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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 7 Office of Trustee

GO TO THE TENNESSEE ANNOTATED STATUTES ARCHIVE DIRECTORY

Tenn. Code Ann. § 35-15-701 (2012)

35-15-701. Accepting or declining trusteeship.

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

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

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

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

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

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

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

HISTORY: Acts 2004, ch. 537, § 51.

NOTES: Section to Section References.

This section is referred to in § 35-15-709.

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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.

This part contains a series of default rules dealing with the office of trustee. Sections 701 and 702 [*T.C.A.* §§ 35-15-701 and 35-15-702] address the process for getting a trustee into office, including the procedures for indicating an acceptance and whether bond will be required. Section 703 [*T.C.A.* § 35-15-703] addresses cotrustees, permitting the cotrustees to act by majority action and specifying the extent to which one trustee may delegate to another. Sections 704 through 707 [*T.C.A.* § 35-15-704 -- 35-15-707] address changes in the office of trustee, specifying the circumstances when a vacancy must be filled, the procedure for resignation, the grounds for removal, and the process for appointing a successor. Sections 708 and 709 [*T.C.A.* § 35-15-708 and 35-15-709] prescribe the standards for determining trustee compensation and reimbursement for expenses advanced.

Except for the court's authority to order bond, all of the provisions of this chapter are subject to modification in the terms of the trust. *See* section 105 [*T.C.A.* § 35-15-105].

Section Comment.

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

To avoid the inaction that can result if the person designated as trustee fails to communicate a decision either to accept or to reject the trusteeship, subsection (b) provides that a failure to accept within a reasonable time constitutes a rejection of the trusteeship. What will constitute a reasonable time depends on the facts and circumstances of the particular case. A major consideration is possible harm that might occur if a vacancy in a trusteeship is not filled in a timely manner. A trustee's rejection normally precludes a later acceptance but does not cause the trust to fail. *See* Restatement (Third) of Trusts § 35 cmt. c (Tentative Draft No. 2, approved 1999). Regarding the filling of a vacancy in the event of a rejection, *see* section 704 [*T.C.A.* § 35-15-704].

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

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

Because of the potential liability that can inhere in trusteeship, subdivision (c)(2) allows a person designated as trustee to inspect the trust property without accepting the trusteeship. The condition of real property is a particular concern, including possible tort liability for the condition of the premises or liability for violation of state or federal environmental laws such as CERCLA, 42 *U.S.C.* § 9607. For a provision limiting a trustee's personal liability for obligations arising from ownership or control of trust property, *see* subsection 1010(b) [*T.C.A.* § 35-15-1010(b)].



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Tenn. Code Ann. § 35-15-702 (2012)

35-15-702. Trustee's bond.

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

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

(c) A state or national bank, savings institution, or trust company authorized to exercise fiduciary powers and regulated by the office of the comptroller of the currency, office of thrift supervision, the department of financial institutions or equivalent state banking supervisors need not give bond, even if required by the terms of the trust.

HISTORY: Acts 2004, ch. 537, § 52.

NOTES: Section to Section References.

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

COMMENTS TO OFFICIAL TEXT

Section Comment.

This provision is consistent with the Restatement Third and with the bonding provisions of the Uniform Probate Code. *See* Restatement (Third) of Trusts § 34(3) and cmt. a (Tentative Draft No. 2, approved 1999); Uniform Probate Code §§ 3-604 (personal representatives), 5-415 (conservators), and 7-304 (trustees). Because a bond is required only if the terms of the trust require bond or a bond is found by the court to be necessary to protect the interests of beneficiaries, bond should rarely be required under this Code.

Despite the ability of the court pursuant to subdivision 105(b)(6) [*T.C.A. § 35-15-105(b)(6)*] to override a term of the trust waiving bond, the court should order bond in such cases only for good reasons. Similarly, the court should rarely dispense with bond if the settlor directed that the trustee give bond.

This section does not attempt to detail all of the technical bonding requirements that the court may impose. Typical requirements are listed in the Uniform Probate Code sections cited above. The amount of a bond otherwise required may be reduced by the value of trust property deposited in a manner that prevents its unauthorized disposition, and by the value of real property which the trustee, by express limitation of power, lacks power to convey without court au-

thorization. Also, the court may excuse or otherwise modify a requirement of a bond, reduce or increase the amount of a bond, release a surety, or permit the substitution of another bond with the same or different sureties.

Subsection (c) clarifies that a regulated financial service institution need not provide bond for individual trusts. Such institutions must meet detailed financial responsibility requirements in order to do trust business in the state, thereby obviating the need to post bonds in individual trusts. Subsection (c) is placed in brackets because the enacting jurisdiction may have already dealt with the subject in separate legislation, such as in its statutes on regulation of financial institutions. Instead of the phrase "regulated financial-service institution," enacting jurisdictions may wish to substitute their own term for institutions qualified to engage in trust business in the state.

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Tenn. Code Ann. § 35-15-703 (2012)

35-15-703. Cotrustees.

- (a) Cotrustees who are unable to reach a unanimous decision may act by majority decision.
- (b) If a vacancy occurs in a cotrusteeship, the remaining cotrustees may act for the trust.
- (c) A cotrustee must participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity or the cotrustee has properly delegated the performance of the function to another trustee.
- (d) If a cotrustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.
- (e) A trustee may not delegate to a cotrustee the performance of a function the settlor reasonably expected the trustees to perform jointly. Unless a delegation was irrevocable, a trustee may revoke a delegation previously made.
- (f) Except as otherwise provided in subsection (g), a trustee who does not join in an action of another trustee is not liable for the action.
- (g) Each trustee shall exercise reasonable care to:
 - (1) Prevent a cotrustee from committing a serious breach of trust; and
 - (2) Compel a cotrustee to redress a serious breach of trust.
- (h) A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified any cotrustee of the dissent at or before the time of the action is not liable for the action unless the action is a serious breach of trust.

HISTORY: Acts 2004, ch. 537, § 53.

NOTES:

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section contains most but not all of the Code's provisions on cotrustees. Other provisions relevant to cotrustees include sections 704 [*T.C.A. § 35-15-704*] (vacancy in trusteeship need not be filled if cotrustee remains in office), 705 [*T.C.A. § 35-15-705*] (notice of resignation must be given to cotrustee), 706 [*T.C.A. § 35-15-706*] (lack of cooperation among cotrustees as ground for removal), 707 [*T.C.A. § 35-15-707*] (obligations of resigning or removed trustee), 812 [*T.C.A. § 35-15-812*] (reporting requirements upon vacancy in trusteeship), and 1013 [*T.C.A. § 35-15-1013*] (authority of cotrustees to authenticate documents).

