attorney General and Reporter of Tennessee sought to intervene to represent the interests of the charitable beneficiaries, the potential charitable beneficiaries, and the people of Tennessee pursuant to the Charitable Beneficiaries Act of 1997, T.C.A. § 35-13-110, and the Uniform Trust Code, T.C.A. § 35-15-110; the Attorney General's initial motion to intervene was denied. *Georgia O'Keeffe Found. (Museum) v. Fisk Univ.*, 312 S.W.3d 1, 2009 Tenn. App. LEXIS 434 (Tenn. Ct. App. July 14, 2009), appeal denied, *Ga. O'Keeffe Found. (Museum) v. Fisk Univ.*, -- S.W.3d --, 2010 Tenn. LEXIS 204 (Tenn. Feb. 22, 2010).

COMMENTS TO OFFICIAL TEXT

Section Comment.

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 [T.C.A. §§ 35 15 110(a) and (b)]. Under subsection (a) [T.C.A. § 35-15-110(a)], charitable organizations expressly designated in the terms of the trust to receive distributions and who would qualify as a qualified beneficiary were the trust noncharitable, are granted the rights of qualified beneficiaries under this Tennessee Uniform Trust Code. Because the charitable organization must be expressly named in the terms of the trust and must be designated to receive distributions, excluded are organizations that might receive distributions in the trustee's discretion but that are not named in the trust's terms. Requiring that the organization have an interest similar to that of a beneficiary of a private trust also denies the rights of a qualified beneficiary to organizations holding remote remainder interests. For further discussion of the definition of "qualified beneficiary," see Section 103 [§ 35-15-103].

Subsection (a) [T.C.A. 35-15-110(a)] 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 [T.C.A. §§ 35-15-408 and 35-15-409].

This section does not limit other means by which the attorney general or other designated official can enforce a charitable trust.

2007 Amendment.

Subsection (a) [T.C.A. § 35-15-110(a)] is amended to better conform this provision to the Drafting Committee's intent. Charitable trusts do not have beneficiaries in the usual sense. Yet, such trusts are often created to benefit named charitable organizations. Under this amendment, which is based on the definition of qualified beneficiary in Section 103(12) [T.C.A. § 35-15-103(13)], a designated charitable organization has the rights of a qualified beneficiary only if it holds an interest similar to that of a qualified beneficiary in a noncharitable trust. The effect of the amendment is to exclude charitable organizations that might receive distributions in the trustee's discretion even though not expressly mentioned in the trust's terms. Also denied the rights of qualified beneficiaries are charitable organizations that hold only remote remainder interests. The previous version of subsection (a) [T.C.A. § 35-15-110(a)] had a similar intent but the language could have been read more broadly.



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Tenn. Code Ann. § 35-15-111 (2012)

35-15-111. Nonjudicial settlement agreements.

(a) Except as otherwise provided in subsection (b), the trustee and the qualified beneficiaries may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.

(b) 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.

(c) Matters that may be resolved by a nonjudicial settlement agreement include, but are not limited to:

- (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;
- (6) Liability of a trustee for an action relating to the trust;
- (7) The extent or waiver of bond of a trustee;
- (8) The governing law of the trust; and
- (9) The criteria for distribution to a beneficiary where the trustee is given discretion.

(d) Any qualified beneficiary or trustee may request the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in part 3 of this chapter was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.

HISTORY: Acts 2004, ch. 537, § 12; 2007, ch. 24, §§ 7-9.

NOTES: Amendments.

The 2007 amendment deleted former (a) which read: "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.", and redesignated former (b) through (e) as (a) through (d), respectively; substituted "subsection (b), the trustee and the qualified beneficiaries" for "subsection (c), interested persons" in present (a); and substituted "Any qualified beneficiary or trustee" for "Any interested person" in present (d).

Effective Dates.

Acts 2007, ch 24, § 35. April 12, 2007.

COMMENTS TO OFFICIAL TEXT

Section Comment.

While the Tennessee 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)) [*T.C.A. § 35-15-201(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 (b) 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 Tennessee 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 part 3 [*T.C.A. §§ 35-15-301 -- 35-15-305*]. The category "interested persons" in the original version of the Tennessee Uniform Trust Code has been replaced with "the trustee and qualified beneficiaries" as those who are necessary parties to a nonjudicial settlement agreement. Qualified beneficiary is defined in Section 103(12) [*T.C.A. § 35-15-103(13)*]. The purpose of this revision is to avoid the required involvement of potential (or even unborn) beneficiaries whose interests are remote and who previously may have required the appointment of a representative by the court, thus limiting the objectives of a having a nonjudicial settlement agreement process.

