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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 4 Creation, Validity, Modification, and Termination of Trust

GO TO THE TENNESSEE ANNOTATED STATUTES ARCHIVE DIRECTORY

Tenn. Code Ann. § 35-15-401 (2012)

35-15-401. Methods of creating trust.

A trust may be created by:

- (1) The transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;
- (2) The declaration by the owner of property that the owner holds identifiable property as trustee;
- (3) The exercise of a power of appointment in favor of a trustee; or
- (4) A court pursuant to its statutory or equitable powers.

HISTORY: Acts 2004, ch. 537, § 23.

NOTES:

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Cited:

Manning v. Snyder, -- S.W.3d --, 2009 Tenn. App. LEXIS 120 (Tenn. Ct. App. Mar. 26, 2009).

COMMENTS TO OFFICIAL TEXT

General Comment.

Sections 401 through 409 [*T.C.A. §§ 35-15-401 -- 35-15-409*], which specify the requirements for the creation of a trust, largely codify traditional doctrine. Section 401 [*T.C.A. § 35-15-401*] specifies the methods by which trusts are created, that is, by transfer of property, self-declaration, or exercise of a power of appointment. Whatever method may have been employed, other requirements, including intention, capacity and, for certain types of trusts, an ascertainable beneficiary, also must be satisfied before a trust is created. These requirements are listed in section 402 [*T.C.A. § 35-15-402*]. Section 403 [*T.C.A. § 35-15-403*] addresses the validity in the enacting jurisdiction of trusts created in other jurisdictions. A trust not created by will is validly created if its creation complied with the law of specified jurisdictions

in which the settlor or trustee had a significant contact. Section 404 [T.C.A. § 35-15-404] forbids trusts for illegal or impossible purposes, and requires that a trust and its terms must be for the benefit of its beneficiaries. Section 405 [T.C.A. § 35-15-405] recites the permitted purposes of a charitable trust. Section 406 [T.C.A. § 35-15-406] lists some of the grounds for contesting a trust. Section 407 [T.C.A. § 35-15-407] validates oral trusts. The remaining sections address what are often referred to as "honorary" trusts, although such trusts are valid and enforceable under this Code. Section 408 [T.C.A. § 35-15-408] covers a trust for the care of an animal; section 409 [T.C.A. § 35-15-409] allows creation of a trust for another noncharitable purpose such as maintenance of a cemetery lot.

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 by the court if the court concludes that the trust or a particular provision no longer achieves a material purpose or by the trustee if the settlor does not object (section 411) [T.C.A. § 35-15-411], by the court in response to unanticipated circumstances or due to ineffective administrative terms (section 412) [T.C.A. § 35-15-412], or by the court or trustee if continued administration under the trust's existing terms would be uneconomical (section 414) [T.C.A. § 35-15-414]. A trust may be reformed to correct a mistake of law or fact (section 415) [T.C.A. § 35-15-415], or modified to achieve the settlor's tax objectives (section 416) [T.C.A. § 35-15-416]. Trusts may be combined or divided (section 417) [T.C.A. § 35-15-417]. A trustee or beneficiary has standing to petition the court with respect to a proposed termination or modification (section 410) [T.C.A. § 35-15-410].

Section 413 [T.C.A. § 35-15-413] codifies and at the same time modifies the doctrine of cy pres, at least as applied in most states. The Tennessee Uniform Trust Code authorizes the court to apply cy pres not only if the original means becomes impossible or unlawful but also if the means become impracticable or wasteful. Section 413 [T.C.A. § 35-15-413] also creates a presumption of general charitable intent. Upon failure of the settlor's original plan, the court cannot divert the trust property to a noncharity unless the terms of the trust expressly so provide. Furthermore, absent a contrary provision in the terms of the trust, limits are placed on when a gift over to a noncharity can take effect upon failure or impracticality of the original charitable purpose. The gift over is effective only if, when the provision takes effect, the trust property is to revert to the settlor and the settlor is still living, or fewer than 21 years have elapsed since the date of the trust's creation.

The requirements for a trust's creation, such as the necessary level of capacity and the requirement that a trust have a legal purpose, are controlled by statute and common law, not by the settlor. *See* subdivision 105(b)(1), (3) [T.C.A. § 35-15-105(b)(1), (3)]. Nor may the settlor negate the court's ability to modify or terminate a trust as provided in sections 410 through 416 [T.C.A. §§ 35-15-410 -- 35-15-416]. *See* subdivision 105(b)(4) [T.C.A. § 35-15-105(b)(4)]. However, a settlor is free to restrict or modify the trustee's power to terminate an uneconomic trust as provided in section 414 [T.C.A. § 35-15-414], and the trustee's power to combine and divide trusts as provided in section 417 [T.C.A. § 35-15-417].

Section Comment.

This section is based on Restatement (Third) of Trusts § 10 (Tentative Draft No. 1, approved 1996), and *Restatement (Second) of Trusts* § 17 (1959). Under the methods specified for creating a trust in this section, a trust is not created until it receives property. For what constitutes an adequate property interest, see Restatement (Third) of Trusts §§ 40-41 (Tentative Draft No. 2, approved 1999); *Restatement (Second) of Trusts* §§ 74-86 (1959). The property interest necessary to fund and create a trust need not be substantial. A revocable designation of the trustee as beneficiary of a life insurance policy or employee benefit plan has long been understood to be a property interest sufficient to create a trust. *See* subdivision 103(11) [T.C.A. § 35-15-103(12)] ("property" defined). Furthermore, the property interest need not be transferred contemporaneously with the signing of the trust instrument. A trust instrument signed during the settlor's lifetime is not rendered invalid simply because the trust was not created until property was transferred to the trustee at a much later date, including by contract after the settlor's death. A pourover devise to a previously unfunded trust is also valid and may constitute the property interest creating the trust. *See* Uniform Testamentary Additions to Trusts Act § 1 (1991), *codified at* Uniform Probate Code § 2-511 (pourover devise to trust valid regardless of existence, size, or character of trust corpus). *See also* Restatement (Third) of Trusts § 19 (Tentative Draft No. 1, approved 1996).

While this section refers to transfer of property to a trustee, a trust can be created even though for a period of time no trustee is in office. *See* Restatement (Third) of Trusts § 2 cmt. g (Tentative Draft No. 1, approved 1996); *Restatement (Second) of Trusts* § 2 cmt. i (1959). A trust can also be created without notice to or acceptance by a trustee or benefi-

ciary. See Restatement (Third) of Trusts § 14 (Tentative Draft No. 1, approved 1996); *Restatement (Second) of Trusts* §§ 35-36 (1959).

The methods specified in this section are not exclusive. Section 102 [*T.C.A. § 35-15-102*] recognizes that trusts can also be created by special statute or court order. See also Restatement (Third) of Trusts § 1 cmt. a (Tentative Draft No. 1, approved 1996); Uniform Probate Code § 2-212 (elective share of incapacitated surviving spouse to be held in trust on terms specified in statute); Uniform Probate Code § 5-411(a)(4) (conservator may create trust with court approval); *Restatement (Second) of Trusts* § 17 cmt. i (1959) (trusts created by statutory right to bring wrongful death action).

A trust can also be created by a promise that creates enforceable rights in a person who immediately or later holds these rights as trustee. See Restatement (Third) of Trusts § 10(e) (Tentative Draft No. 1, approved 1996). A trust thus created is valid notwithstanding that the trustee may resign or die before the promise is fulfilled. Unless expressly made personal, the promise can be enforced by a successor trustee. For examples of trusts created by means of promises enforceable by the trustee, see Restatement (Third) of Trusts § 10 cmt. g (Tentative Draft No. 1, approved 1996); *Restatement (Second) of Trusts* §§ 14 cmt. h, 26 cmt. n (1959).

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

While a trust created by will may come into existence immediately at the testator's death and not necessarily only upon the later transfer of title from the personal representative, section 701 [*T.C.A. § 35-15-701*] makes clear that the nominated trustee does not have a duty to act until there is an acceptance of the trusteeship, express or implied. To avoid an implied acceptance, a nominated testamentary trustee who is monitoring the actions of the personal representative but who has not yet made a final decision on acceptance should inform the beneficiaries that the nominated trustee has assumed only a limited role. The failure so to inform the beneficiaries could result in liability if misleading conduct by the nominated trustee causes harm to the trust beneficiaries. See Restatement (Third) of Trusts § 35 cmt. b (Tentative Draft No. 2, approved 1999).

While this section confirms the familiar principle that a trust may be created by means of the exercise of a power of appointment (subdivision (3)), this Code does not legislate comprehensively on the subject of powers of appointment but addresses only selected issues. See section 302 [*T.C.A. § 35-15-302*] (representation by holder of general testamentary power of appointment); subsection 505(b) [*T.C.A. § 35-15-505(b)*] (creditor claims against holder of power of withdrawal); and subsection 603(c) [*T.C.A. § 35-15-603(c)*] (rights of holder of power of withdrawal). For the law on powers of appointment generally, see *Restatement (Second) of Property: Donative Transfers* §§ 11.1-24.4 (1986); Restatement (Third) of Property: Wills and Other Donative Transfers (in progress).



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Tenn. Code Ann. § 35-15-402 (2012)

35-15-402. Requirements for creation.

(a) A trust is created only if:

- (1) The settlor has capacity to create a trust;
- (2) The settlor indicates an intention to create the trust;
- (3) The trust has a definite beneficiary or is:
 - (A) A charitable trust;
 - (B) A trust for the care of an animal, as provided in § 35-15-408; or
 - (C) A trust for a noncharitable purpose, as provided in § 35-15-409;
- (4) The trustee has duties to perform; and
- (5) The same person is not the sole trustee and sole beneficiary.

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

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

HISTORY: Acts 2004, ch. 537, § 24.

NOTES:

LexisNexis 50 State Surveys, Legislation & Regulations

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Cited:

Atkins v. Marks, 288 S.W.3d 356, 2008 Tenn. App. LEXIS 349 (Tenn. Ct. App. June 11, 2008); *State v. Sudberry*, -- S.W.3d --, 2012 Tenn. Crim. App. LEXIS 939 (Tenn. Crim. App. Nov. 14, 2012).

NOTES TO DECISIONS

1. Trust Intent. 2. Creation Not Found

1. Trust Intent.

Where an organization did not claim that it intended to create a revocable charitable trust under *T.C.A. § 35-15-402(a)(2)* when it entered into agreements with a college, and no evidence was presented suggesting a trust intent on the part of the organization, the contracts reflected a charitable gift subject to conditions rather than the creation of a revocable charitable trust. *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).

2. Creation Not Found

Finding against decedent's friend in his claim against decedent's estate for \$1 million was proper because there was no indication that decedent declared his intention to create a trust for the benefit of the friend; decedent certainly knew how to create a trust, as he created numerous trusts for the benefits of his daughters. *Ziyad v. Estate of Tanner*, -- S.W.3d --, 2008 Tenn. App. LEXIS 682 (Tenn. Ct. App. Nov. 6, 2008).

COMMENTS TO OFFICIAL TEXT**Section Comment.**

Subsection (a) codifies the basic requirements for the creation of a trust. To create a valid trust, the settlor must indicate an intention to create a trust. *See* Restatement (Third) of Trusts § 13 (Tentative Draft No. 1, approved 1996); *Restatement (Second) of Trusts § 23* (1959). But only such manifestations of intent as are admissible as proof in a judicial proceeding may be considered. *See* section 103(17) [*T.C.A. § 35-15-103(19)*] ("terms of a trust" defined).

To create a trust, a settlor must have the requisite mental capacity. To create a revocable or testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have capacity during lifetime to transfer the property free of trust. *See* section 601 [*T.C.A. § 35-15-601*] (capacity of settlor to create revocable trust), and *See generally* Restatement (Third) of Trusts § 11 (Tentative Draft No. 1, approved 1996); *Restatement (Second) of Trusts §§ 18-22* (1959); and Restatement (Third) of Property: Wills and Other Donative Transfers § 8.1 (Tentative Draft No. 3, 2001).

Subdivision (a)(3) requires that a trust, other than a charitable trust, a trust for the care of an animal, or a trust for another valid noncharitable purpose, have a definite beneficiary. While some beneficiaries will be definitely ascertained as of the trust's creation, subsection (b) recognizes that others may be ascertained in the future as long as this occurs within the applicable perpetuities period. The definite beneficiary requirement does not prevent a settlor from making a disposition in favor of a class of persons. Class designations are valid as long as the membership of the class will be finally determined within the applicable perpetuities period. For background on the definite beneficiary requirement, see Restatement (Third) of Trusts §§ 44-46 (Tentative Draft No. 2, approved 1999); *Restatement (Second) of Trusts §§ 112-122* (1959).