Cotrustees are appointed for a variety of reasons. Having multiple decision makers serves as a safeguard against eccentricity or misconduct. Cotrustees are often appointed to gain the advantage of differing skills, perhaps a financial institution for its permanence and professional skills, and a family member to maintain a personal connection with the beneficiaries. On other occasions, cotrustees are appointed to make certain that all family lines are represented in the trust's management.

Cotrusteeship should not be called for without careful reflection. Division of responsibility among cotrustees is often confused, the accountability of any individual trustee is uncertain, obtaining consent of all trustees can be burdensome, and unless an odd number of trustees is named deadlocks requiring court resolution can occur. Potential problems can be reduced by addressing division of responsibilities in the terms of the trust. Like the other sections of this chapter, this section is freely subject to modification in the terms of the trust. *See* section 105 [*T.C.A. § 35-15-105*].

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

Subsection (a) is in accord with Restatement (Third) of Trusts § 39 (Tentative Draft No. 2, approved 1999), which rejects the common law rule, followed in earlier Restatements, requiring unanimity among the trustees of a private trust. *See Restatement (Second) of Trusts § 194* (1959). This section is consistent with the prior Restatement rule applicable to charitable trusts, which allowed for action by a majority of trustees. *See Restatement (Second) of Trusts § 383* (1959).

Under subsection (b), a majority of the remaining trustees may act for the trust when a vacancy occurs in a cotrusteeship. Section 704 [*T.C.A. § 35-15-704*] provides that a vacancy in a cotrusteeship need be filled only if there is no trustee remaining in office.

Pursuant to subsection (c), a cotrustee must participate in the performance of a trustee function unless the cotrustee has properly delegated performance to another cotrustee, or the cotrustee is unable to participate due to temporary incapacity or disqualification under other law. Other laws under which a cotrustee might be disqualified include federal securities law and the ERISA prohibited transactions rules. Subsection (d) authorizes a cotrustee to assume some or all of the functions of another trustee who is unavailable to perform duties as provided in subsection (c).

Subsection (e) addresses the extent to which a trustee may delegate the performance of functions to a cotrustee. The standard differs from the standard for delegation to an agent as provided in section 807 [*T.C.A. § 35-15-807*] because the two situations are different. Section 807 [*T.C.A. § 35-15-807*], which is identical to section 9 of the Uniform Prudent Investor Act [*T.C.A. § 35-14-111*], recognizes that many trustees are not professionals. Consequently, trustees should be encouraged to delegate functions they are not competent to perform. Subsection (e) is premised on the assumption that the settlor selected cotrustees for a specific reason and that this reason ought to control the scope of a permitted delegation to a cotrustee. Subsection (e) prohibits a trustee from delegating to another trustee functions the settlor reasonably expected the trustees to perform jointly. The exact extent to which a trustee may delegate functions to another trustee in a particular case will vary depending on the reasons the settlor decided to appoint cotrustees. The better practice is to address the division of functions in the terms of the trust, as allowed by section 105 [*T.C.A. § 35-15-35; -15; -105*]. Subsection (e) is based on language derived from *Restatement (Second) of Trusts § 171* (1959). This section of the Restatement Second, which applied to delegations to both agents and cotrustees, was superseded, as to delegation to agents, by Restatement (Third) of Trusts: Prudent Investor Rule § 171 (1992).

By permitting the trustees to act by a majority, this section contemplates that there may be a trustee or trustees who might dissent. Trustees who dissent from the acts of a cotrustee are in general protected from liability. Subsection (f) protects trustees who refused to join in the action. Subsection (h) protects a dissenting trustee who joined the action at the direction of the majority, such as to satisfy a demand of the other side to a transaction, if the trustee expressed the dissent to a cotrustee at or before the time of the action in question. However, the protections provided by subsections (f) and (h) no longer apply if the action constitutes a serious breach of trust. In that event, subsection (g) may impose

liability against a dissenting trustee for failing to take reasonable steps to rectify the improper conduct. The responsibility to take action against a breaching cotrustee codifies the substance of *sections 184 and 224 of the Restatement (Second) of Trusts* (1959).

A cotrustee can always seek declaratory relief under *T.C.A. § 29-14-105* when a deadlock exists among trustees or when a dissenting cotrustee fears that an action or omission of the majority could result in potential liability to the cotrustee.

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Tenn. Code Ann. § 35-15-704 (2012)

35-15-704. Vacancy in trusteeship -- Appointment of successor.

(a) A vacancy in a trusteeship occurs if:

- (1) A person designated as trustee rejects the trusteeship;
- (2) A person designated as trustee cannot be identified or does not exist;
- (3) A trustee resigns;
- (4) A trustee is disqualified or removed;
- (5) A trustee dies; or
- (6) A conservator is appointed for an individual serving as trustee.

(b) If one (1) or more cotrustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustee.

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

- (1) By a person designated in the terms of the trust to act as successor trustee;
- (2) By a person appointed by unanimous agreement of the qualified beneficiaries; or
- (3) By a person appointed by the court.

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

- (1) By a person designated in the terms of the trust to act as successor trustee;
- (2) By a person selected by the charitable organizations expressly designated to receive distributions under the terms of the trust if the attorney general does not affirmatively object within thirty (30) days of receipt of notice of the person selected; or
- (3) By a person appointed by the court.

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

HISTORY: Acts 2004, ch. 537, § 54; 2007, ch. 24, § 26.

NOTES: Amendments.

The 2007 amendment substituted "does not affirmatively object within thirty (30) days of receipt of notice of the person selected" for "concur in the selection" in (d)(2).

Effective Dates.

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

Section to Section References.

This section is referred to in § 35-15-108.

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Cited:

Acree v. Acree, -- S.W.3d --, 2012 Tenn. App. LEXIS 808 (Tenn. Ct. App. Nov. 20, 2012).

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section lists the ways in which a trusteeship becomes vacant and the rules on filling the vacancy. *See also* sections 701 [*T.C.A. § 35-15-701*] (accepting or declining trusteeship), 705 [*T.C.A. § 35-15-705*] (resignation), and 706 [*T.C.A. § 35-15-706*] (removal). Good drafting practice suggests that the terms of the trust deal expressly with the problem of vacancies, naming successors and specifying the procedure for filling vacancies. This section applies only if the terms of the trust fail to specify a procedure.