Subsection (c) 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 part 3 General Comment [*T.C.A. § 35-15-301*]. 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 [*T.C.A. § 35-15-705*] solely by giving notice to the qualified beneficiaries, a living settlor, and any cotrustees. But a nonjudicial settlement between the trustee and beneficiaries will frequently prove helpful in working out the terms of the resignation.

2007 Amendment.

The old *Subsection 35-15-111(a)* was deleted from the Code. Additionally, the parties who are required to sign off on a non-judicial settlement agreement are modified to be the trustee and qualified beneficiaries.

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 Part 1 General Provisions and Definitions

GO TO THE TENNESSEE ANNOTATED STATUTES ARCHIVE DIRECTORY

Tenn. Code Ann. § 35-15-112 (2012)

35-15-112. 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.

HISTORY: Acts 2004, ch. 537, § 13.

NOTES: Law Reviews.

Tennessee Uniform Trust Code: New Formulation for a Trusty Tool (Marshall H. Peterson), 41 No. 1 *Tenn. B.J.* 24 (2005).

COMMENTS TO OFFICIAL TEXT

Section Comment.

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 prefer-

ence, 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 required time period for surviving the settlor [*T.C.A. Section 31-3-120*], 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 whether a specific devisee will receive a substitute gift if the subject matter of the devise is disposed of during the settlor's lifetime and the effect of a divorce on bequests made to a former spouse pursuant to a trust executed during the marriage to such spouse, with respect to which the settlor retained either a power of revocation or a power to change the beneficiaries of the trust.

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.

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Tenn. Code Ann. § 35-15-201 (2012)

35-15-201. 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.

HISTORY: Acts 2004, ch. 537, § 14.

NOTES:

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Cited:

Martin v. Nash, -- S.W.3d --, 2009 Tenn. App. LEXIS 292 (Tenn. Ct. App. Mar. 20, 2009).

NOTES TO DECISIONS

1. General Consideration.

1. General Consideration.

Trial court had jurisdiction over the trusts in a case, both personal and subject matter, because the court had the power to intervene in administration of a trust if its jurisdiction was invoked by any interested person. *Acree v. Acree*, -- S.W.3d --, 2012 Tenn. App. LEXIS 808 (Tenn. Ct. App. Nov. 20, 2012).

COMMENTS TO OFFICIAL TEXT

General Comment.

This part addresses selected issues involving judicial proceedings concerning trusts, particularly trusts with contacts in more than one state or country. This part 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 [T.C.A. § 35-15-201] 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 [T.C.A. § 35-15-202] 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 [T.C.A. §§ 35-15-203 and 35-15-204] are optional, bracketed provisions relating to subject matter jurisdiction and venue.

Section Comment.

While the Tennessee 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 [T.C.A. § 35-15-111], 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 Tennessee 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.



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Tenn. Code Ann. § 35-15-202 (2012)

35-15-202. 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.

HISTORY: Acts 2004, ch. 537, § 15.

NOTES:

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NOTES TO DECISIONS

1. Jurisdiction.

1. Jurisdiction.

Trial court had jurisdiction over the trusts in a case, both personal and subject matter, because trustees who accepted the trusteeship of a trust with its principal place of administration in Tennessee, as well as any beneficiaries who accepted a distribution from the trust submitted to the personal jurisdiction of the Tennessee Courts, pursuant to *T.C.A. § 35-15-202*, and the chancery court, which had probate jurisdiction, had subject matter jurisdiction over trusts, pursuant to *T.C.A. § 35-15-203*. *Acree v. Acree*, -- S.W.3d --, 2012 Tenn. App. LEXIS 808 (Tenn. Ct. App. Nov. 20, 2012).

COMMENTS TO OFFICIAL TEXT

Section Comment.

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).



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Tenn. Code Ann. § 35-15-203 (2012)

35-15-203. Subject matter jurisdiction.

Chancery courts and other courts of record having probate jurisdiction:

- (1) To the exclusion of all other courts, have concurrent jurisdiction over proceedings in this state brought by a trustee or beneficiary concerning the administration of a trust; and
- (2) Have concurrent jurisdiction with other courts of record in this state over other proceedings involving a trust.

HISTORY: Acts 2004, ch. 537, § 16; 2012, ch. 886, § 10.

NOTES: Compiler's Notes.