Subdivision (a)(4) recites standard doctrine that a trust is created only if the trustee has duties to perform. *See* Restatement (Third) of Trusts § 2 (Tentative Draft No. 1, approved 1996); *Restatement (Second) of Trusts § 2* (1959). Trustee duties are usually active, but a validating duty may also be passive, implying only that the trustee has an obligation not to interfere with the trustee's enjoyment of the trust property. Such passive trusts, while valid under this Code, may be terminable under the enacting jurisdiction's Statute of Uses. *See* Restatement (Third) of Trusts § 6 (Tentative Draft No. 1, approved 1996); *Restatement (Second) of Trusts §§ 67-72* (1959).

Subdivision (a)(5) addresses the doctrine of merger, which, as traditionally stated, provides that a trust is not created if the settlor is the sole trustee and sole beneficiary of all beneficial interests. The doctrine of merger has been inappropriately applied by the courts in some jurisdictions to invalidate self-declarations of trust in which the settlor is the sole life beneficiary but other persons are designated as beneficiaries of the remainder. The doctrine of merger is properly applicable only if all beneficial interests, both life interests and remainders, are vested in the same person, whether in the settlor or someone else. An example of a trust to which the doctrine of merger would apply is a trust of which the settlor is sole trustee, sole beneficiary for life, and with the remainder payable to the settlor's probate estate.

On the doctrine of merger generally, see Restatement (Third) of Trusts § 69 (Tentative Draft No. 3, 2001); *Restatement (Second) of Trusts* § 341 (1959).

Subsection (c) allows a settlor to empower the trustee to select the beneficiaries even if the class from whom the selection may be made cannot be ascertained. Such a provision would fail under traditional doctrine; it is an imperative power with no designated beneficiary capable of enforcement. Such a provision is valid, however, under both this Code and the Restatement, if there is at least one person who can meet the description. If the trustee does not exercise the power within a reasonable time, the power fails and the property will pass by resulting trust. *See* Restatement (Third) of Trusts § 46 (Tentative Draft No. 2, approved 1999). *See also* Restatement (Second) of Trusts § 122 (1959); Restatement (Second) of Property: Donative Transfers § 12.1 cmt. e (1986).



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Tenn. Code Ann. § 35-15-403 (2012)

35-15-403. Trusts created in other jurisdictions.

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

- (1) The settlor was domiciled, had a place of abode, or was a national;
- (2) A trustee was domiciled or had a place of business; or
- (3) Any trust property was located.

HISTORY: Acts 2004, ch. 537, § 25.

NOTES:

COMMENTS TO OFFICIAL TEXT

Section Comment.

The validity of a trust created by will is ordinarily determined by the law of the decedent's domicile. No such certainty exists with respect to determining the law governing the validity of inter vivos trusts. Generally, at common law a trust was created if it complied with the law of the state having the most significant contacts to the trust. Contacts for making this determination include the domicile of the trustee, the domicile of the settlor at the time of trust creation, the location of the trust property, the place where the trust instrument was executed, and the domicile of the beneficiary. *See* 5A Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* §§ 597, 599 (4th ed. 1987). Furthermore, if the trust has contacts with two or more states, one of which would validate the trust's creation and the other of which would deny the trust's validity, the tendency is to select the law upholding the validity of the trust. *See* 5A Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* 600 (4th ed. 1987).

Section 403 [*T.C.A. § 35-15-403*] extends the common law rule by validating a trust if its creation complies with the law of any of a variety of states in which the settlor or trustee had significant contacts. Pursuant to section 403 [*T.C.A. § 35-15-403*], a trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation the settlor was domiciled, had a place of abode, or was a national; the trustee was domiciled or had a place of business; or any trust property was located.

Section 403 [*T.C.A. § 35-15-403*] is comparable to section 2-506 of the Uniform Probate Code, which validates wills executed in compliance with the law of a variety of places in which the testator had a significant contact. Unlike the UPC, however, section 403 [*T.C.A. § 35-15-403*] is not limited to execution of the instrument but applies to the entire process of a trust's creation, including compliance with the requirement that there be trust property. In addition, unlike the UPC, section 403 [*T.C.A. § 35-15-403*] validates a trust valid under the law of the domicile or place of business of the designated trustee, or if valid under the law of the place where any of the trust property is located.

The section does not supersede local law requirements for the transfer of real property, such that title can be transferred only by recorded deed.

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GO TO THE TENNESSEE ANNOTATED STATUTES ARCHIVE DIRECTORY*Tenn. Code Ann. § 35-15-404 (2012)***35-15-404. Trust purposes.**

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

HISTORY: Acts 2004, ch. 537, § 26.**NOTES:****COMMENTS TO OFFICIAL TEXT****Section Comment.**

For an explication of the requirement that a trust must not have a purpose that is unlawful or against public policy, see Restatement (Third) of Trusts §§ 27-30 (Tentative Draft No. 2, approved 1999); *Restatement (Second) of Trusts* §§ 59-65 (1959). A trust with a purpose that is unlawful or against public policy is invalid. Depending on when the violation occurred, the trust may be invalid at its inception or it may become invalid at a later date. The invalidity may also affect only particular provisions. Generally, a trust has a purpose which is illegal if (1) its performance involves the commission of a criminal or tortious act by the trustee; (2) the settlor's purpose in creating the trust was to defraud creditors or others; or (3) the consideration for the creation of the trust was illegal. See Restatement (Third) of Trusts § 28 cmt. a (Tentative Draft No. 2, approved 1999); *Restatement (Second) of Trusts* § 60 cmt. a (1959). Purposes violative of public policy include those that tend to encourage criminal or tortious conduct, that interfere with freedom to marry or encourage divorce, that limit religious freedom, or which are frivolous or capricious. See *Restatement (Third) of Trusts* § 29 cmt. d-h (Tentative Draft No. 2, 1999); *Restatement (Second) of Trusts* § 62 (1959).

Pursuant to subsection 402(a) [*T.C.A. § 35-15-402(a)*], a trust must have an identifiable beneficiary unless the trust is of a type that does not have beneficiaries in the usual sense, such as a charitable trust or, as provided in sections 408 and 409 [*T.C.A. §§ 35-15-408 and 35-15-409*], trusts for the care of an animal or other valid noncharitable purpose. The general purpose of trusts having identifiable beneficiaries is to benefit those beneficiaries in accordance with their interests as defined in the trust's terms. The requirement of this section that a trust and its terms be for the benefit of its beneficiaries, which is derived from Restatement (Third) of Trusts § 27(2) (Tentative Draft No. 2, approved 1999), implements this general purpose. While a settlor has considerable latitude in specifying how a particular trust purpose is to be pursued, the administrative and other nondispositive trust terms must reasonably relate to this purpose and not divert the trust property to achieve a trust purpose that is invalid, such as one which is frivolous or capricious. See Restatement (Third) of Trusts § 27 cmt. b (Tentative Draft No. 2, approved 1999).

Subsection 412(b) [*T.C.A. § 35-15-412(b)*], which allows the court to modify administrative terms that are impracticable, wasteful, or impair the trust's administration, is a specific application of the requirement that a trust and its terms be for the benefit of the beneficiaries. The fact that a settlor suggests or directs an unlawful or other inappropriate means for performing a trust does not invalidate the trust if the trust has a substantial purpose that can be achieved by other methods. *See* Restatement (Third) of Trusts § 28 cmt. e (Tentative Draft No. 2, approved 1999).

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Tenn. Code Ann. § 35-15-405 (2012)

35-15-405. Charitable purposes -- Enforcement.

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

(b) If the terms of a charitable trust do not indicate a particular charitable purpose or beneficiary, the court may select one (1) or more charitable purposes or beneficiaries. The selection must be consistent with the settlor's intention to the extent it can be ascertained.

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

HISTORY: Acts 2004, ch. 537, § 27.

NOTES: Section to Section References.

This section is referred to in § 35-15-103.

COMMENTS TO OFFICIAL TEXT

Section Comment.

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

Charitable trusts are subject to the restriction in section 404 [*T.C.A. § 35-15-404*] that a trust purpose must be legal and not contrary to public policy. This would include trusts that involve invidious discrimination. *See* Restatement (Third) of Trusts § 28 cmt. f (Tentative Draft No. 3, approved 2001).

Under subsection (b), a trust that states a general charitable purpose does not fail if the settlor neglected to specify a particular charitable purpose or organization to receive distributions. The court may instead validate the trust by specifying particular charitable purposes or recipients, or delegate to the trustee the framing of an appropriate scheme. *See Restatement (Second) of Trusts* § 397 cmt. d (1959). Subsection (b) of this section is a corollary to section 413 [*T.C.A. § 35-15-413*], which states the doctrine of cy pres. Under subsection 413(a) [*T.C.A. § 35-15-413(a)*], a trust failing to state

a general charitable purpose does not fail upon failure of the particular means specified in the terms of the trust. The court must instead apply the trust property in a manner consistent with the settlor's charitable purposes to the extent they can be ascertained.

Subsection (b) does not apply to the long-established estate planning technique of delegating to the trustee the selection of the charitable purposes or recipients. In that case, judicial intervention to supply particular terms is not necessary to validate the creation of the trust. The necessary terms instead will be supplied by the trustee. *See Restatement (Second) of Trusts § 396* (1959). Judicial intervention under subsection (b) will become necessary only if the trustee fails to make a selection. *See Restatement (Second) of Trusts § 397 cmt. d* (1959). Pursuant to subsection 110(b) [*T.C.A. § 35-15-110(a)*], the charitable organizations selected by the trustee would not have the rights of qualified beneficiaries under this Code because they are not expressly designated to receive distributions under the terms of the trust.

Contrary to *Restatement (Second) of Trusts § 391* (1959), subsection (c) [*T.C.A. § 35-15-405(c)*] grants a settlor standing to maintain an action to enforce a charitable trust. The grant of standing to the settlor does not negate the right of the state attorney general or persons with special interests to enforce either the trust or their interests. For the law on the enforcement of charitable trusts, see Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 *U. Hawaii L. Rev.* 593 (1999).

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Tenn. Code Ann. § 35-15-406 (2012)

35-15-406. Creation of trust induced by fraud, duress, or undue influence.

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

HISTORY: Acts 2004, ch. 537, § 28.

NOTES:

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NOTES TO DECISIONS

1. Summary Judgment.

1. Summary Judgment.

In a beneficiary's suit against the trustees in which he claimed he did not understand the consequences of executing amendments to the trusts, as reasonable minds could draw more than one conclusion as to whether the transactions were the product of undue influence, this genuine issue of material fact precluded the chancery court from granting the trustees partial summary judgment on the beneficiary's undue influence defense. *Cartwright v. Capital*, -- S.W.3d --, 2012 Tenn. App. LEXIS 369 (Tenn. Ct. App. June 5, 2012).

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section is a specific application of Restatement (Third) of Trusts § 12 (Tentative Draft No. 1, approved 1996), and *Restatement (Second) of Trusts § 333* (1959), which provide that a trust can be set aside or reformed on the same grounds as those which apply to a transfer of property not in trust, among which include undue influence, duress, and fraud, and mistake. This section addresses undue influence, duress, and fraud. For reformation of a trust on grounds of mistake, see section 415 [*T.C.A. § 35-15-415*]. See also Restatement (Third) of Property: Wills and Other Donative Transfers § 8.3 (Tentative Draft No. 3, approved 2001), which closely tracks the language above. Similar to a will, the invalidity of a trust on grounds of undue influence, duress, or fraud may be in whole or in part.



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Tenn. Code Ann. § 35-15-407 (2012)

35-15-407. Evidence of oral trust.

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

HISTORY: Acts 2004, ch. 537, § 29.

NOTES:

COMMENTS TO OFFICIAL TEXT

Section Comment. While it is always advisable for a settlor to reduce a trust to writing, the Tennessee Uniform Trust Code follows established law in recognizing oral trusts. Such trusts are viewed with caution, however. The requirement of this section that an oral trust can be established only by clear and convincing evidence is a higher standard than is in effect in many states. See *Restatement (Third) of Trusts § 20* Reporter's Notes (Tentative Draft No. 1, approved 1996).