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

Subsection (b) provides that a vacancy in the cotrusteeship must be filled only if the trust has no remaining trustee. If a vacancy in the cotrusteeship is not filled, section 703 [*T.C.A. § 35-15-703*] authorizes the remaining cotrustees to continue to administer the trust. However, as provided in subsection (e), the court, exercising its inherent equity authority, may always appoint additional trustees if the appointment would promote better administration of the trust. *See* Restatement (Third) of Trusts § 34 cmt. e (Tentative Draft No. 2, approved 1999); *Restatement (Second) of Trusts § 108* cmt. e (1959).

Subsection (c) provides a procedure for filling a vacancy in the trusteeship of a noncharitable trust. Absent an effective provision in the terms of the trust, subdivision (c)(2) permits a vacancy in the trusteeship to be filled, without the need for court approval, by a person selected by unanimous agreement of the qualified beneficiaries. An effective provision in the terms of the trust for the designation of a successor trustee includes a procedure under which the successor trustee is selected by a person designated in those terms. Pursuant to subdivision 705(a)(1) [*T.C.A. § 35-15-705(a)(1)*], the qualified beneficiaries may also receive the trustee's resignation. If a trustee resigns following notice as provided in section 705 [*T.C.A. § 35-15-705*], the trust may be transferred to a successor appointed pursuant to subdivision (c)(2) of this section, all without court involvement. A nonqualified beneficiary who is displeased with the choice of the qualified beneficiaries may petition the court for removal of the trustee under section 706 [*T.C.A. § 35-15-706*].

If the qualified beneficiaries fail to make an appointment, subdivision (c)(3) authorizes the court to fill the vacancy. In making the appointment, the court should consider the objectives and probable intention of the settlor, the promotion of the proper administration of the trust, and the interests and wishes of the beneficiaries. *See* Restatement (Third) of Trusts § 34 cmt. f (Tentative Draft No. 2, approved 1999); *Restatement (Second) of Trusts § 108* cmt. d (1959).

Subsection (d) specifies a procedure for filling a vacancy in the trusteeship of a charitable trust. Absent an effective designation in the terms of the trusts, a successor trustee may be selected by the charitable organizations expressly designated to receive distributions in the terms of the trusts if the attorney general does not affirmatively object within thirty days of receipt of the notice of the person selected. If the attorney general objects within the specified time frame, or if the trust does not designate a charitable organization to receive distributions, the vacancy may be filled only by a court.

In the case of a revocable trust, the appointment of a successor will normally be made directly by the settlor. As to the duties of a successor trustee with respect to the actions of a predecessor, *see* section 812 [*T.C.A. § 35-15-812*].

2007 Amendment.

Subsection (d)(2) was changed to eliminate the necessity for the attorney general to concur in the procedure for filling a vacancy.



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Tenn. Code Ann. § 35-15-705 (2012)

35-15-705. Resignation of trustee.

(a) A trustee may resign:

- (1) Upon at least thirty (30) days' notice to the qualified beneficiaries, the settlor, if living, and all cotrustees; or
- (2) With the approval of the court.

(b) In approving a resignation, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property.

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

HISTORY: Acts 2004, ch. 537, § 55.

NOTES:

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section rejects the common law rule that a trustee may resign only with permission of the court, and goes further than the Restatements, which allow a trustee to resign with the consent of the beneficiaries. *See* Restatement (Third) of Trusts § 36 (Tentative Draft No.2, approved 1999); *Restatement (Second) of Trusts § 106* (1959). Concluding that the default rule ought to approximate standard drafting practice, the drafting committee provided in subsection (a) that a trustee may resign by giving notice to the qualified beneficiaries, a living settlor, and any cotrustee. A resigning trustee may also follow the traditional method and resign with approval of the court.

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

Regarding the residual responsibilities of a resigning trustee until the trust property is delivered to a successor trustee, *see* section 707 [*T.C.A. § 35-15-707*].

In the case of a revocable trust, because the rights of the qualified beneficiaries are subject to the settlor's control (*see* section 603 [*T.C.A. § 35-15-603*]), resignation of the trustee is accomplished by giving notice to the settlor instead of the beneficiaries.

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Tenn. Code Ann. § 35-15-706 (2012)

35-15-706. Removal of trustee.

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

(b) The court may remove a trustee if:

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

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

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

(4) There has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

(c) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under § 35-15-1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries.

HISTORY: Acts 2004, ch. 537, § 56.

NOTES: Section to Section References.

This section is referred to in §§ 30-1-151, 35-15-1001.

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Cited:

Acree v. Acree, -- S.W.3d --, 2012 Tenn. App. LEXIS 808 (Tenn. Ct. App. Nov. 20, 2012).

NOTES TO DECISIONS

1. Removal. 2. --Attorney Fees.

1. Removal.

2. --Attorney Fees.

Award of attorney fees to the father in his action seeking to remove his daughter as trustee of an irrevocable trust that the father created was appropriate because the replacement of his daughter as trustee benefitted all of the beneficiaries and the services provided by the father's attorneys benefitted the trust. *Duke v. Simmons*, -- S.W.3d --, 2009 Tenn. App. LEXIS 174 (Tenn. Ct. App. Apr. 30, 2009).

COMMENTS TO OFFICIAL TEXT

Section Comment.

Subsection (a), contrary to the common law, grants the settlor of an irrevocable trust the right to petition for removal of a trustee. The right to petition for removal does not give the settlor of an irrevocable trust any other rights, such as the right to an annual report or to receive other information concerning administration of the trust. The right of a qualified beneficiary to petition for removal does not apply to a revocable trust while the settlor has capacity. Pursuant to section 603(a) [*T.C.A. § 35-15-603(a)*], while a trust is revocable and the settlor has capacity, the rights of the beneficiaries are subject to the settlor's exclusive control.

Trustee removal may be regulated by the terms of the trust. *See* section 105 [*T.C.A. § 35-15-105*]. In fashioning a removal provision for an irrevocable trust, the drafter should be cognizant of the danger that the trust may be included in the settlor's federal gross estate if the settlor retains the power to be appointed as trustee or to appoint someone who is not independent. *See Rev. Rul. 95-58, 1995-2 C.B. 191*.

Subsection (b) lists the grounds for removal of the trustee. The grounds for removal are similar to those found in Restatement (Third) of Trusts § 37 cmt. e (Tentative Draft No. 2, approved 1999). A trustee may be removed for untoward action, such as for a serious breach of trust, but the section is not so limited. A trustee may also be removed under a variety of circumstances in which the court concludes that the trustee is not best serving the interests of the beneficiaries. The term "interests of the beneficiaries" means the beneficial interests as provided in the terms of the trust, not as defined by the beneficiaries. *See* subdivision 103(7) [*T.C.A. § 35-15-103(8)*]. Removal for conduct detrimental to the interests of the beneficiaries is a well-established standard for removal of a trustee. *See* Restatement (Third) of Trusts § 37 cmt. d (Tentative Draft No. 2, approved 1999); *Restatement (Second) of Trusts § 107 cmt. a* (1959).