Acts 2012, ch. 886, § 13 provided that § 10 of the act, which amended this section, shall apply to any proceeding occurring on or after July 1, 2004, because the section clarifies existing law as enacted by chapter 537, § 16 of the Tennessee Public Acts of 2004.

Amendments.

The 2012 amendment rewrote the section which read: "(a) The chancery court and other courts having probate jurisdiction have exclusive jurisdiction of proceedings in this state brought by a trustee or beneficiary concerning the administration of a trust.

"(b) The chancery court and other courts having probate jurisdiction has concurrent jurisdiction with other courts of this state of other proceedings involving a trust."

Effective Dates.

Acts 2012, ch. 886, § 13. May 9, 2012.

Section to Section References.

This section is referred to in § 35-15-105.

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NOTES TO DECISIONS

1. General Consideration.

1. General Consideration.

Trial court had jurisdiction over the trusts in a case, both personal and subject matter, because trustees who accepted the trusteeship of a trust with its principal place of administration in Tennessee, as well as any beneficiaries who accepted a distribution from the trust submitted to the personal jurisdiction of the Tennessee Courts, pursuant to *T.C.A. § 35-15-202*, and the chancery court, which had probate jurisdiction, had subject matter jurisdiction over trusts, pursuant to *T.C.A. § 35-15-203*. *Acree v. Acree*, -- S.W.3d --, 2012 Tenn. App. LEXIS 808 (Tenn. Ct. App. Nov. 20, 2012).

COMMENTS TO OFFICIAL TEXT**Section Comment.**

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 Section Comment to section 201 [*T.C.A. § 35-15-201*].



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Tenn. Code Ann. § 35-15-204 (2012)

35-15-204. 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.

HISTORY: Acts 2004, ch. 537, § 17.

NOTES: Section to Section References.

This section is referred to in § 35-15-105.

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NOTES TO DECISIONS

1. Continuous Jurisdiction.

1. Continuous Jurisdiction.

While the trustees' transfer of the situs of a trust from Tennessee to Mississippi in 1999 was invalid because the trustees did not obtain court approval as required by former T.C.A. § 35-1-122 (repealed), and under T.C.A. § 35-15-204(a), the state of Tennessee retained jurisdiction over the trust without interruption, the ruling that the ineffective transfer resulted in voiding all transactions after the attempted transfer was inappropriate. *State Ex Rel. Tommye Maddox Working*, 216 S.W.3d 758, 2006 Tenn. App. LEXIS 535 (Tenn. Ct. App. Aug. 8, 2006), appeal denied, *State ex rel. Working v. Costa*, -- S.W.3d --, 2006 Tenn. LEXIS 1151 (Tenn. 2006).

COMMENTS TO OFFICIAL TEXT

Section Comment.

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.



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Tenn. Code Ann. § 35-15-301 (2012)

35-15-301. Representation -- Basic effect.

(a) Notice to a person who may represent and bind another person under this chapter 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 chapter 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 §§ 35-15-411 and 35-15-602, a person who under this chapter may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor's behalf.

(d) A settlor may not represent and bind a beneficiary under this chapter with respect to the termination or modification of a trust under § 35-15-411(a).

HISTORY: Acts 2004, ch. 537, § 18; 2007, ch. 24, § 10.

NOTES: Amendments.

The 2007 amendment added (d).

Effective Dates.

Acts 2007, ch 24, § 35. April 12, 2007.

Section to Section References.

This part is referred to in §§ 32-3-113, 35-15-111.

Sections 35-15-301--35-15-305 are referred to in § 32-3-113.

Law Reviews.

Tennessee Uniform Trust Code: New Formulation for a Trusty Tool (Marshall H. Peterson), 41 No. 1 *Tenn. B.J.* 24 (2005).

COMMENTS TO OFFICIAL TEXT

General Comment.

This part 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 part is more complete.

Section 301 [T.C.A. § 35-15-301] is the introductory section, laying out the scope of the part. The representation principles of this part have numerous applications under this Code. The representation principles of the part 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 [T.C.A. §§ 35-15-302 -- 35-15-305] cover the different types of representation. Section 302 [T.C.A. § 35-15-302] 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 [T.C.A. § 35-15-603], 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 [T.C.A. § 35-15-303] 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 [T.C.A. § 35-15-304] 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 [T.C.A. § 35-15-305] 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 part are subject to modification in the terms of the trust. *See* section 105 [T.C.A. § 35-15-105]. Settlers are free to specify their own methods for providing substituted notice and obtaining substituted consent.

Section Comment.