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

For the Statute of Frauds generally, see *Restatement (Second) of Trusts §§ 40-52* (1959). For a description of what the writing must contain, assuming that a writing is required, see *Restatement (Third) of Trusts § 22* (Tentative Draft No. 1, approved 1996); *Restatement (Second) of Trusts § 46-49* (1959). For a discussion of when the writing must be signed, see *Restatement (Third) of Trusts § 23* (Tentative Draft No. 1, approved 1996); *Restatement (Second) of Trusts § 41-42* (1959). For the law of oral trusts, see *Restatement (Third) of Trusts § 20* (Tentative Draft No. 1, approved 1996); *Restatement (Second) of Trusts §§ 43-45* (1959).

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Tenn. Code Ann. § 35-15-408 (2012)

35-15-408. Trust for care of animal.

(a) A trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one (1) animal alive during the settlor's lifetime, upon the death of the last surviving animal. The trust may not be enforced for more than ninety (90) years.

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

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

HISTORY: Acts 2004, ch. 537, § 30; 2007, ch. 24, § 13.

NOTES: Amendments.

The 2007 amendment substituted "ninety (90) years" for "twenty-one (21) years" at the end of (a).

Effective Dates.

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

Section to Section References.

This section is referred to in §§ 35-15-402, 35-15-409.

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section and the next section of the Code [*T.C.A. § 35-15-409*] validate so called honorary trusts. Unlike honorary trusts created pursuant to the common law of trusts, which are arguably no more than powers of appointment, the trusts created by this and the next section [*T.C.A. §§ 35-15-408 and 35-15-409*] are valid and enforceable as trusts for a

period of up to ninety (90) years. For a discussion of the common law doctrine, see Restatement (Third) of Trusts § 47 (Tentative Draft No. 2, approved 1999); *Restatement (Second) of Trusts* § 124 (1959).

This section addresses a particular type of honorary trust, the trust for the care of an animal. Section 409 [*T.C.A.* § 35-15-409] specifies the requirements for trusts without ascertainable beneficiaries that are created for other noncharitable purposes. A trust for the care of an animal may last for the life of the animal. While the animal will ordinarily be alive on the date the trust is created, an animal may be added as a beneficiary after that date as long as the addition is made prior to the settlor's death. Animals in gestation but not yet born at the time of the trust's creation may also be covered by its terms. A trust authorized by this section may be created to benefit one designated animal or several designated animals.

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

Sections 408 and 409 [*T.C.A.* §§ 35-15-408 and 35-15-409] close this gap. The intended use of a trust authorized by either section may be enforced by a person designated in the terms of the trust or, if none, by a person appointed by the court. In either case, subsection 110(b) [*T.C.A.* § 35-15-110(b)] grants to the person appointed the rights of a qualified beneficiary for the purpose of receiving notices and providing consents. If the trust is created for the care of an animal, a person with an interest in the welfare of the animal has standing to petition for an appointment. The person appointed by the court to enforce the trust should also be a person who has exhibited an interest in the animal's welfare. The concept of granting standing to a person with a demonstrated interest in the animal's welfare is derived from the Uniform Guardianship and Protective Proceedings Act, which allows a person interested in the welfare of a ward or protected person to file petitions on behalf of the ward or protected person. *See, e.g.*, Uniform Probate Code §§ 5-210(b), 5-414(a).

Subsection (c) addresses the problem of excess funds. If the court determines that the trust property exceeds the amount needed for the intended purpose and that the terms of the trust do not direct the disposition, a resulting trust is ordinarily created in the settlor or settlor's successors in interest. *See Restatement (Third) of Trusts* § 47 (Tentative Draft No. 2, approved 1999); *Restatement (Second) of Trusts* § 124 (1959). Successors in interest include the beneficiaries under the settlor's will, if the settlor has a will, or in the absence of an effective will provision, the settlor's heirs. The settlor may also anticipate the problem of excess funds by directing their disposition in the terms of the trust. The disposition of excess funds is within the settlor's control. *See* subsection 105(a) [*T.C.A.* § 35-15-105(a)]. While a trust for an animal is usually not created until the settlor's death, subsection (a) allows such a trust to be created during the settlor's lifetime. Accordingly, if the settlor is still living, subsection (c) provides for distribution of excess funds to the settlor, and not to the settlor's successors in interest.

Should the means chosen not be particularly efficient, a trust created for the care of an animal can also be terminated by the trustee or court under section 414 [*T.C.A.* § 35-15-414]. Termination of a trust under that section, however, requires that the trustee or court develop an alternative means for carrying out the trust purposes. *See* subsection 414(c) [*T.C.A.* § 35-15-414(c)].

This section and the next section [*T.C.A.* § 35-15-409] are suggested by section 2-907 of the Uniform Probate Code, but much of this and the following section is new.

2007 Amendment.

This Section was amended to increase the maximum potential duration of a trust created under this Section from twenty-one (21) years to ninety (90) years.

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Tenn. Code Ann. § 35-15-409 (2012)

35-15-409. Noncharitable trust without ascertainable beneficiary.

Except as otherwise provided in § 35-15-408 or by another statute, the following rules apply:

(1) A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. The trust may not be enforced for more than ninety (90) years;

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

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

HISTORY: Acts 2004, ch. 537, § 31; 2007, ch. 24, § 14.

NOTES: Amendments.

The 2007 amendment substituted "ninety (90) years" for "twenty-one (21) years" at the end of (1).

Effective Dates.

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

Section to Section References.

This section is referred to in § 35-15-402.

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section authorizes two types of trusts without ascertainable beneficiaries; trusts for general but noncharitable purposes, and trusts for a specific noncharitable purpose other than the care of an animal, on which see section 408 [T.C.A. § 35-15-408]. Examples of trusts for general noncharitable purposes include a bequest of money to be distributed to such objects of benevolence as the trustee might select. Unless such attempted disposition was interpreted as char-

itable, at common law the disposition was honorary only and did not create a trust. Under this section, however, the disposition is enforceable as a trust for a period of up to ninety (90) years.

The most common example of a trust for a specific noncharitable purpose is a trust for the care of a cemetery plot. The lead-in language to the section recognizes that some special purpose trusts, particularly those for care of cemetery plots, are subject to other statutes. Such legislation will typically endeavor to facilitate perpetual care as opposed to care limited to ninety (90) years as under this section.

For the requirement that a trust, particularly the type of trust authorized by this section, must have a purpose that is not capricious, see section 404 Section Comment [*T.C.A. § 35-15-404*]. For examples of the types of trusts authorized by this section, see Restatement (Third) of Trusts § 47 (Tentative Draft No. 2, approved 1999), and *Restatement (Second) of Trusts § 62* cmt. w and § 124 (1959). The case law on capricious purposes is collected in 2 Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 124.7 (4th ed. 1987).

This section is similar to section 408 [*T.C.A. § 35-15-408*], although less detailed. Much of the Section Comment to section 408 [*T.C.A. § 35-15-408*] also applies to this section.

2007 Amendment.

This Section was amended to increase the maximum potential duration of a trust created under this Section from twenty-one (21) years to ninety (90) years.

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Tenn. Code Ann. § 35-15-410 (2012)

35-15-410. Modification or termination of trust -- Proceedings for approval or disapproval.

(a) In addition to the methods of termination prescribed by §§ 35-15-411 -- 35-15-414, a trust terminates to the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve.

(b) A proceeding to approve or disapprove a proposed modification or termination under §§ 35-15-411 -- 35-15-416, or trust combination or division under § 35-15-417, may be commenced by a trustee or beneficiary. The settlor of a charitable trust may maintain a proceeding to modify the trust under § 35-15-413.

(c) Nothing in this section or this chapter is intended to create or imply a duty for a trustee to make or seek approval of a modification, termination, combination or division, and a trustee is not liable for not making or seeking approval of a modification, termination, combination or division.

(d) No modification, termination, combination or division may be made pursuant to §§ 35-15-411 -- 35-15-417 that:

(1) Results in the trust not qualifying for the federal or state marital or charitable income, gift, estate or inheritance tax deduction if the trust would qualify but for the modification, termination, combination or division;

(2) Results in the trust being subject to the federal or state generation-skipping transfer tax if the trust would not be subject to the generation-skipping transfer tax but for the modification, termination, combination or division; or

(3) Results in an overall increase in federal or state estate, inheritance, gift or generation-skipping transfer taxes.

HISTORY: Acts 2004, ch. 537, § 32.

NOTES: Section to Section References.

Sections 35-15-410 -- 35-15-416 are referred to in § 35-15-105.

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

Subsection (a) lists the grounds on which trusts typically terminate. For a similar formulation, see Restatement (Third) of Trusts § 61 (Tentative Draft No. 3, approved 2001). Terminations under subsection (a) may be in either in whole or in part. Other types of terminations, all of which require action by a court, trustee, or beneficiaries, are covered in sections 411-414 [*T.C.A.* §§ 35-15-411 -- 35-15-414], which also address trust modification. Of these sections, all but section 411 [*T.C.A.* § 35-15-411] apply to charitable trusts and all but section 413 [*T.C.A.* § 35-15-413] apply to non-charitable trusts.

Withdrawal of the trust property is not an event terminating a trust. The trust remains in existence although the trustee has no duties to perform unless and until property is later contributed to the trust.

Subsection (b) specifies the persons who have standing to seek court approval or disapproval of proposed trust modifications, terminations, combinations, or divisions. An approval or disapproval may be sought for an action that does not require court permission, including a petition questioning the trustee's distribution upon termination of a trust under one hundred thousand dollars (\$100,000) (section 414) [*T.C.A.* § 35-15-414], and a petition to approve or disapprove a proposed trust division or consolidation (section 417) [*T.C.A.* § 35-15-417]. Subsection (b) makes the settlor an interested person with respect to a judicial proceeding brought by the beneficiaries under section 411 [*T.C.A.* § 35-15-411] to terminate or modify a trust. Contrary to *Restatement (Second) of Trusts* § 391 (1959), subsection (b) grants a settlor standing to petition the court under section 413 [*T.C.A.* § 35-15-413] to apply *cy pres* to modify the settlor's charitable trust.

Subsection (c) clarifies that a trustee has no duty to make or seek approval of a modification, termination, combination, or division and cannot be held liable for failing to do so.

Subsection (d) prohibits a modification, termination, combination, or division that would cause adverse tax consequences.

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Tenn. Code Ann. § 35-15-411 (2012)

35-15-411. Modification or termination of noncharitable irrevocable trust by consent.

(a) During the settlor's lifetime, a noncharitable irrevocable trust may be modified or terminated by the trustee upon consent of all qualified beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust if the settlor does not object to the proposed modification or termination. The trustee shall notify the settlor of the proposed modification or termination not less than sixty (60) days before initiating the modification or termination. The notice of modification or termination must include:

- (1) An explanation of the reasons for the proposed modification or termination;
- (2) The date on which the proposed modification or termination is anticipated to occur; and

(3) The date, not less than sixty (60) days after the giving of the notice, by which the settlor must notify the trustee of an objection to the proposed modification or termination.

(b) Following the settlor's death, a noncharitable irrevocable trust may be terminated upon consent of all of the qualified beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified upon consent of all of the qualified beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.

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

(d) If not all of the qualified beneficiaries consent to a proposed modification or termination of the trust under subsection (a) or (b), the modification or termination may be approved by the court if the court is satisfied that:

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

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

(e) Solely for purposes of this section, the term "noncharitable irrevocable trust" refers to a trust that is not revocable by the settlor with respect to which:

(1) No federal or state income, gift, estate or inheritance tax charitable deduction was allowed upon transfers to the trust; and

(2) The value of all interests in the trust owned by charitable organizations does not exceed five percent (5%) of the value of the trust.

(f) Notwithstanding subsection (a), the trustee may seek court approval of a modification or termination.

HISTORY: Acts 2004, ch. 537, § 33; 2007, ch. 24, §§ 15-19.

NOTES: Amendments.

The 2007 amendment inserted "qualified" preceding "beneficiaries" in the first sentence in the introductory paragraph of (a), in the first and second sentences in (b), in (c), in the introductory paragraph of (d) and in (d)(1); inserted "qualified" preceding "beneficiary" in (d)(2); deleted the former second sentence in the introductory paragraph of (a) which read: "Nothing in this section shall be construed to preclude the trustee from obtaining court approval of the modification or termination."; and added (f).

Effective Dates.

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

Section to Section References.

Sections 35-15-410 -- 35-15-416 are referred to in § 35-15-105.

Sections 35-15-411 -- 35-15-417 are referred to in § 35-15-410.

Sections 35-15-411 -- 35-15-416 are referred to in § 35-15-410.

Sections 35-15-411 -- 35-15-414 are referred to in § 35-15-410.