Subdivision (b)(1), consistent with *Restatement (Third) of Trusts § 37 cmt. e and g* (Tentative Draft No. 2, approved 1999), makes clear that not every breach of trust justifies removal of the trustee. The breach must be "serious." A serious breach of trust may consist of a single act that causes significant harm or involves flagrant misconduct. A serious breach of trust may also consist of a series of smaller breaches, none of which individually justify removal when considered alone, but which do so when considered together. A particularly appropriate circumstance justifying removal of the trustee is a serious breach of the trustee's duty to keep the beneficiaries reasonably informed of the administration of the trust or to comply with a beneficiary's request for information as required by section 813 [*T.C.A. § 35-15-813*]. Failure to comply with this duty may make it impossible for the beneficiaries to protect their interests. It may also mask more serious violations by the trustee.

The lack of cooperation among trustees justifying removal under subdivision (b)(2) need not involve a breach of trust. The key factor is whether the administration of the trust is significantly impaired by the trustees' failure to agree. Removal is particularly appropriate if the naming of an even number of trustees, combined with their failure to agree, has resulted in deadlock requiring court resolution. The court may remove one or more or all of the trustees. If a cotrustee remains in office following the removal, under section 704 [*T.C.A. § 35-15-704*] appointment of a successor trustee is not required.

Subdivision (b)(2) deals only with lack of cooperation among cotrustees, not with friction between the trustee and beneficiaries. Friction between the trustee and beneficiaries is ordinarily not a basis for removal. However, removal might be justified if a communications breakdown is caused by the trustee or appears to be incurable. *See* Restatement (Third) of Trusts § 37 cmt. e (Tentative Draft No. 2, approved 1999).

Subdivision (b)(3) authorizes removal for a variety of grounds, including unfitness, unwillingness, or persistent failure to administer the trust effectively. Removal in any of these cases is allowed only if it best serves the interests of the beneficiaries. For the definition of "interests of the beneficiaries," see subdivision 103(7) [*T.C.A. § 35-15-103(8)*]. "Unfitness" may include not only mental incapacity but also lack of basic ability to administer the trust. Before removing a trustee for unfitness the court should consider the extent to which the problem might be cured by a delegation of functions the trustee is personally incapable of performing. "Unwillingness" includes not only cases where the trustee refuses to act but also a pattern of indifference to some or all of the beneficiaries. See Restatement (Third) of Trusts § 37 cmt. e (Tentative Draft No. 2, approved 1999). A "persistent failure to administer the trust effectively" might include a long-term pattern of mediocre performance, such as consistently poor investment results when compared to comparable trusts.

It has traditionally been more difficult to remove a trustee named by the settlor than a trustee named by the court, particularly if the settlor at the time of the appointment was aware of the trustee's failings. See Restatement (Third) of Trusts § 37 cmt. f (Tentative Draft No.2, approved 1999); *Restatement (Second) of Trusts § 107* cmt. f-g (1959). Because of the discretion normally granted to a trustee, the settlor's confidence in the judgment of the particular person whom the settlor selected to act as trustee is entitled to considerable weight. This deference to the settlor's choice can weaken or dissolve if a substantial change in the trustee's circumstances occurs. To honor a settlor's reasonable expectations, subdivision (b)(4) lists a substantial change of circumstances as a possible basis for removal of the trustee. Changed circumstances justifying removal of a trustee might include a substantial change in the character of the service or location of the trustee. A corporate reorganization of an institutional trustee is not itself a change of circumstances if it does not affect the service provided the individual trust account. Before removing a trustee on account of changed circumstances, the court must also conclude that removal is not inconsistent with a material purpose of the trust, that it will best serve the interests of the beneficiaries, and that a suitable cotrustee or successor trustee is available.

Subdivision (b)(4) also contains a specific but more limited application of section 411 [*T.C.A. § 35-15-411*]. Section 411 [*T.C.A. § 35-15-411*] allows the beneficiaries by unanimous agreement to compel modification of a trust if the court concludes that the particular modification is not inconsistent with a material purpose of the trust. Subdivision (b)(4) of this section similarly allows the qualified beneficiaries to request removal of the trustee if the designation of the trustee was not a material purpose of the trust. Before removing the trustee the court must also find that removal will best serve the interests of the beneficiaries and that a suitable cotrustee or successor trustee is available.

Subsection (c) authorizes the court to intervene pending a final decision on a request to remove a trustee. Among the relief that the court may order under subsection 1001(b) [*T.C.A. § 35-15-1001(b)*] is an injunction prohibiting the trustee from performing certain acts and the appointment of a special fiduciary to perform some or all of the trustee's functions. Pursuant to section 1004 [*T.C.A. § 35-15-1004*], the court may also award attorney's fees as justice and equity may require.



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Tenn. Code Ann. § 35-15-707 (2012)

35-15-707. Delivery of property by former trustee.

(a) Unless a cotrustee remains in office or the court otherwise orders, and until the trust property is delivered to a successor trustee or other person entitled to it, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the trust property.

(b) A trustee who has resigned or been removed shall, within a reasonable time, deliver the trust property within the trustee's possession to the cotrustee, successor trustee, or other person entitled to it.

HISTORY: Acts 2004, ch. 537, § 57; 2007, ch. 24, § 27.

NOTES: Amendments.

The 2007 amendment substituted "shall, within a reasonable time," for "shall proceed expeditiously to" in (b).

Effective Dates.

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

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Cited:

Atkins v. Marks, 288 S.W.3d 356, 2008 Tenn. App. LEXIS 349 (Tenn. Ct. App. June 11, 2008).

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section addresses the continuing authority and duty of a resigning or removed trustee. Subject to the power of the court to make other arrangements or unless a cotrustee remains in office, a resigning or removed trustee has continuing authority until the trust property is delivered to a successor. If a cotrustee remains in office, there is no reason to grant a resigning or removed trustee any continuing authority, and none is granted under this section. In addition, if a

cotrustee remains in office, the former trustee need not submit a final trustee's report. *See* subsection 813(c) [*T.C.A. § 35-15-813(c)*].