This section is general and introductory, laying out the scope of the part.

Subsection (a) validates substitute notice to a person who may represent and bind another person as provided in the succeeding sections of this part. 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 subsection 109(d) [T.C.A. § 35-15-109(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 (subsection 108(d)) [T.C.A. § 35-15-108(d)], of a proposed trust combination or division (section 417) [T.C.A. § 35-15-417], of a temporary assumption of duties without accepting trusteeship (subdivision 701(c)(1)) [T.C.A. § 35-15-701(c)(1)], of a trustee's resignation (subdivision 705(a)(1)) [T.C.A. § 35-15-705(a)(1)], and of a trustee's report (subsection 813(c)) [T.C.A. § 35-15-813(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) [T.C.A. § 35-15-411], agreement of the qualified beneficiaries on appointment of a successor trustee of a noncharitable trust (subdivision 704(c)(2)) [T.C.A. § 35-15-704(c)(2)], and a beneficiary's consent to or release or affirmance of the actions of a trustee (section 1009) [T.C.A. § 35-15-1009]. 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 part 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 [T.C.A. § 35-15-303] 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 refusal to allow an objection by an adult competent remainder beneficiary violated due process.

Subsection (c) implements the policy of sections 411 and 602 [*T.C.A. §§ 35-15-411 and 35-15-602*] requiring express authority in the power of attorney or approval of court before the settlor's agent, conservator or guardian may consent on behalf of the settlor to the termination or revocation of the settlor's revocable trust.

2007 Amendment.

Because of the ability of a settlor under Section 301 [*T.C.A. § 35-15-301*] to represent and bind a beneficiary with respect to a termination or modification of an irrevocable trust, Section 411(a) [*T.C.A. § 35-15-411(a)*] might result in inclusion of the trust in the settlor's gross estate. New Section 301(d) [*T.C.A. § 35-15-301(d)*] eliminates the possibility of such representation.

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Tenn. Code Ann. § 35-15-302 (2012)

35-15-302. Representation by holder of power of appointment.

To the extent there is no material conflict of interest between the holder of a 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.

HISTORY: Acts 2004, ch. 537, § 19; 2010, ch. 725, § 3; 2012, ch. 886, § 11.

NOTES: Amendments.

The 2010 amendment substituted "material conflict" for "conflict" near the beginning.

The 2012 amendment deleted "general testamentary" prior to "power of appointment".

Effective Dates.

Acts 2010, ch. 725, § 25. July 1, 2010.

Acts 2012, ch. 886, § 13. May 9, 2012.

Section to Section References.

Sections 35-15-301--35-15-305 are referred to in § 32-3-113.

COMMENTS TO OFFICIAL TEXT

Section Comment.

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) [26 U.S.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.

In determining whether the representative has a conflict with the person sought to be represented, the following may be indicia of a conflict:

The action to be approved may cause the trustee or co-trustee to operate the trust in a manner that would generally be considered imprudent;

The action to be approved if submitted to a court would generally not be approved; and

The action to be approved if subject to review by a court appointed guardian ad litem, would not generally be recommended for approval.

If any of these or other indicia of a conflict exists, the representative seeking to exercise a representative position has the burden to demonstrate that notwithstanding the indicia of conflict, the proposed action is in the best interest of the represented beneficiary.

2010 Amendment.

This section was amended to make it clear that the standard used to determine whether no conflict exists, and therefore, representation is available, is subject to a test of materiality. Therefore, it is not necessary that no conflict, whatsoever, exist in order to avail oneself of representation, only that no material conflict exist.

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Tenn. Code Ann. § 35-15-303 (2012)

35-15-303. Representation by fiduciaries and parents.

To the extent there is no material 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;
- (6) A person may represent and bind the person's minor or unborn descendant if a guardian for the descendant has not been appointed;
- (7) A person designated by the settlor in the trust instrument or in a writing delivered to the trustee to represent the beneficiaries of the trust may represent and bind such beneficiaries; and
- (8) A person designated by the beneficiaries of the trust to represent them may represent and bind such beneficiaries.

HISTORY: Acts 2004, ch. 537, § 20; 2007, ch. 24, §§ 11, 12; 2010, ch. 725, § 4.

NOTES: Amendments.

The 2007 amendment, in (6), substituted "person" for "parent", substituted "person's" for "parent's", and twice substituted "descendant" for "child"; and, in (7), inserted "in the trust instrument or in a writing delivered to the trustee".

The 2010 amendment substituted "material conflict" for "conflict" in the introductory paragraph.