This section is referred to in 35-15-301.

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Cited:

Cartwright v. Capital, -- S.W.3d --, 2012 Tenn. App. LEXIS 369 (Tenn. Ct. App. June 5, 2012).

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section describes the circumstances in which termination or modification of a noncharitable irrevocable trust may be compelled by the qualified beneficiaries, with or without the concurrence of the settlor. For provisions governing modification or termination of trusts without the need to seek beneficiary consent, see sections 412 [*T.C.A. § 35-15-412*] (modification or termination due to unanticipated circumstances or inability to administer trust effectively), 414 [*T.C.A. § 35-15-414*] (termination or modification of uneconomic noncharitable trust), and 416 [*T.C.A. § 35-15-416*] (modification to achieve settlor's tax objectives). If the trust is revocable by the settlor, the method of revocation specified in section 602 [*T.C.A. § 35-15-602*] applies.

Subsection (a) states the test for termination or modification by the trustee during the settlor's life. Subsection (b) states the test for termination or modification by the court following the settlor's death. Subsection (c) directs how the trust property is to be distributed following a termination under either subsection (a) or (b). Subsection (d) creates a procedure for judicial approval of a proposed termination or modification when the consent of less than all of the beneficiaries is available. Subsection (e) clarifies that this section applies to trusts with a small charitable interest if no charitable tax deduction was allowed with respect to the funding of the trust.

Under subsection (b), a trust may be modified or terminated over a trustee's objection. However, pursuant to section 410 [*T.C.A. § 35-15-410*], the trustee has standing to object to a proposed termination or modification.

No gift tax consequences result from a termination as long as the beneficiaries agree to distribute the trust property in accordance with the value of their proportionate interests.

The provisions of part 3 [T.C.A. §§ 35-15-301 -- 35-15-305] on representation, virtual representation and the appointment and approval of representatives appointed by the court apply to the determination of whether all beneficiaries have signified consent under this section. The authority to consent on behalf of another person, however, does not include authority to consent over the other person's objection. *See* subsection 301(b) [T.C.A. § 35-15-301(b)]. Regarding the persons who may consent on behalf of a beneficiary, see sections 302 through 305 [T.C.A. §§ 35-15-302 -- 35-15-305]. A consent given by a representative is invalid to the extent there is a conflict of interest between the representative and the person represented. Given this limitation, virtual representation of a beneficiary's interest by another beneficiary pursuant to section 304 [T.C.A. § 35-15-304] will rarely be available in a trust termination case, although it should be routinely available in cases involving trust modification, such as a grant to the trustee of additional powers. If virtual or other form of representation is unavailable, section 305 of the Code [T.C.A. § 35-15-305] permits the court to appoint a representative who may give the necessary consent to the proposed modification or termination on behalf of the minor, incapacitated, unborn, or unascertained beneficiary. The ability to use virtual and other forms of representation to consent on a beneficiary's behalf to a trust termination or modification has not traditionally been part of the law, although there are some notable exceptions. *Compare* Restatement (Second) § 337(1) (1959) (beneficiary must not be under incapacity), *with* *Hatch v. Riggs National Bank*, 361 F.2d 559 (D.C. Cir. 1966) (guardian ad litem authorized to consent on beneficiary's behalf).

Termination under subsection (a) does not require a finding that the trust no longer serves a material purpose. Subsection (b) of this section allows the qualified beneficiaries to compel termination of a trust that still serves a material purpose if the reasons for termination outweigh the continuing material purpose.

Subsection (b), similar to Restatement Third but not Restatement Second, allows modification by beneficiary action. The qualified beneficiaries may modify any term of the trust if the modification is not inconsistent with a material purpose of the trust. Restatement Third, though, goes further than this Code in also allowing the qualified beneficiaries to use trust modification as a basis for removing the trustee if removal would not be inconsistent with a material purpose of the trust. Under the Code, however, Section 706 [T.C.A. § 35-15-706] is the exclusive provision on removal of trustees. Subdivision 706(b)(4) [T.C.A. § 35-15-706(b)(4)] recognizes that a request for removal upon unanimous agreement of the qualified beneficiaries is a factor for the court to consider, but before removing the trustee the court must also find that such action best serves the interests of all the beneficiaries, that removal is not inconsistent with a material purpose of the trust, and that a suitable cotrustee or successor trustee is available. *Compare* Section 706(b)(4), *with* Restatement (Third) Section 65 cmt. f (Tentative Draft No. 3, approved 2001).

The requirement that the trust no longer serve a material purpose before it can be terminated by the beneficiaries does not mean that the trust has no remaining function. In order to be material, the purpose remaining to be performed must be of some significance:

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

Restatement (Third) of Trusts § 65 cmt. d (Tentative Draft No. 3, approved 2001).

Subsection (c) recognizes that the qualified beneficiaries' power to compel termination of the trust includes the right to direct how the trust property is to be distributed. Once termination has been approved, how the trust property is to be distributed is solely for the beneficiaries to decide.

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

2007 Amendment.

The group of persons who must consent to a modification or termination is changed from all beneficiaries to qualified beneficiaries. This change makes the statutory authority for modifications or terminations more useful because the trustee does not have to try to locate every possible beneficiary.

Although consideration was given to allowing the trustee and qualified beneficiaries to consent to a modification or termination after the settlor's death, the consensus was that requiring court approval was a beneficial protection. The section's requirement of court approval does not apply to matters specifically authorized to be handled by nonjudicial settlement under *T.C.A. § 35-15-111*. The actions authorized under *T.C.A. § 35-15-111* are not an exclusive list. Nonjudicial settlement agreements between the trustee and the qualified beneficiaries should be applicable to the resolution of any matter of an administrative nature that does not alter a beneficiary's income or principal interest in the trust. Any proposed change that alters a beneficiary's income or principal interest in the trust must be submitted for court approval. A proposal to extend the term of a trust or to convert the trust to a total return trust in compliance with *T.C.A. § 35-6-101* et seq. is not an alteration of a beneficiary's income or principal interest in the trust.



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Tenn. Code Ann. § 35-15-412 (2012)

35-15-412. Modification or termination because of unanticipated circumstances or inability to administer trust effectively.

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

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

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

HISTORY: Acts 2004, ch. 537, § 34.

NOTES: Section to Section References.

Sections 35-15-410 -- 35-15-416 are referred to in § 35-15-105.

Sections 35-15-411 -- 35-15-417 are referred to in § 35-15-410.

Sections 35-15-411 -- 35-15-416 are referred to in § 35-15-410.

Sections 35-15-411 -- 35-15-414 are referred to in § 35-15-410.

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section broadens the court's ability to apply equitable deviation to terminate or modify a trust. Subsection (a) allows a court to modify the dispositive provisions of the trust as well as its administrative terms. For example, modification of the dispositive provisions to increase support of a beneficiary might be appropriate if the beneficiary has become unable to provide for support due to poor health or serious injury. Subsection (a) is similar to Restatement (Third) of Trusts § 66(1) (Tentative Draft No. 3, approved 2001), except that this section, unlike the Restatement, does not impose a duty on the trustee to petition the court if the trustee is aware of circumstances justifying judicial modification. The purpose of the "equitable deviation" authorized by subsection (a) is not to disregard the settlor's intent but to modify inopportune details to effectuate better the settlor's broader purposes. Among other things, equitable deviation may be used to modify administrative or dispositive terms due to the failure to anticipate economic change or the incapacity of a

beneficiary. For numerous illustrations, see Restatement (Third) of Trusts § 66 cmt. b (Tentative Draft No. 3, approved 2001). While it is necessary that there be circumstances not anticipated by the settlor before the court may grant relief under subsection (a), the circumstances may have been in existence when the trust was created. This section thus complements section 415 [*T.C.A. § 35-15-415*], which allows for reformation of a trust based on mistake of fact or law at the creation of the trust.

Subsection (b) broadens the court's ability to modify the administrative terms of a trust. The standard under subsection (b) is similar to the standard for applying *cy pres* to a charitable trust. *See* subsection 413(a) [*T.C.A. § 35-15-413(a)*]. Just as a charitable trust may be modified if its particular charitable purpose becomes impracticable or wasteful, so can the administrative terms of any trust, charitable or noncharitable. Subsections (a) and (b) are not mutually exclusive. Many situations justifying modification of administrative terms under subsection (a) will also justify modification under subsection (b). Subsection (b) is also an application of the requirement in section 404 [*T.C.A. § 35-15-404*] that a trust and its terms must be for the benefit of its beneficiaries. *See also* Restatement (Third) of Trusts § 27(2) & cmt. b (Tentative Draft No. 2, approved 1999). Although the settlor is granted considerable latitude in defining the purposes of the trust, the principle that a trust have a purpose which is for the benefit of its beneficiaries precludes unreasonable restrictions on the use of trust property. An owner's freedom to be capricious about the use of the owner's own property ends when the property is impressed with a trust for the benefit of others. *See Restatement (Second) of Trusts § 124* cmt. g (1959). Thus, attempts to impose unreasonable restrictions on the use of trust property will fail. *See Restatement (Third) of Trusts § 27* Reporter's Notes to cmt. b (Tentative Draft No. 2, approved 1999). Subsection (b), unlike subsection (a), does not have a direct precedent in the common law, but various states have insisted on such a measure by statute. *See, e.g., Mo. Rev. Stat. § 456.590.1.*

Upon termination of a trust under this section, subsection (c) requires that the trust be distributed in a manner consistent with the purposes of the trust. As under the doctrine of *cy pres*, effectuating a distribution consistent with the purposes of the trust requires an examination of what the settlor would have intended had the settlor been aware of the unanticipated circumstances. Typically, such terminating distributions will be made to the qualified beneficiaries, often in proportion to the actuarial value of their interests, although the section does not so prescribe. For the definition of qualified beneficiary, see subdivision 103(12) [*T.C.A. § 35-15-103(13)*].

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

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Tenn. Code Ann. § 35-15-413 (2012)

35-15-413. Cy pres.

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

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

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

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

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

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

(2) Fewer than twenty-one (21) years have elapsed since the date of the trust's creation.

HISTORY: Acts 2004, ch. 537, § 35.

NOTES: Section to Section References.

Sections 35-15-410 -- 35-15-416 are referred to in § 35-15-105.

Sections 35-15-411 -- 35-15-417 are referred to in § 35-15-410.

Sections 35-15-411 -- 35-15-416 are referred to in § 35-15-410.

Sections 35-15-411 -- 35-15-414 are referred to in § 35-15-410.

This section is referred to in §§ 35-13-114, 35-15-410.

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Cited:

Georgia O'Keeffe Found. (Museum) v. Fisk Univ., 312 S.W.3d 1, 2009 Tenn. App. LEXIS 434 (Tenn. Ct. App. July 14, 2009).

COMMENTS TO OFFICIAL TEXT

Section Comment.

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

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

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

For the definition of charitable purpose, see subdivision 405(a) [*T.C.A.* § 35-15-405(a)]. Pursuant to subdivisions 405(c) and 410(b) [*T.C.A.* §§ 35-15-405(c) and 35-15-410(b)], a petition requesting a court to enforce a charitable trust or to apply cy pres may be maintained by a settlor. Such actions can also be maintained by a cotrustee, the state attorney general, or by a person having a special interest in the charitable disposition. See *Restatement (Second) of Trusts* § 391 (1959).



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Tenn. Code Ann. § 35-15-414 (2012)

35-15-414. Modification or termination of uneconomic trust.

(a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value less than one hundred thousand dollars (\$100,000) may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.

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

(c) Upon the termination of a trust under this section, the trustee shall distribute the trust property to or for the benefit of the beneficiaries, in such shares as the trustee, or the court if a court proceeding, determines, after taking into account the interests of income and remainder beneficiaries so as to conform as nearly as possible to the intention of the settlor, but a trust that qualified for the marital deduction for tax purposes shall only be distributed to the spouse of the settlor for whom the trust was created.

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

(e) This section shall not limit the right of a trustee, acting alone, to terminate a trust in accordance with applicable provisions of the governing instrument.

HISTORY: Acts 2004, ch. 537, § 36.

NOTES: Section to Section References.

Sections 35-15-410 -- 35-15-416 are referred to in § 35-15-105.

Sections 35-15-411 -- 35-15-417 are referred to in § 35-15-410.

Sections 35-15-411 -- 35-15-416 are referred to in § 35-15-410.

Sections 35-15-411 -- 35-15-414 are referred to in § 35-15-410.

This section is referred to in 35-15-410.