There is ample authority in the Tennessee Uniform Trust Code for the appointment of a special fiduciary, an appointment which can avoid the need for a resigning or removed trustee to exercise residual powers until a successor can take office. *See* subsection 704(e) [*T.C.A. § 35-15-704(e)*] (court may appoint additional trustee or special fiduciary whenever court considers appointment necessary for administration of trust), subsection 705(b) [*T.C.A. § 35-15-705(b)*] (in approving resignation, court may impose conditions necessary for protection of trust property), subsection 706(c) [*T.C.A. § 35-15-706(c)*] (pending decision on petition for removal, court may order appropriate relief), and subdivision 1001(b)(5) [*T.C.A. § 35-15-1001(b)(5)*] (to remedy breach of trust, court may appoint special fiduciary as necessary to protect trust property or interests of beneficiary).

If the former trustee has died, the Tennessee Uniform Trust Code does not require that the trustee's personal representative windup the deceased trustee's administration. Nor is a trustee's conservator or guardian required to complete the former trustee's administration if the trustee's authority terminated due to an adjudication of incapacity. However, to limit the former trustee's liability, the personal representative, conservator or guardian may submit a trustee's report on the former trustee's behalf as authorized by subsection 813(c) [*T.C.A. § 35-15-813(c)*]. Otherwise, the former trustee remains liable for actions taken during the trustee's term of office until liability is otherwise barred.

Subsection (b) recognizes that the process of changing trustees does not take place overnight. The resigning or removed trustee may have to sell proprietary mutual funds whose sale is limited to certain times each month; it may have to wait for a court order to become final; it may wish to have in hand releases from beneficiaries; and it may have to wait on the preparation and filing of deeds or other instruments of conveyance before transferring the trust property in its possession or under its control.



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GO TO THE TENNESSEE ANNOTATED STATUTES ARCHIVE DIRECTORY

Tenn. Code Ann. § 35-15-708 (2012)

35-15-708. Compensation of trustee.

(a) If the terms of a trust do not specify the trustee's compensation, and if the settlor, if living, otherwise a majority of the qualified beneficiaries as defined in § 35-15-103(13)(A), have not otherwise agreed, a trustee is entitled to compensation that is reasonable under the circumstances.

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

- (1) The duties of the trustee are substantially different from those contemplated when the trust was created; or
- (2) The compensation specified by the terms of the trust would be unreasonably low or high.

(c) Factors for the court to consider in deciding upon a trustee's compensation shall include the size of the trust, the nature and number of the assets, the income produced, the time and responsibility required, the expertise required, any management or sale of real property or closely held business interests, any involvement in litigation to protect trust property, and other relevant factors.

(d) Subject to the court's authority as provided in subsection (b), the fees set forth in the published fee schedule of a corporate trustee shall be presumed to be reasonable, unless otherwise provided by the terms of the trust.

HISTORY: Acts 2004, ch. 537, § 58.

NOTES: Section to Section References.

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

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Cited:

Meeks v. Successor Trs. of Marital Trust, -- S.W.3d --, 2010 Tenn. App. LEXIS 554 (Tenn. Ct. App. Sept. 1, 2010).

COMMENTS TO OFFICIAL TEXT

Section Comment.

Subsection (a) establishes a standard of reasonable compensation. Relevant factors in determining this compensation, as specified in the Restatement, include the custom of the community; the trustee's skill, experience, and facilities; the time devoted to trust duties; the amount and character of the trust property; the degree of difficulty, responsibility and risk assumed in administering the trust, including in making discretionary distributions; the nature and costs of services rendered by others; and the quality of the trustee's performance. *See* Restatement (Third) of Trusts § 38 cmt. c (Tentative Draft No. 2, approved 1999); *Restatement (Second) of Trusts* § 242 cmt. b (1959).

In setting compensation, the services actually performed and responsibilities assumed by the trustee should be closely examined. A downward adjustment of fees may be appropriate if a trustee has delegated significant duties to agents, such as the delegation of investment authority to outside managers. *See* section 807 [T.C.A. § 35-15-807] (delegation by trustee). On the other hand, a trustee with special skills, such as those of a real estate agent, may be entitled to extra compensation for performing services that would ordinarily be delegated. *See* Restatement (Third) of Trusts § 38 cmt. d (Tentative Draft No. 2, approved 1999); *Restatement (Second) of Trusts* § 242 cmt. d (1959).

Because "trustee" as defined in section 103(19) [T.C.A. § 35-15-103(21)] includes not only an individual trustee but also cotrustees, each trustee, including a cotrustee, is entitled to reasonable compensation under the circumstances. The fact that a trust has more than one trustee does not mean that the trustees together are entitled to more compensation than had either acted alone. Nor does the appointment of more than one (1) trustee mean that the trustees are eligible to receive the compensation in equal shares. The total amount of the compensation to be paid and how it will be divided depend on the totality of the circumstances. Factors to be considered include the settlor's reasons for naming more than one (1) trustee and the level of responsibility assumed and exact services performed by each trustee. Often the fees of cotrustees will be in the aggregate higher than the fees for a single trustee because of the duty of each trustee to participate in administration and not delegate to a cotrustee duties the settlor expected the trustees to perform jointly. *See* Restatement (Third) of Trusts § 38 cmt. i (Tentative Draft No. 2, approved 1999). The trust may benefit in such cases from the enhanced quality of decision-making resulting from the collective deliberations of the trustees.

Financial institution trustees normally base their fees on published fee schedules. Published fee schedules are subject to the same standard of reasonableness under the Tennessee Uniform Trust Code as are other methods for computing fees. The courts have generally upheld published fee schedules but this is not automatic. Among the more litigated topics is the issue of termination fees. Termination fees are charged upon termination of the trust and sometimes upon transfer of the trust to a successor trustee. Factors relevant to whether the fee is appropriate include the actual work performed; whether a termination fee was authorized in the terms of the trust; whether the fee schedule specified the circumstances in which a termination fee would be charged; whether the trustee's overall fees for administering the trust from the date of the trust's creation, including the termination fee, were reasonable; and the general practice in the community regarding termination fees. Because significantly less work is normally involved, termination fees are less appropriate upon transfer to a successor trustee than upon termination of the trust. For representative cases, *see Cleveland Trust Co. v. Wilmington Trust Co.*, 258 A.2d 58 (Del. 1969); *In re Trusts Under Will of Dwan*, 371 N.W. 2d 641 (Minn. Ct. App. 1985); *Mercer v. Merchants National Bank*, 298 A.2d 736 (N.H. 1972); *In re Estate of Payson*, 562 N.Y.S. 2d 329 (Surr. Ct. 1990); *In re Indenture Agreement of Lawson*, 607 A. 2d 803 (Pa. Super. Ct. 1992); *In re Estate of Ischy*, 415 A.2d 37 (Pa. 1980); *Memphis Memorial Park v. Planters National Bank*, 1986 Tenn. App. LEXIS 2978 (May 7, 1986); *In re Trust of Sensenbrenner*, 252 N.W. 2d 47 (Wis. 1977).