Effective Dates.

Acts 2007, ch 24, § 35. April 12, 2007.

Acts 2010, ch. 725, § 25. July 1, 2010.

Section to Section References.

Sections 35-15-301--35-15-305 are referred to in § 32-3-113.

COMMENTS TO OFFICIAL TEXT**Section Comment.**

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. Subdivision (6) allows a person to represent his or her descendant; this includes the person's child but it is extended to other descendants as well. 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.

Subdivision (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 section 1-403 of the Uniform Probate Code, from which this section was derived. Under the Tennessee law, a "conservator" is appointed by the court to manage the ward's property and to make decisions with respect to a ward's personal affairs. The reference to a "guardian" was left in the statute because Tennessee does have provisions for the appointment of Veterans guardians which guardians speak for adult wards.

Subdivision (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 section 602 [*T.C.A. § 35-15-602*], an agent may represent a settlor with respect to the amendment, revocation or termination of a revocable 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.

Subdivision (7) deals with the situation where a settlor appoints a trust advisor or trust protector to exercise certain powers on behalf of a beneficiary.

In determining whether the representative has a conflict with the person sought to be represented, the following may be indicia of a conflict:

The action to be approved may cause the trustee or co-trustee to operate the trust in a manner that would generally be considered imprudent;

The action to be approved if submitted to a court would generally not be approved; and

The action to be approved if subject to review by a court appointed guardian ad litem, would not generally be recommended for approval.

If any of these or other indicia of a conflict exists, the representative seeking to exercise a representative position has the burden to demonstrate that notwithstanding the indicia of conflict, the proposed action is in the best interest of the represented beneficiary.

2007 Amendment.

This Section was amended to expand representation beyond a child and a parent to allow a person to represent his or her descendants if no conflict exists. As amended in 2007, subsection (7) clarifies that the settlor may designate the person to represent a beneficiary or beneficiaries in the trust instrument or in a separate written document that is delivered to the trustee. A written designation of a representative by a settlor may occur subsequent to the execution of the trust instrument. If the designated representative is an individual, the settlor would be wise to designate a successor or establish a procedure for selecting a successor. The designated representative should be given specific duties that might include receipt of any required notice under *T.C.A. § 35-15-813 (a)* or (b) or under any other section of the Tennessee Uniform Trust Code.

2010 Amendment.

This section was amended to make it clear that the standard used to determine whether no conflict exists, and therefore, representation is available, is subject to a test of materiality. Therefore, it is not necessary that no conflict, whatsoever, exist in order to avail oneself of representation, only that no material conflict exist.

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Title 35 Fiduciaries And Trust Estates
Chapter 15 Tennessee Uniform Trust Code
Part 3 Representation

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Tenn. Code Ann. § 35-15-304 (2012)

35-15-304. 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 material conflict of interest between the representative and the person represented.

HISTORY: Acts 2004, ch. 537, § 21; 2010, ch. 725, § 5.

NOTES: Amendments.

The 2010 amendment substituted "material conflict" for "conflict" near the end.

Effective Dates.

Acts 2010, ch. 725, § 25. July 1, 2010.

Section to Section References.

Sections 35-15-301--35-15-305 are referred to in § 32-3-113.

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section authorizes a person with a substantially identical 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).*

In determining whether the representative has a conflict with the person sought to be represented, the following may be indicia of a conflict:

The action to be approved may cause the trustee or co-trustee to operate the trust in a manner that would generally be considered imprudent;

The action to be approved if submitted to a court would generally not be approved; and

The action to be approved if subject to review by a court appointed guardian ad litem, would not generally be recommended for approval.

If any of these or other indicia of a conflict exists, the representative seeking to exercise a representative position has the burden to demonstrate that notwithstanding the indicia of conflict, the proposed action is in the best interest of the represented beneficiary.

2010 Amendment.

This section was amended to make it clear that the standard used to determine whether no conflict exists, and therefore, representation is available, is subject to a test of materiality. Therefore, it is not necessary that no conflict, whatsoever, exist in order to avail oneself of representation, only that no material conflict exist.

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Tenn. Code Ann. § 35-15-305 (2012)

35-15-305. Appointment of representative.

(a) If the court determines that an interest is not represented under this chapter, 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 chapter, 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.

HISTORY: Acts 2004, ch. 537, § 22.

NOTES: Section to Section References.

Sections 35-15-301--35-15-305 are referred to in § 32-3-113.

COMMENTS TO OFFICIAL TEXT

Section Comment.

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 part.

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