COMMENTS TO OFFICIAL TEXT

Section Comment.

Subsection (a) assumes that a trust with a value of one hundred thousand dollars (\$100,000) or less is sufficiently likely to be inefficient to administer that a trustee should be able to terminate it without the expense of a judicial termination proceeding. Because subsection (a) is a default rule, a settlor is free to set a higher or lower figure or to specify different procedures or to prohibit termination without a court order. *See* section 105 [*T.C.A.* § 35-15-105] and Chapter 4 General Comment [*T.C.A.* § 35-15-401].

Subsection (b) allows the court to modify or terminate a trust if the costs of administration would otherwise be excessive in relation to the size of the trust. The court may terminate a trust under this section even if the settlor has forbidden it. *See* subdivision 105(b)(4) [*T.C.A.* § 35-15-105(b)(4)]. Judicial termination under this subsection may be used whether or not the trust is larger or smaller than one hundred thousand dollars (\$100,000).

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

Upon termination of a trust under this section, subsection (c) requires that the trust property be distributed in a manner consistent with the purposes of the trust. In addition to outright distribution to the beneficiaries, subdivision 816(21) [*T.C.A.* § 35-15-816(21)] authorizes payment to be made by a variety of alternate payees. Distribution under this section will typically be made to the qualified beneficiaries in proportion to the actuarial value of their interests.

Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the "trustee" could constitute a breach of trust. The drafters of the Tennessee Uniform Trust Code concluded that easements for conservation or preservation are sufficiently different from the typical cash and securities found in small trusts that they should be excluded from this section, and subsection (d) so provides. Most creators of such easements, it was surmised, would prefer that the easement be continued unchanged even if the easement, and hence the trust, has a relatively low market value. For the law of conservation easements, *see Restatement (Third) of Property: Servitudes* § 1.6 (2000).

While this section is not directed principally at honorary trusts, it may be so applied. *See* sections 408, 409 [*T.C.A.* §§ 35-15-408 and 35-15-409].

Because termination of a trust under this section is initiated by the trustee or ordered by the court, termination is not precluded by a spendthrift provision.

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Tenn. Code Ann. § 35-15-415 (2012)

35-15-415. Reformation to correct mistakes.

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

HISTORY: Acts 2004, ch. 537, § 37.

NOTES: Section to Section References.

Sections 35-15-410 -- 35-15-416 are referred to in § 35-15-105.

Sections 35-15-411 -- 35-15-417 are referred to in § 35-15-410.

Sections 35-15-411 -- 35-15-416 are referred to in § 35-15-410.

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NOTES TO DECISIONS

0.5. Reformation Lawful.

0.5. Reformation Lawful.

In accordance with the Tennessee Uniform Trust Code, *T.C.A. § 35-15-101 et seq.*, it was lawful to reform the mistake of expression contained within the decedent's will in establishing a trust; the mistake of expression was the decedent's failure to include a term in which he intended to include, which was the beneficiary of the corpus of the trust. *In re Estate of Shults v. Shults*, -- *S.W.3d* --, 2008 *Tenn. App. LEXIS 96* (Tenn. Ct. App. Feb. 22, 2008).

Trial court properly reformed the trust document to read as it did at the time the deceased signed it with the grantee being the trustee and her husband being successor trustee; the reformation effectuated the intention of the deceased as well as give effect to the quitclaim deed that named the grantee. *Manning v. Snyder*, -- *S.W.3d* --, 2009 *Tenn. App. LEXIS 120* (Tenn. Ct. App. Mar. 26, 2009).

COMMENTS TO OFFICIAL TEXT**Section Comment.**

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

This section applies whether the mistake is one of expression or one of inducement. A mistake of expression occurs when the terms of the trust misstate the settlor's intention, fail to include a term that was intended to be included, or include a term that was not intended to be included. A mistake in the inducement occurs when the terms of the trust accurately reflect what the settlor intended to be included or excluded but this intention was based on a mistake of fact or law. *See* Restatement (Third) of Property: Donative Transfers § 12.1 cmt. i (Tentative Draft No. 1, approved 1995). Mistakes of expression are frequently caused by scriveners' errors while mistakes of inducement often trace to errors of the settlor.

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

In determining the settlor's original intent, the court may consider evidence relevant to the settlor's intention even though it contradicts an apparent plain meaning of the text. The objective of the plain meaning rule, to protect against fraudulent testimony, is satisfied by the requirement of clear and convincing proof. *See* Restatement (Third) of Property: Donative Transfers § 12.1 cmt. d and Reporter's Notes (Tentative Draft No. 1, approved 1995). *See also* John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 *U. Pa. L. Rev.* 521 (1982).

For further discussion of the rule of this section and its application to illustrative cases, see Restatement (Third) of Property: Donative Transfers § 12.1 cmts. and Reporter's Notes (Tentative Draft No. 1, approved 1995).



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Tenn. Code Ann. § 35-15-416 (2012)

35-15-416. Modification to achieve settlor's tax objectives.

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

HISTORY: Acts 2004, ch. 537, § 38.

NOTES: Section to Section References.

Sections 35-15-410 -- 35-15-416 are referred to in § 35-15-105.

Sections 35-15-411 -- 35-15-417 are referred to in § 35-15-410.

Sections 35-15-411 -- 35-15-416 are referred to in § 35-15-410.

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section is copied from Restatement (Third) of Property: Donative Transfers § 12.2 (Tentative Draft No. 1, approved 1995). "Modification" under this section is to be distinguished from the "reformation" authorized by section 415 [T.C.A. § 35-15-415]. Reformation under section 415 [T.C.A. § 35-15-415] is available when the terms of a trust fail to reflect the donor's original, particularized intention. The mistaken terms are then reformed to conform to this specific intent. The modification authorized here allows the terms of the trust to be changed to meet the settlor's tax-saving objective as long as the resulting terms, particularly the dispositive provisions, are not inconsistent with the settlor's probable intent. The modification allowed by this subsection is similar in concept to the cy pres doctrine for charitable trusts (see section 413 [T.C.A. § 35-15-413]), and the deviation doctrine for unanticipated circumstances (see section 412 [T.C.A. § 35-15-412]).

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

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

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Tenn. Code Ann. § 35-15-417 (2012)

35-15-417. Combination and division of trusts.

After notice to the qualified beneficiaries, a trustee may combine two (2) or more trusts into a single trust or divide a trust into two (2) or more separate trusts, if the result does not impair rights of any beneficiary or adversely affect the achievement of the purposes of the trust. If the trusts to be combined or divided have different trustees, the trustees may negotiate the terms of the combined or divided trusts, including which trust or trusts will be the surviving trust or trusts, who will be the trustee or trustees of the surviving trust or trusts and any other matter relating to the operation of the surviving trust or trusts.

HISTORY: Acts 2004, ch. 537, § 39; 2007, ch. 24, § 20.

NOTES: Amendments.

The 2007 amendment added the second sentence.

Effective Dates.

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

Section to Section References.

Sections 35-15-411 -- 35-15-417 are referred to in § 35-15-410.

This section is referred to in 35-15-410.

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section, which authorizes the combination or division of trusts, is subject to contrary provision in the terms of the trust. *See* section 105 [*T.C.A. § 35-15-105*] and Chapter 4 General Comment [*T.C.A. § 35-15-401*]. Many trust instruments and standardized estate planning forms include comprehensive provisions governing combination and division of trusts. Except for the requirement that the qualified beneficiaries receive advance notice of a proposed combination or division, this section is similar to Restatement (Third) of Trusts § 68 (Tentative Draft No. 3, approved 2001).

This section allows a trustee to combine two or more trusts even though their terms are not identical. Typically the trusts to be combined will have been created by different members of the same family and will vary on only insignificant details, such as the presence of different perpetuities savings periods. The more the dispositive provisions of the

trusts to be combined differ from each other the more likely it is that a combination would impair some beneficiary's interest, hence the less likely that the combination will not be objected to by one of the beneficiaries. Combining trusts may prompt more efficient trust administration and is sometimes an alternative to terminating an uneconomic trust as authorized by section 414 [T.C.A. § 35-15-414]. Administrative economies promoted by combining trusts include a potential reduction in trustees' fees, particularly if the trustee charges a minimum fee per trust, the ability to file one trust income tax return instead of multiple returns, and the ability to invest a larger pool of capital more effectively. Particularly if the terms of the trust are identical, available administrative economies may suggest that the trustee has a responsibility to pursue a combination. See section 805 [T.C.A. § 35-15-805] (duty to incur only reasonable costs).

Division of trusts is often beneficial and, in certain circumstances, almost routine. Division of trusts is frequently undertaken due to a desire to obtain maximum advantage of exemptions available under the federal generation-skipping tax. While the terms of the trusts which result from such a division are identical, the division will permit differing investment objectives to be pursued and allow for discretionary distributions to be made from one trust and not the other. Given the substantial tax benefits often involved, a failure by the trustee to pursue a division might in certain cases be a breach of fiduciary duty. The opposite could also be true if the division is undertaken to increase fees or to fit within the small trust termination provision. See section 414 [T.C.A. § 35-15-414].

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

This section does not require that a combination or division be approved either by the court or by the beneficiaries. Prudence may dictate, however, that court approval under section 410 [T.C.A. § 35-15-410] be sought and beneficiary consent obtained whenever the terms of the trusts to be combined or the trusts that will result from a division differ substantially one from the other. For the provisions relating to beneficiary consent or ratification of a transaction, or release of trustee from liability, see section 1009 [T.C.A. § 35-15-1009].

While the consent of the beneficiaries is not necessary before a trustee may combine or divide trusts under this section, advance notice to the qualified beneficiaries of the proposed combination or division is required. This is consistent with section 813 [T.C.A. § 35-15-813], which requires that the trustee keep the beneficiaries reasonably informed of trust administration, including the giving of advance notice to the qualified beneficiaries of several specified actions that may have a major impact on their interests.

Numerous states have enacted statutes authorizing division of trusts, either by trustee action or upon court order. For a list of these statutes, see Restatement (Third) Property: Donative Transfers Section 12.2 Statutory Note (Tentative Draft No. 1, approved 1995). Combination or division has also been authorized by the courts in the absence of authorizing statute. See, e.g., *In re Will of Marcus*, 552 N.Y.S. 2d 546 (Surr. Ct. 1990) (combination); *In re Heller Inter Vivos Trust*, 613 N.Y.S. 2d 809 (Surr. Ct. 1994) (division); and *BankBoston v. Marlow*, 701 N.E. 2d 304 (Mass. 1998) (division).

For a provision authorizing a trustee, in distributing the assets of the divided trust, to make non-pro-rata distributions, see subdivision 816(22) [T.C.A. § 35-15-816(b)(22)].

2007 Amendment.

This Section was amended to provide that if trusts being combined or divided have or will have different trustees, the two trustees may negotiate the terms of the trust relative to such merger or division.

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Tenn. Code Ann. § 35-15-501 (2012)

35-15-501. Rights of beneficiary's creditor or assignee.

To the extent a beneficiary's interest is not subject to a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to such relief as is appropriate under the circumstances.

HISTORY: Acts 2004, ch. 537, § 40; 2007, ch. 24, § 21.

NOTES: Amendments.

The 2007 amendment substituted "not subject to" for "not protected by" in the first sentence.

Effective Dates.

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

Section to Section References.

Sections 35-15-501--35-15-507 are referred to in § 26-4-101.

Sections 35-15-501 -- 35-15-507 are referred to in § 26-4-101.

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NOTES TO DECISIONS

0.5. Spendthrift Provision.

0.5. Spendthrift Provision.

Appellate court construed trust as restraining the voluntary and involuntary transfer of farm property itself, but also as allowing a beneficiary to voluntarily transfer a year's worth of income from the property; thus, that portion of the spendthrift provision pertaining to voluntary alienation of farm income was invalid, and debtor's interest in that income was subject to execution. *Atkins v. Marks*, 288 S.W.3d 356, 2008 Tenn. App. LEXIS 349 (Tenn. Ct. App. June 11, 2008), rehearing denied, 288 S.W.3d 356, 2008 Tenn. App. LEXIS 449 (Tenn. Ct. App. July 15, 2008).

COMMENTS TO OFFICIAL TEXT

General Comment.