This Code does not take a specific position on whether dual fees may be charged when a trustee hires its own law firm to represent the trust. The trend is to authorize dual compensation as long as the overall fees are reasonable. For a discussion, *see* Ronald C. Link, *Developments Regarding the Professional Responsibility of the Estate Administration Lawyer: The Effect of the Model Rules of Professional Conduct*, 26 *Real Prop. Prob. & Tr. J.* 1, 22-38 (1991).

Subsection (b) permits the terms of the trust to override the reasonable compensation standard, subject to the court's inherent equity power to make adjustments downward or upward in appropriate circumstances. Compensation provisions should be drafted with care. Common questions include whether a provision in the terms of the trust setting the amount of the trustee's compensation is binding on a successor trustee, whether a dispositive provision for the trustee in the terms of the trust is in addition to or in lieu of the trustee's regular compensation, and whether a dispositive provision for the trustee is conditional on the person performing services as trustee. *See* Restatement (Third) of Trusts § 38 cmt. e (Tentative Draft No.2, approved 1999); *Restatement (Second) of Trusts* § 242 cmt. f (1959).

Compensation may be set by agreement. A trustee may enter into an agreement with the settlor or a majority of the qualified beneficiaries for lesser or increased compensation, although an agreement increasing compensation is not

binding on a nonconsenting beneficiary. *See* subsection 111(d) [*T.C.A. § 35-15-111(d)*] (matters that may be the resolved by nonjudicial settlement). *See also* Restatement (Third) of Trusts § 38 cmt. f (Tentative Draft No. 2, approved 1999); *Restatement (Second) of Trusts* § 242 cmt. i (1959). A trustee may also agree to waive compensation and should do so prior to rendering significant services if concerned about possible gift and income taxation of the compensation accrued prior to the waiver. *See Rev. Rul. 66-167, 1966-1 C.B. 20. See also* Restatement (Third) of Trusts § 38 cmt. g (Tentative Draft No. 2, approved 1999); *Restatement (Second) of Trusts* § 242 cmt. j (1959).

Subdivision 816(15) [*T.C.A. § 35-15-816(15)*] grants the trustee authority to fix and pay its compensation without the necessity of prior court review, subject to the right of a beneficiary to object to the compensation in a later judicial proceeding. Allowing the trustee to pay its compensation without prior court approval promotes efficient trust administration but does place a significant burden on a beneficiary who believes the compensation is unreasonable. To provide a beneficiary with time to take action, and because of the importance of trustee's fees to the beneficiaries' interests, subdivision 813(b)(4) [*T.C.A. § 35-15-813(b)(4)*] requires a trustee to provide the qualified beneficiaries with advance notice of any change in the method or rate of the trustee's compensation. Failure to provide such advance notice constitutes a breach of trust, which, if sufficiently serious, would justify the trustee's removal under section 706 [*T.C.A. § 35-15-706*].

Under sections 501-502 [*T.C.A. § 35-6-501 -- 35-6-502*] of the Uniform Principal and Income Act (1997), one half (1/2) of a trustee's regular compensation is charged to income and the other half (1/2) to principal. Chargeable to principal are fees for acceptance, distribution, or termination of the trust, and fees charged on disbursements made to prepare property for sale.



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Tenn. Code Ann. § 35-15-709 (2012)

35-15-709. Reimbursement of expenses.

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

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

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

(b) An advance, either by the trustee or by a person named in § 35-15-701(c)(1), of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.

HISTORY: Acts 2004, ch. 537, § 59.

NOTES:

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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.

A trustee has the authority to expend trust funds as necessary in the administration of the trust, including expenses incurred in the hiring of agents. *See* section 807 [*T.C.A. § 35-15-807*] (delegation by trustee) and subdivision 816(15) [*T.C.A. § 35-15-816(15)*] (trustee to pay expenses of administration from trust).

Subsection (a)(1) clarifies that a trustee is entitled to reimbursement from the trust for incurring expenses within the trustee's authority. The trustee may also withhold appropriate reimbursement for expenses before making distributions to the beneficiaries. *See* Restatement (Third) of Trusts § 38 cmt. b (Tentative Draft No. 2, approved 1999); *Restatement*

(Second) of Trusts § 244 cmt. b (1959). A trustee is ordinarily not entitled to reimbursement for incurring unauthorized expenses. Such expenses are normally the personal responsibility of the trustee.

As provided in subdivision (a)(2), a trustee is entitled to reimbursement for unauthorized expenses only if the unauthorized expenditures benefitted the trust. The purpose of this provision, which is derived from *Restatement (Second) of Trusts § 245* (1959), is not to ratify the unauthorized conduct of the trustee, but to prevent unjust enrichment of the trust. Given this purpose, a court, on appropriate grounds, may delay or even deny reimbursement for expenses which benefitted the trust. Appropriate grounds include: (1) whether the trustee acted in bad faith in incurring the expense; (2) whether the trustee knew that the expense was inappropriate; (3) whether the trustee reasonably believed the expense was necessary for the preservation of the trust estate; (4) whether the expense has resulted in a benefit; and (5) whether indemnity can be allowed without defeating or impairing the purposes of the trust. *See Restatement (Second) of Trusts § 245* cmt. g (1959).

Subsection (b) implements section 802(h)(5) [*T.C.A. § 35-15-802(k)(5)*], which creates an exception to the duty of loyalty for advances by the trustee for the protection of the trust if the transaction is fair to the beneficiaries.

Reimbursement under this section may include attorney's fees and expenses incurred by the trustee in defending an action. However, a trustee is not ordinarily entitled to attorney's fees and expenses if it is determined that the trustee breached the trust. *See* 3A Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 245 (4th ed. 1988).



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Tenn. Code Ann. § 35-15-801 (2012)

35-15-801. Duty to administer trust.

Upon acceptance of a trusteeship, the trustee shall administer the trust until such time as the trust terminates or a successor trustee is appointed and all assets are delivered in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this chapter.

HISTORY: Acts 2004, ch. 537, § 60.

NOTES:

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NOTES TO DECISIONS

1. Illustrative Cases.

1. Illustrative Cases.

Beneficiary's breach-of-fiduciary claim against trustees was properly dismissed on partial summary judgment; as the payments he sought were contrary to the terms of the trust documents, and the trustees followed the directions of the trusts, pursuant to *T.C.A. § 35-15-1006*, they could not be found to have breached their fiduciary duties to him. *Cartwright v. Capital*, -- S.W.3d --, 2012 Tenn. App. LEXIS 369 (Tenn. Ct. App. June 5, 2012).

COMMENTS TO OFFICIAL TEXT

General Comment.

This part states the fundamental duties of a trustee and lists the trustee's powers. The duties listed are not new, but how the particular duties are formulated and applied has changed over the years. This part was drafted where possible to conform with the 1994 Uniform Prudent Investor Act [*T.C.A. § 35-6-101 et seq.*], which has been enacted in approximately two thirds of the states. The Uniform Prudent Investor Act [*T.C.A. § 35-6-101 et seq.*] prescribes a trustee's responsibilities with respect to the management and investment of trust property. The Tennessee Uniform Trust Code also addresses a trustee's duties with respect to distribution to beneficiaries.

Because of the widespread adoption of the Uniform Prudent Investor Act [*T.C.A. § 35-6-101 et seq.*], it was decided not to disassemble and fully integrate the Prudent Investor Act [*T.C.A. § 35-6-101 et seq.*] into the Tennessee Uniform Trust Code. Instead, states enacting the Uniform Trust Code are encouraged to recodify their version of the Prudent Investor Act by reenacting it as part 9 [*T.C.A. § 35-15-901*] of this Code rather than leaving it elsewhere in their statutes. Where the Uniform Trust Code and Uniform Prudent Investor Act overlap, states should enact the provisions of this part and not enact the duplicative provisions of the Prudent Investor Act. Sections of this part which overlap with the Prudent Investor Act are sections 802 [*T.C.A. § 35-15-802*] (duty of loyalty), 803 [*T.C.A. § 35-15-803*] (impartiality), 805 [*T.C.A. § 35-15-805*] (costs of administration), 806 [*T.C.A. § 35-15-806*] (trustee's skills), and 807 [*T.C.A. § 35-15-807*] (delegation). For more complete instructions on how to enact the Uniform Prudent Investor Act as part of this Code, see the General Comment to part 9 [*T.C.A. § 35-15-901*].

All of the provisions of this part may be overridden in the terms of the trust except for certain aspects of the trustee's duty to keep the beneficiaries informed of administration (*See* subdivisions 105(b)(8)-(9) [*T.C.A. § 35-15-105(b)(8)-(9)*], and the trustee's fundamental obligation to act in good faith, in accordance with the purposes of the trust, and for the benefit of the beneficiaries (*See* subdivisions 105(b)(2)-(3) [*T.C.A. § 35-15-105(b)(2)-(3)*]).

Section Comment.

This section confirms that a primary duty of a trustee is to follow the terms and purposes of the trust and to do so in good faith. Only if the terms of a trust are silent or for some reason invalid on a particular issue does this Tennessee Uniform Trust Code govern the trustee's duties. This section also confirms that a trustee does not have a duty to act until the trustee has accepted the trusteeship. For the procedure for accepting a trusteeship, *see* section 701 [*T.C.A. § 35-15-701*].

In administering the trust, the trustee must not only comply with this section but also with the other duties specified in this part, particularly the obligation not to place the interests of others above those of the beneficiaries (section 802) [*T.C.A. § 35-15-802*], the duty to act with prudence (section 804) [*T.C.A. § 35-15-804*], and the duty to keep the qualified beneficiaries reasonably informed about the administration of the trust (section 813) [*T.C.A. § 35-15-813*].

While a trustee generally must administer a trust in accordance with its terms and purposes, the purposes and particular terms of the trust can on occasion conflict. If such a conflict occurs because of circumstances not anticipated by the settlor, it may be appropriate for the trustee to petition under section 412 [*T.C.A. § 35-15-412*] to modify or terminate the trust. Pursuant to section 404 [*T.C.A. § 35-15-404*], the trustee is not required to perform a duty prescribed by the terms of the trust if performance would be impossible, illegal or contrary to public policy.

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



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Tenn. Code Ann. § 35-15-802 (2012)

35-15-802. Duty of loyalty.

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

(b) Subject to the rights of persons dealing with or assisting the trustee as provided in § 35-15-1012 or as may otherwise be allowed under Tennessee law, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:

- (1) The transaction was authorized by the terms of the trust;
- (2) The transaction was approved by the court;
- (3) The beneficiary did not commence a judicial proceeding within the time allowed by § 35-15-1005;

(4) The beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with § 35-15-1009; or

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

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

- (1) The trustee's spouse;
- (2) The trustee's descendants, siblings, parents, or their spouses;
- (3) An agent or attorney of the trustee; or

(4) A corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

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

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

(f) In addition to all other permissible investments and delegatable duties listed in this title, so long as they are fairly priced and in accordance with the interest of the beneficiaries and the interests of the fiduciary's appointment and otherwise comply with chapter 14 of this title, a fiduciary may purchase, sell, hold or otherwise deal with an affiliate or an interest in an affiliated investment, as well as delegate to an affiliate or other agent associated with the fiduciary and, upon satisfaction of the conditions stated in subsection (h), such fiduciary may receive fiduciary compensation from such account at the same rate as the fiduciary would otherwise be entitled to be compensated. Such activities shall occur without any presumption of a conflict between personal and fiduciary interests of the trustee or other fiduciary.

(g) As used in this section:

(1) "Affiliate" means any corporation or other entity that directly or indirectly through one or more intermediaries controls, is controlled by or is under common control with the fiduciary;

(2) "Affiliated investment" means an investment for which the fiduciary or an affiliate of the fiduciary acts as adviser, administrator, distributor, placement agent, underwriter, broker or in any other capacity for which it receives or has received a fee or commission from such investment or an investment acquired or disposed of in a transaction for which the fiduciary or an affiliate of the fiduciary receives or has received a fee or commission. "Affiliated investment" also means an investment in an insurance contract purchased from an insurance agency owned by, or affiliated with, the fiduciary, or any of its affiliates;

(3) "Delegate to an affiliate or associated agent" means a proper delegation of any duty of the fiduciary to any person or entity that is affiliated with, or associated with, the fiduciary. The action of doing any of the above shall be known as a "delegation to an affiliate or associated agent";

(4) "Fee or commission" means compensation paid to a fiduciary or an affiliate thereof on account of its services to or on behalf of an investment;

(5) For purposes of this section, "fiduciary" includes any trustee, which has the same meaning as in § 35-14-102, as well as any other fiduciary; and

(6) "Investment" shall mean any security as defined in § 2(a)(1) of the Securities Act of 1933, any contract of sale of a commodity for future delivery within the meaning of § 2(i) of the Commodity Exchange Act, or any other asset permitted for fiduciary accounts pursuant to the terms of chapter 14 of this title or by the terms of the governing instrument, including by way of illustration and not limitation: shares or interests in a public or private investment fund, which shall include, but not be limited to, a public or private investment fund organized as a limited partnership, limited liability company, statutory or common law business trust, real estate investment trust, joint venture or other general or limited partnership; or an open-end or closed-end management type investment company or investment trust registered under the Investment Company Act of 1940.