This part addresses the validity of a spendthrift provision and the rights of creditors, both of the settlor and beneficiaries, to reach a trust to collect a debt. Sections 501 and 502 [T.C.A. §§ 35-15-501 and 35-15-502] state the general rules. To the extent that a trust is protected by a spendthrift provision, a beneficiary's creditor may not reach the beneficiary's interest until distribution is made by the trustee. To the extent not protected by a spendthrift provision, however, the creditor can reach the beneficiary's interest subject to the court's power to limit the relief. Section 503 [T.C.A. § 35-15-503] lists the categories of creditors whose claims are not subject to a spendthrift restriction. Sections 504 through 507 [T.C.A. § 35-15-504 -- 35-15-507] address special categories in which the rights of a beneficiary's creditors are the same whether or not the trust contains a spendthrift provision. Section 504 [T.C.A. § 35-15-504] deals with discretionary trusts and trusts for which distributions are subject to a standard. Section 505 [T.C.A. § 35-15-505] covers creditor claims against a settlor, whether the trust is revocable or irrevocable, and if revocable, whether the claim is made during the settlor's lifetime or incident to the settlor's death. Section 506 [T.C.A. § 35-15-506] provides a creditor with a remedy if a trustee fails to make a mandated distribution within a reasonable time. Section 507 [T.C.A. § 35-15-507] clarifies that although the trustee holds legal title to trust property, that property is not subject to the trustee's personal debts.

The provisions of this part relating to the validity and effect of a spendthrift provision and the rights of certain creditors and assignees to reach the trust may not be modified by the terms of the trust. *See* subdivision 105(b)(5) [T.C.A. § 35-15-105(b)(5)].

This part does not supersede state exemption statutes nor an enacting jurisdiction's Uniform Fraudulent Transfers Act [T.C.A. title 66, chapter 3, part 3] which, when applicable, invalidates any type of gratuitous transfer, including transfers into trust.

Section Comment.

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

A creditor typically will pursue a claim by serving an order on the trustee attaching the beneficiary's interest. Assuming that the validity of the order cannot be contested, the trustee will then pay to the creditor instead of to the beneficiary any payments the trustee would otherwise be required to make to the beneficiary, as well as discretionary distributions the trustee decides to make. The creditor may also, in theory, force a judicial sale of a beneficiary's interest.

Because proceedings to satisfy a claim are equitable in nature, the second sentence of this section ratifies the court's discretion to limit the award as appropriate under the circumstances. In exercising its discretion to limit relief, the court may appropriately consider the support needs of a beneficiary and the beneficiary's family. *See* Restatement (Third) of Trusts § 56 cmt. e (Tentative Draft No. 2, approved 1999).



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Tenn. Code Ann. § 35-15-502 (2012)

35-15-502. Spendthrift provision.

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

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

(c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

HISTORY: Acts 2004, ch. 537, § 41.

NOTES: Section to Section References.

Sections 35-15-501 -- 35-15-507 are referred to in § 26-4-101.

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NOTES TO DECISIONS

0.5. Validity.

0.5. Validity.

Appellate court construed trust as restraining the voluntary and involuntary transfer of farm property itself, but also as allowing a beneficiary to voluntarily transfer a year's worth of income from the property; thus, that portion of the spendthrift provision pertaining to voluntary alienation of farm income was invalid, and debtor's interest in that income was subject to execution. *Atkins v. Marks*, 288 S.W.3d 356, 2008 Tenn. App. LEXIS 349 (Tenn. Ct. App. June 11, 2008), rehearing denied, 288 S.W.3d 356, 2008 Tenn. App. LEXIS 449 (Tenn. Ct. App. July 15, 2008).

COMMENTS TO OFFICIAL TEXT

Section Comment.

Under this section, a settlor has the power to restrain the transfer of a beneficiary's interest, regardless of whether the beneficiary has an interest in income, in principal, or in both. A creditor of the beneficiary is prohibited from attaching a protected interest and may only attempt to collect directly from the beneficiary after payment is made. This section is similar to Restatement (Third) of Trusts § 58 (Tentative Draft No. 2, approved 1999), and *Restatement (Second) of Trusts* §§ 152-153 (1959). For the definition of spendthrift provision, see subdivision 103(15) [*T.C.A.* § 35-15-103(16)].

For a spendthrift provision to be effective under this Code, it must prohibit both the voluntary and involuntary transfer of the beneficiary's interest, that is, a settlor may not allow a beneficiary to assign while prohibiting a beneficiary's creditor from collecting, and vice versa. *See* Restatement (Third) of Trusts § 58 cmt. b (Tentative Draft No. 2, approved 1999). *See also* *Restatement (Second) of Trusts* § 152(2) (1959). A spendthrift provision valid under this Code will also be recognized as valid in a federal bankruptcy proceeding. *See 11 U.S.C. § 541(c)(2)*.

Subsection (b), which is derived from *Texas Property Code* § 112.035(b), allows a settlor to provide maximum spendthrift protection simply by stating in the instrument that all interests are held subject to a "spendthrift trust" or words of similar effect.

A disclaimer, because it is a refusal to accept ownership of an interest and not a transfer of an interest already owned, is not affected by the presence or absence of a spendthrift provision. Most disclaimer statutes expressly provide that the validity of a disclaimer is not affected by a spendthrift protection. *See, e.g.*, Uniform Probate Code § 2-801(a). Releases and exercises of powers of appointment are also not affected because they are not transfers of property. *See* Restatement (Third) of Trusts § 58 cmt. c (Tentative Draft No. 2, approved 1999).

A spendthrift provision is ineffective against a beneficial interest retained by the settlor. *See* Restatement (Third) of Trusts § 58(2) (Tentative Draft No. 2, approved 1999). This is a necessary corollary to subdivision 505(a)(2) [*T.C.A.* § 35-15-505(a)(2)], which allows a creditor or assignee of the settlor to reach the maximum amount that can be distributed to or for the settlor's benefit. This right to reach the trust applies whether or not the trust contains a spendthrift provision.

A valid spendthrift provision makes it impossible for a beneficiary to make a legally binding transfer, but the trustee may choose to honor the beneficiary's purported assignment. The trustee may recommence distributions to the beneficiary at anytime. The beneficiary, not having made a binding transfer, can withdraw the beneficiary's direction but only as to future payments. *See* Restatement (Third) of Trusts § 58 cmt. d (Tentative Draft No. 2, approved 1999); *Restatement (Second) of Trusts* § 152 cmt. i (1959).



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Tenn. Code Ann. § 35-15-503 (2012)

35-15-503. Exceptions to spendthrift provision.

A spendthrift provision is unenforceable against a claim of this state to the extent a statute of this state so provides.

HISTORY: Acts 2004, ch. 537, § 42.

NOTES: Section to Section References.

Sections 35-15-501 -- 35-15-507 are referred to in § 26-4-101.

COMMENTS TO OFFICIAL TEXT

This section exempts the claims of the state from the effects of a spendthrift restriction.

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Tenn. Code Ann. § 35-15-504 (2012)

35-15-504. Discretionary trusts -- Effect of standard.

(a) Whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if:

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

(2) The trustee has abused the discretion.

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

(c) If the trustee's or co-trustee's discretion to make distributions for the trustee's or co-trustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim were the beneficiary not acting as trustee or co-trustee.

HISTORY: Acts 2004, ch. 537, § 43; 2007, ch. 24, § 22.

NOTES: Amendments.

The 2007 amendment added (c).

Effective Dates.

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

Section to Section References.

Sections 35-15-501 -- 35-15-507 are referred to in § 26-4-101.

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section addresses the ability of a beneficiary's creditor to reach the beneficiary's discretionary trust interest, whether or not the exercise of the trustee's discretion is subject to a standard. This section, similar to the Restatement, eliminates the distinction between discretionary and support trusts, unifying the rules for all trusts fitting within either of the former categories. *See Restatement (Third) of Trusts § 60 Reporter's Notes to cmt. a (Tentative Draft No. 2, approved 1999).*

This section will have limited application. Pursuant to section 502 [*T.C.A. § 35-15-502*], the effect of a valid spendthrift provision, where applicable, is to prohibit a creditor from collecting on a distribution prior to its receipt by the beneficiary.

2007 Amendment.

Subsection (c) was added to clarify that if a beneficiary is serving as trustee or co-trustee and has discretion to make a distribution to himself or for his own benefit pursuant to an ascertainable standard, then the creditor can not reach or compel a distribution except to the extent the interest would be subject to a creditor's claim if the beneficiary were not acting as trustee or co-trustee.

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Tenn. Code Ann. § 35-15-505 (2012)

35-15-505. Creditor's claims against settlor.

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

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

(2) Except as provided in chapter 16 of this title regarding investment services trusts and subdivision (a)(3) regarding an irrevocable special needs trust, a creditor or assignee of the settlor of an irrevocable trust may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one (1) settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution;

(3) For the purposes of this section, "irrevocable special needs trust" means an irrevocable trust established for the benefit of one or more disabled persons, which includes, but is not limited to, any individual who is disabled pursuant to 42 U.S.C. § 1382c(a), as well as any individual who is disabled pursuant to any similar federal, state or other jurisdictional law or regulation, or has a condition that is substantially equivalent to one that qualifies them to be so disabled in accordance with any of the above even if not officially found to be so disabled by a governmental body if one of the purposes of the trust, expressed in the trust instrument or implied from the trust instrument, is to allow the disabled person to qualify or continue to qualify for public, charitable or private benefits that might otherwise be available to the disabled person. The existence of one or more nondisabled remainder beneficiaries of the trust shall not disqualify it as an irrevocable special needs trust for the purposes of this section;

(4) No creditor or assignee of the settlor of an irrevocable special needs trust, as defined in subdivision (a)(3), may reach or compel distributions from such special needs trust, to or for the benefit of the settlor of such special needs trust, or otherwise, regardless of whether or not such irrevocable special needs trust complies with the provisions of, and irrespective of the requirements of, chapter 16 of this title; and

(5) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable immediately preceding the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate and the expenses of the settlor's funeral and disposal of remains. With respect to claims, expenses, and taxes in connection with the settlement of the settlor's estate, any claim of a creditor that would be barred against the fiduciary of a settlor's estate, the estate of the settlor, or any creditor or beneficiary of the settlor's estate shall be barred against the trust property of a trust that was revocable at the settlor's death, the trustee of the revocable trust, and the creditors and beneficiaries of the trust. The provisions of § 30-2-317(a) detailing the priority of payment of claims, expenses, and taxes from the probate estate of a decedent shall apply to a revoca-

ble trust to the extent the assets of the settlor's probate estate are inadequate and the personal representative or creditor or taxing authority of the settlor's estate has perfected its right to collect from the settlor's revocable trust.

(b) For purposes of this section during the period a power of withdrawal may be exercised or upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in § 2041(b)(2) or 2514(e) of the *Internal Revenue Code of 1986*, codified in 26 U.S.C. § 2041(b)(2) or § 2514(e), or § 2503(b) of the *Internal Revenue Code of 1986*, codified in 26 U.S.C. § 2503(b), in each case as in effect on July 1, 2004, or as later amended.

(c) For purposes of subdivision (a)(2), the power of a trustee of an irrevocable trust, whether arising under the trust agreement or any other provision of the law, to make a distribution to or for the benefit of a settlor for the purpose of reimbursing the settlor in an amount equal to any income taxes payable on any portion of the trust principal and income that are includable in the settlor's personal income under applicable law, as well as distributions made by the trustee pursuant to such authority, shall not be considered an amount that may be distributed to or for the settlor's benefit.

(d) With respect to an irrevocable trust for which the settlor made a qualified election pursuant to 26 U.S.C. § 2523(f), the power of a trustee, and any benefit resulting to the settlor from any exercise of such power, whether arising under the trust agreement or any other provision of the law, to make a distribution to or for the benefit of a settlor or to otherwise permit the settlor to use or benefit from trust property following the death of the settlor's spouse, shall not be considered an amount that may be distributed to or for the settlor's benefit for purposes of subdivision (a)(2). This subsection (d) shall not limit a creditor's remedies under the Uniform Fraudulent Transfer Act, compiled in title 66, chapter 3, part 3, regarding the settlor's transfers to such trust.

HISTORY: Acts 2004, ch. 537, § 44; 2007, ch. 24, §§ 23, 24; 2007, ch. 144, § 13; 2010, ch. 725, §§ 6, 7.

NOTES: Amendments.

The 2007 amendment by ch. 24 in (a)(3), made a minor stylistic change in the first sentence and added the last two sentences; and added (c).

The 2007 amendment by ch. 144 substituted "Except as provided in chapter 16 of this title regarding investment services trusts," for "With respect to an irrevocable trust," in the first sentence of (a)(2).

The 2010 amendment, in (a), inserted "and subdivision (a)(3) regarding an irrevocable special needs trust" in (2), added present (3) and (4), and redesignated former (3) as present (5); and added (d).

Effective Dates.

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

Acts 2007, ch. 144, § 17. July 1, 2007.

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

Section to Section References.

Sections 35-15-501 -- 35-15-507 are referred to in § 26-4-101.

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1. Bureau of TennCare Reimbursement.

1. Bureau of TennCare Reimbursement.

Chancery court properly concluded the Bureau of TennCare was entitled to use real property in a decedent's revocable trust to satisfy a claim against the estate for medical benefits, *T.C.A. § 71-5-116(c)(1)*, because any property that could be reached by the personal representative pursuant to *T.C.A. § 35-15-505* for the payment of the debts of an in-

solvent estate could be reached by the probate court for the purpose of reimbursing the Bureau. *In re Estate of Stidham*, -- S.W.3d --, 2012 Tenn. App. LEXIS 584 (Tenn. Ct. App. Aug. 23, 2012).

COMMENTS TO OFFICIAL TEXT

Section Comment.

Subdivision (a)(1) states what is now a well accepted conclusion, that a revocable trust is subject to the claims of the settlor's creditors while the settlor is living. *See* Restatement (Third) of Trusts § 25 cmt. e (Tentative Draft No. 1, approved 1996). Such claims were not allowed at common law, however. *See* Restatement (Second) of Trusts § 330 cmt. o (1959). Because a settlor usually also retains a beneficial interest that a creditor may reach under subdivision (a)(2), the common law rule, were it retained in this Code, would be of little significance. *See* Restatement (Second) of Trusts § 156(2) (1959).

Subdivision (a)(2), provides that a settlor who is also a beneficiary may not use the trust as a shield against the settlor's creditors, unless the settlor establishes an Investment Services Trust pursuant to title 35, chapter 16. Except for an Investment Services Trust, a creditor of the settlor may reach the maximum amount that the trustee could have paid to the settlor-beneficiary. For the definition of "settlor," see subdivision 103(14) [T.C.A. § 35-15-103(15)].

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

Subdivision (a)(3) recognizes that a revocable trust is usually employed as a will substitute. As such, the trust assets, following the death of the settlor, should be subject to the settlor's debts and other charges. However, in accordance with traditional doctrine, the assets of the settlor's probate estate must normally first be exhausted before the assets of the revocable trust can be reached. This section does not attempt to address the procedural issues raised by the need first to exhaust the decedent's probate estate before reaching the assets of the revocable trust. Subdivision (a)(3), however, does ratify the typical pourover will, revocable trust plan. As long as the rights of the creditor are not impaired, the settlor is free to shift liability from the probate estate to the revocable trust. This section clarifies that claims against revocable trusts are subject to the same time limitations, and are subject to the same order of priority among creditors as are imposed on claims against probate estates. Regarding other issues associated with potential liability of nonprobate assets for unpaid claims, see section 6-102 of the Uniform Probate Code, which was added to that Code in 1998.

Subdivision (b) treats a power of withdrawal as the equivalent of a power of revocation because the two powers are functionally identical. This is also the approach taken in Restatement (Third) of Trusts § 56 cmt. b (Tentative Draft No. 2, approved 1999). If the power is unlimited, the property subject to the power will be fully subject to the claims of the power holder's creditors, the same as the power holder's other assets. If the power holder retains the power until death, the property subject to the power may be liable for claims to the extent the power holder's probate estate is insufficient to satisfy those claims.

Upon the lapse, release, or waiver of a power of withdrawal, the property formerly subject to the power will normally be subject to the claims of the power holder's creditors and assignees the same as if the power holder were the settlor of a now irrevocable trust. Pursuant to subdivision (a)(2), a creditor or assignee of the power holder generally may reach the power holder's entire beneficial interest in the trust, whether or not distribution is subject to the trustee's discretion. However, following the lead of *Arizona Revised Statutes § 14-7705(g)* and *Texas Property Code § 112.035(e)*, subsection (b) creates an exception for trust property which was subject to a Crummey or five and five power. Upon the lapse, release, or waiver of a power of withdrawal, the holder is treated as the settlor of the trust only to the extent the value of the property subject to the power at the time of the lapse, release, or waiver exceeded the greater of the amounts specified in *IRC §§ 2041(b)(2)* or *2514(e)* [greater of five percent (5%) or five thousand dollars (\$5,000)], or *IRC § 2503(b)* [ten thousand dollars (\$10,000) in 2001].

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

2007 Amendment.

The section was amended to recognize that a settlor-beneficiary of an Investment Services Trust is entitled to spendthrift protection under certain circumstances. The section was amended to further clarify that claims against revocable trusts are subject to the same time limitations, and are subject to the same order of priority among creditors as are imposed on claims against probate estates. Subdivision (c) provides another exception to the general rule that creditors can reach the settlor's interest under an irrevocable trust to the extent it can be used for the settlor's benefit. The exception provides that the payment of income taxes on behalf of the settlor of an irrevocable grantor trust will not make the trust available to creditors of the settlor.

2010 Amendment.

This section was amended to recognize that disabled persons who are beneficiaries of certain special needs trusts are entitled to spendthrift trust protection.

Subsection (d) was added in 2010. This subsection provides that the donor spouse's successor interests in an inter vivos qtip trust do not cause the trust to lose spendthrift trust protection as to the donor spouse. Thus, if the donee spouse predeceases the donor spouse, the trust will continue to be a spendthrift trust after the donor spouse becomes a successor beneficiary of the trust.



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Tenn. Code Ann. § 35-15-506 (2012)

35-15-506. Overdue distribution.

(a) In this section, "mandatory distribution" means a distribution of income or principal that the trustee is required to make to a beneficiary under the terms of the trust, including a distribution upon termination of the trust. "Mandatory distribution" does not include a distribution subject to the exercise of the trustee's discretion even if:

- (1) The discretion is expressed in the form of a standard of distribution; or
- (2) The terms of the trust authorizing a distribution couple language of discretion with language of direction.

(b) Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.

HISTORY: Acts 2004, ch. 537, § 45; 2007, ch. 24, § 25.

NOTES: Amendments.

The 2007 amendment added (a) and redesignated former (a) as present (b).

Effective Dates.

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

Section to Section References.

Sections 35-15-501 -- 35-15-507 are referred to in § 26-4-101.

COMMENTS TO OFFICIAL TEXT

Section Comment.

The effect of a spendthrift provision is generally to insulate totally a beneficiary's interest until a distribution is made and received by the beneficiary. *See* section 502 [*T.C.A. § 35-15-502*]. But this section, along with several other sections in this chapter, recognizes exceptions to this general rule. Whether a trust contains a spendthrift provision or not, a trustee should not be able to avoid creditor claims against a beneficiary by refusing to make a distribution required to be made by the express terms of the trust. On the other hand, a spendthrift provision would become largely a nullity were a beneficiary's creditors able to attach all required payments as soon as they became due. This section re-

flects a compromise between these two competing principles. A creditor can reach a mandatory distribution, including a distribution upon termination, if the trustee has failed to make the payment within a reasonable time after the designated distribution date. Following this reasonable period, payments mandated by the express terms of the trust are in effect being held by the trustee as agent for the beneficiary and should be treated as part of the beneficiary's personal assets.

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

2007 Amendment.

Subsection (a) was added to define exactly what constitutes a mandatory distribution for purposes of Section 506 [*T.C.A. 35-15-506*].

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Tenn. Code Ann. § 35-15-507 (2012)

35-15-507. Personal obligations of trustee.

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

HISTORY: Acts 2004, ch. 537, § 46.

NOTES: Section to Section References.

Sections 35-15-501 -- 35-15-507 are referred to in § 26-4-101.

COMMENTS TO OFFICIAL TEXT

Section Comment.

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

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

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GO TO THE TENNESSEE ANNOTATED STATUTES ARCHIVE DIRECTORY*Tenn. Code Ann. § 35-15-601 (2012)***35-15-601. Capacity of settlor of revocable trust -- Form of execution for post-death disposition.**

The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will. To be effective as a post death disposition of property transferred during the transferor's life or by the transferor's will to a trust of which the transferor is the settlor or deemed to be the settlor, neither a revocable nor irrevocable trust existing on or executed after July 1, 2004, has to be executed with the formalities of a will.

HISTORY: Acts 2004, ch. 537, § 47; 2005, ch. 99, § 8.

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

This part deals with issues of significance not totally settled under prior law. Because of the widespread use in recent years of the revocable trust as an alternative to a will, this short part is one of the more important parts of the Code. This part and the other parts of the Code treat the revocable trust as the functional equivalent of a will. Section 601 [*T.C.A. § 35-15-601*] provides that the capacity standard for wills applies in determining whether the settlor had capacity to create a revocable trust. Section 602 [*T.C.A. § 35-15-602*], after providing that a trust is presumed revocable unless stated otherwise, prescribes the procedure for revocation or amendment, whether the trust contains one or several settlors. Section 603 [*T.C.A. § 35-15-603*] provides that while a trust is revocable and the settlor has capacity, the rights of the beneficiaries are subject to the settlor's control. Section 604 [*T.C.A. § 35-15-604*] prescribes a statute of limitations on contest of revocable trusts.

Sections 601 and 604 [*T.C.A. §§ 35-15-601 and 35-15-604*], because they address requirements relating to creation and contest of trusts, are not subject to alteration or restriction in the terms of the trust. *See* section 105 [*T.C.A. § 35-15-105*]. Sections 602 and 603 [*T.C.A. §§ 35-15-602 and 35-15-603*], by contrast, are not so limited and are fully subject to the settlor's control.

Section Comment.

This section is patterned after Restatement (Third) of Trusts § 11(1) (Tentative Draft No. 1, approved 1996). The revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property upon the settlor's death. To solidify the use of the revocable trust as a device for transferring

property at death, the settlor usually also executes a pourover will. The use of a pourover will assures that property not transferred to the trust during life will be combined with the property the settlor did manage to convey. Given this primary use of the revocable trust as a device for disposing of property at death, the capacity standard for wills rather than that for lifetime gifts should apply. The application of the capacity standard for wills does not mean that the revocable trust must be executed with the formalities of a will. There are no execution requirements under this Code for a trust not created by will, and a trust not containing real property may be created by an oral statement. *See* section 407 and Section Comment [*T.C.A. § 35-15-407*].

The Tennessee Uniform Trust Code does not explicitly spell out the standard of capacity necessary to create other types of trusts, although section 402 [*T.C.A. § 35-15-402*] does require that the settlor have capacity. This section includes a capacity standard for creation of a revocable trust because of the uncertainty in the case law and the importance of the issue in modern estate planning. No such uncertainty exists with respect to the capacity standard for other types of trusts. To create a testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have the capacity that would be needed to transfer the property free of trust. *See generally* Restatement (Third) of Trusts § 11 (Tentative Draft No. 1, approved 1996); Restatement (Third) of Property: Wills and Other Donative Transfers § 8.1 (Tentative Draft No. 3, approved 2001).

2005 Amendment.

A sentence was added to clarify that neither a revocable trust nor an irrevocable trust needs to be executed with the formalities of a Will.

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Title 35 Fiduciaries And Trust Estates
Chapter 15 Tennessee Uniform Trust Code
Part 6 Revocable Trusts

GO TO THE TENNESSEE ANNOTATED STATUTES ARCHIVE DIRECTORY

Tenn. Code Ann. § 35-15-602 (2012)

35-15-602. Revocation or amendment of revocable trust.

(a) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This subsection (a) does not apply to a trust created under an instrument executed before July 1, 2004.

(b) If a revocable trust is created or funded by more than one (1) settlor:

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

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

(3) At the death of one (1) settlor, each surviving settlor shall have the right to revoke the trust as to that surviving settlor's portion of the trust as determined by the type of property in accordance with subdivisions (b)(1) and (b)(2).

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

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

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

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

(B) Any other method manifesting clear and convincing evidence of the settlor's intent.

(d) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs. However, with respect to community property under subdivision (b)(1), the trustee shall deliver the property one-half (1/2) to each spouse unless the governing instrument specifically states otherwise.

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

(f) A conservator of the settlor or, if no conservator has been appointed, a guardian of the settlor may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only if the trust instrument specifically grants to the conservator or guardian the power to revoke or amend the trust or distribute trust property.

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

HISTORY: Acts 2004, ch. 537, § 48.

NOTES: Section to Section References.

This section is referred to in § 35-15-301.

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.

Subsection (a), which provides that a settlor may revoke or modify a trust unless the terms of the trust expressly state that the trust is irrevocable, changes the common law. Most states follow the rule that a trust is presumed irrevocable absent evidence of contrary intent. *See Restatement (Second) of Trusts § 330* (1959). California, Iowa, Montana, Oklahoma, and Texas presume that a trust is revocable. The Tennessee Uniform Trust Code endorses this minority approach, but only for trusts created after its effective date. This Tennessee Uniform Trust Code presumes revocability when the instrument is silent because the instrument was likely drafted by a nonprofessional, who intended the trust as a will substitute. The most recent revision of the Restatement of Trusts similarly reverses the former approach. A trust is presumed revocable if the settlor has retained a beneficial interest. *See Restatement (Third) of Trusts § 63 cmt. c* (Tentative Draft No. 3, approved 2001). Because professional drafters habitually spell out whether or not a trust is revocable, subsection (a) will have limited application.

A power of revocation includes the power to amend. An unrestricted power to amend may also include the power to revoke a trust. *See Restatement (Third) of Trusts § 63 cmt. g* (Tentative Draft No. 3, approved 2001); *Restatement (Second) of Trusts § 331 cmt. g & h* (1959).

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

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

Subsection (b) does not address the many technical issues that can arise in determining the settlors' proportionate contribution to a joint trust. Most problematic are contributions of jointly-owned property. In the case of joint tenancies in real estate, each spouse would presumably be treated as having made an equal contribution because of the right to sever the interest and convert it into a tenancy in common. This is in contrast to joint accounts in financial institutions,

ownership of which in most states is based not on fractional interest but on actual dollar contribution. *See, e.g.*, Uniform Probate Code § 6-211. Most difficult may be determining a contribution rule for entireties property. In *Holdener v. Fieser*, 971 S.W. 2d 946 (Mo. Ct. App. 1998), the court held that a surviving spouse could revoke the trust with respect to the entire interest but did not express a view as to revocation rights while both spouses were living.

This section does not explicitly require that the other settlor or settlors be notified if a joint trust is revoked by less than all of the settlors, but such notice would be required pursuant to section 603 [T.C.A. § 35-15-603]. While a trust is revocable and the settlor has capacity, subsection 603(a) [T.C.A. § 35-15-603(a)] provides that the duties of the trustee, including the duty to keep the beneficiaries informed of administrative developments, are owed exclusively to the settlor. With respect to trusts having several settlors, subsection 603(b) [T.C.A. § 35-15-603(b)] clarifies that the trustee's duties, including the duty to keep the beneficiaries informed of developments, are owed to all settlors having capacity. Notifying the other settlor or settlors of the revocation or amendment will place them in a better position to protect their interests. If the revocation or amendment by less than all of the settlors breaches an implied agreement not to revoke or amend the trust, those harmed by the action can sue for breach of contract. If the trustee fails to notify the other settlor or settlors of the revocation or amendment, the parties aggrieved by the trustee's failure can sue the trustee for breach of trust.

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

This Tennessee Uniform Trust Code tries to effectuate the settlor's intent to the maximum extent possible while at the same time protecting a trustee against inadvertent liability. While notice to the trustee of a revocation is good practice, this section does not make the giving of such notice a prerequisite to a trust's revocation. To protect a trustee who has not been notified of a revocation or amendment, subsection (g) provides that a trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust, as unamended, was still in effect. However, to honor the settlor's intent, subsection (c) generally honors a settlor's clear expression of intent even if inconsistent with stated formalities in the terms of the trust.

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

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

Revocation or amendment by will is mentioned in subsection (c) not to encourage the practice but to make clear that it is not precluded by omission. *See Restatement (Third) of Property: Will and Other Donative Transfers* § 7.2 cmt. e (Tentative Draft No. 3, approved 2001), which validates revocation or amendment of will substitutes by later will. Situations do arise, particularly in death-bed cases, where revocation by will may be the only practicable method. In such cases, a will, a solemn document executed with a high level of formality, may be the most reliable method for expressing intent. A revocation in a will ordinarily becomes effective only upon probate of the will following the testator's

death. For the cases, see *Restatement (Third) of Trusts* § 63 Reporter's Notes to cmt. h-i (Tentative Draft No. 3, approved 2001).

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

Subsection (c) does not require that a trustee concur in the revocation or amendment of a trust. Such a concurrence would be necessary only if required by the terms of the trust. If the trustee concludes that an amendment unacceptably changes the trustee's duties, the trustee may resign as provided in Section 705 [T.C.A. § 35-15-705].

Subsection (d), providing that upon revocation the trust property is to be distributed as the settlor directs, codifies a provision commonly included in revocable trust instruments. If the trust contains community property, the trustee is required on revocation to distribute the property one-half (1/2) to each spouse unless the instrument directs otherwise.

A settlor's power to revoke is not terminated by the settlor's incapacity. The power to revoke may instead be exercised by an agent under a power of attorney as authorized in subsection (e), by a conservator or guardian as authorized in subsection (f), or by the settlor personally if the settlor regains capacity.

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

Subsection (f) addresses the authority of a conservator to revoke or amend a revocable trust. Under Tennessee law a "conservator" is appointed by the court to manage the ward's party and to make decisions with respect to the ward's personal affairs. See section 103 [T.C.A. § 35-15-103]. Consequently, subsection (f) authorizes a conservator to exercise a settlor's power to revoke or amend a trust only if the instrument authorizes a conservator to have that power.

Steps a conservator can take to stem possible abuse is not limited to petitioning to revoke the trust. The conservator could petition for removal of the trustee under Section 706 [T.C.A. § 35-15-706]. The conservator, acting on the settlor-beneficiary's behalf, could also bring an action to enforce the trust according to its terms. Pursuant to Section 303 [T.C.A. § 35-15-303], a conservator may act on behalf of the beneficiary whose estate the conservator controls whenever a consent or other action by the beneficiary is required or may be given under the Code.

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GO TO THE TENNESSEE ANNOTATED STATUTES ARCHIVE DIRECTORY*Tenn. Code Ann. § 35-15-603 (2012)***35-15-603. Settlor's powers -- Powers of withdrawal.**

(a) While a trust is revocable and the settlor has capacity to revoke the trust, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

(b) If a revocable trust has more than one (1) settlor, the duties of the trustee are owed to all of the settlors having capacity to revoke the trust.

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

HISTORY: Acts 2004, ch. 537, § 49.**NOTES:****COMMENTS TO OFFICIAL TEXT****Section Comment.**

This section has the effect of postponing enforcement of the rights of the beneficiaries of a revocable trust until the death or incapacity of the settlor or other person holding the power to revoke the trust. This section thus recognizes that the settlor of a revocable trust is in control of the trust and should have the right to enforce the trust.

Pursuant to this section, the duty under section 813 [*T.C.A. § 35-15-813*] to inform and report to beneficiaries is owed to the settlor of a revocable trust as long as the settlor has capacity. In the case of a trust having several settlors, subsection (b) clarifies that this duty extends to all settlors having capacity. Should fewer than all settlors revoke or modify their portion of the trust, the trustee must notify the other settlor or settlors of the action. *See* section 602 Section Comment [*T.C.A. § 35-15-602*].

If the settlor loses capacity, subsection (a) no longer applies, with the consequence that the rights of the beneficiaries are no longer subject to the settlor's control. The beneficiaries are entitled to request information concerning the trust and the trustee must provide the beneficiaries with annual trustee reports and whatever other information may be required under section 813 [*T.C.A. § 35-15-813*]. However, because this section may be freely overridden in the terms of the trust, a settlor is free to deny the beneficiaries these rights, even to the point of directing the trustee not to inform them of the existence of the trust. Also, should an incapacitated settlor later regain capacity, the beneficiaries' rights will again be subject to the settlor's control. The cessation of the settlor's control upon the settlor's incapacity or death does not mean that the beneficiaries may reopen transactions the settlor approved while having capacity.

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

Subsection (c) makes clear that a holder of a power of withdrawal has the same powers over the trust as the settlor of a revocable trust. Equal treatment is warranted due to the holder's equivalent power to control the trust. For the definition of power of withdrawal, see subdivision 103(10) [*T.C.A. § 35-15-103(11)*].

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Tenn. Code Ann. § 35-15-604 (2012)

35-15-604. Limitation on action contesting validity of revocable trust -- Distribution of trust property.

(a) A person may commence a judicial proceeding to contest the validity of a trust that was revocable immediately preceding the settlor's death within the earlier of:

(1) Two (2) years after the settlor's death; or

(2) One hundred twenty (120) days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding.

(b) Upon the death of the settlor of a trust that was revocable immediately preceding the settlor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. The trustee is subject to liability for doing so if:

(1) The trustee knows of a pending judicial proceeding contesting the validity of the trust; or

(2) A potential contestant has notified the trustee of a possible judicial proceeding to contest the trust and a judicial proceeding is commenced within sixty (60) days after the contestant sent the notification.

(c) A beneficiary of a trust that is determined by a court proceeding to be invalid is liable to return to the court any distribution received for proper distribution. If the beneficiary refuses to return the distribution after being ordered by the court, the beneficiary shall be liable for all costs incurred for recovery of the distribution.

HISTORY: Acts 2004, ch. 537, § 50.

NOTES:

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section provides finality to the question of when a contest of a revocable trust may be brought. The section is designed to allow an adequate time in which to bring a contest while at the same time permitting the expeditious distribution of the trust property following the settlor's death. The two (2) years is the same statute of limitations on contesting a will admitted to probate in common form.

A trust can be contested on a variety of grounds. For example, the contestant may allege that no trust was created due to lack of intent to create a trust or lack of capacity (*see section 402 [T.C.A. § 35-15-402]*), that undue influence, duress, or fraud was involved in the trust's creation (*see section 406 [T.C.A. § 35-15-406]*), or that the trust had been revoked or modified (*see section 602 [T.C.A. § 35-15-602]*). A "contest" is an action to invalidate all or part of the terms of the trust or of property transfers to the trustee. An action against a beneficiary or other person for intentional interference with an inheritance or gift, not being a contest, is not subject to this section. For the law on intentional interference, *see Restatement (Second) of Torts § 774B* (1979). Nor does this section preclude an action to determine the validity of a trust that is brought during the settlor's lifetime, such as a petition for a declaratory judgment, if such action is authorized by other law. *See section 106 [T.C.A. § 35-15-106]* (Tennessee Uniform Trust Code supplemented by common law of trusts and principles of equity).

This section applies only to a revocable trust that becomes irrevocable by reason of the settlor's death. A trust that became irrevocable by reason of the settlor's lifetime release of the power to revoke is outside its scope. A revocable trust does not become irrevocable upon a settlor's loss of capacity. Pursuant to section 602 [*T.C.A. § 35-15-602*], the power to revoke may be exercised by the settlor's agent, conservator, or guardian, or personally by the settlor if the settlor regains capacity.

Subsection (a) specifies a time limit on when a contest can be brought. A contest is barred upon the first to occur of two possible events. The maximum possible time for bringing a contest is two (2) years from the settlor's death. This should provide potential contestants with ample time in which to determine whether they have an interest that will be affected by the trust, even if formal notice of the trust is lacking. A trustee who wishes to shorten the contest period may do so by giving notice. Drawing from *California Probate Code § 16061.7*, subdivision (a)(2) bars a contest by a potential contestant one hundred twenty (120) days after the date the trustee sent that person a copy of the trust instrument and informed the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a contest. The reference to "120" days is placed in brackets to suggest to the enacting jurisdiction that it substitute its statutory time period for contesting a will following notice of probate. The one hundred twenty (120) day period in subdivision (a)(2) is subordinate to the two-year bar in subdivision (a)(1). A contest is automatically barred three (3) years after the settlor's death even if notice is sent by the trustee less than one hundred twenty (120) days prior to the end of that period.

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

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

For purposes of notices under this section, the substitute representation principles of part 3 [*T.C.A. § 35-15-301 -- 35-15-305*] are applicable. The notice by the trustee under subdivision (a)(2) or by a potential contestant under subdivision (b)(2) must be given in a manner reasonably suitable under the circumstances and likely to result in its receipt. *See* subsection 109(a).

This section does not address possible liability for the debts of the deceased settlor or a trustee's possible liability to creditors for distributing trust assets. For possible liability of the trust, *see* subdivision 505(a)(3) and Section Comment [*T.C.A. § 35-15-505(a)(5)*]. Whether a trustee can be held personally liable for creditor claims following distribution of trust assets is addressed in Uniform Probate Code § 6-102, which was added to that Code in 1998.

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