(h) A fiduciary seeking compensation pursuant to subsection (f) shall, as is applicable relative to the fiduciary's particular appointment, disclose either: to those persons entitled to be kept informed about the administration of a trust under § 35-15-813(a)(1), subject to the provisions of § 35-15-813(d) and (e); to each principal in an agency relationship; or to all current recipients of statements of any other fiduciary account not described above; all fees or commissions paid or to be paid by the account, or received or to be received by an affiliate arising from such affiliated investment or delegation to an affiliate or associated agent. The disclosure required under this subsection (h) may be given either in a copy of the prospectus or any other disclosure document prepared for the affiliated investment under federal or state securities laws or in a written summary that includes all fees or commissions received or to be received by the fiduciary or any affiliate of the fiduciary and an explanation of the manner in which such fees or commissions are calculated, either as a percentage of the assets invested or by some other method. Such disclosure shall be made at least annually unless there has been no increase in the rate at which such fees or commissions are calculated since the most recent disclosure. Notwithstanding this subsection (h), no such disclosure is required if the governing instrument or a court order expressly authorizes the fiduciary to invest the fiduciary account in affiliated investments or to perform the delegation to an affiliate or associated agent.

(i) A fiduciary that has complied with subsection (h), whether by making the applicable disclosure or by relying on the terms of a governing instrument or court order, shall have full authority to administer an affiliated investment, in-

cluding the authority to vote proxies thereon, without regard to the affiliation between the fiduciary and the investment or the fiduciary and delegatee, as the case may be.

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

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

- (1) An agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;
- (2) Payment of reasonable compensation to the trustee;
- (3) A transaction between a trust and another trust, decedent's estate, or conservatorship of which the trustee is a fiduciary or in which a beneficiary has an interest;
- (4) A deposit of trust money in a regulated financial-service institution operated by the trustee; or
- (5) An advance by the trustee of money for the protection of the trust.

(l) The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

HISTORY: Acts 2004, ch. 537, § 61; 2010, ch. 725, § 8.

NOTES: Compiler's Notes.

Section 2(a)(1) of the Securities Act of 1933, referred to in this section, is codified in *15 U.S.C. § 77b(a)(1)*.

Section 2(i) of the Commodity Exchange Act, referred to in this section, is codified in *7 U.S.C. § 2(i)*.

The Investment Company Act of 1940, referred to in this section, is compiled in *15 U.S.C. § 80a-1 et seq.*

Amendments.

The 2010 amendment deleted former (f) which read: "An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests of the trustee if the investment complies with the prudent investor rule of chapter 14 of this title. The trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust if the trustee at least annually notifies the persons entitled under § 35-15-813 to receive a copy of the trustee's annual report of the rate and method by which the compensation was determined."; added present (f)-(i); and redesignated former (g)-(i) as present (j)-(l), respectively.

Effective Dates.

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

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section addresses the duty of loyalty, perhaps the most fundamental duty of the trustee. Subsection (a) states the general principle, which is copied from *Restatement (Second) of Trusts § 170(1)* (1959). A trustee owes a duty of loyalty to the beneficiaries, a principle which is sometimes expressed as the obligation of the trustee not to place the trustee's own interests over those of the beneficiaries. Most but not all violations of the duty of loyalty concern transactions involving the trust property, but breaches of the duty can take other forms. For a discussion of the different types of violations, see George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 543 (Rev. 2d ed. 1993); and 2A Austin W. Scott & William F. Fratcher, *The Law of Trusts* §§ 170-170.24 (4th ed. 1987). The "interests of the beneficiaries" to which the trustee must be loyal are the beneficial interests as provided in the terms of the trust. See subdivision 103(7) [*T.C.A. § 35-15-103(8)*].

The duty of loyalty applies to both charitable and noncharitable trusts, even though the beneficiaries of charitable trusts are indefinite. In the case of a charitable trust, the trustee must administer the trust solely in the interests of effectuating the trust's charitable purposes. *See Restatement (Second) of Trusts § 379 cmt. a (1959).*

Duty of loyalty issues often arise in connection with the settlor's designation of the trustee. For example, it is not uncommon that the trustee will also be a beneficiary. Or the settlor will name a friend or family member who is an officer of a company in which the settlor owns stock. In such cases, settlors should be advised to consider addressing in the terms of the trust how such conflicts are to be handled. Section 105 [*T.C.A. § 35-15-105*] authorizes a settlor to override an otherwise applicable duty of loyalty in the terms of the trust. Sometimes the override is implied. The grant to a trustee of authority to make a discretionary distribution to a class of beneficiaries that includes the trustee implicitly authorizes the trustee to make distributions for the trustee's own benefit.

Subsection (b) states the general rule with respect to transactions involving trust property that are affected by a conflict of interest. A transaction affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary who is affected by the transaction. Subsection (b) carries out the "no further inquiry" rule by making transactions involving trust property entered into by a trustee for the trustee's own personal account voidable without further proof. Such transactions are irrebuttably presumed to be affected by a conflict between personal and fiduciary interests. It is immaterial whether the trustee acts in good faith or pays a fair consideration. *See Restatement (Second) of Trusts § 170 cmt. b (1959).* Subsection (d) does not apply to a corporate trustee that makes a loan to or sells a financial product to a beneficiary in the ordinary course of business.

The rule is less severe with respect to transactions involving trust property entered into with persons who have close business or personal ties with the trustee. Under subsection (c), a transaction between a trustee and certain relatives and business associates is presumptively voidable, not void. Also presumptively voidable are transactions with corporations or other enterprises in which the trustee, or a person who owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment. The presumption is rebutted if the trustee establishes that the transaction was not affected by a conflict between personal and fiduciary interests. Among the factors tending to rebut the presumption are whether the consideration was fair and whether the other terms of the transaction are similar to those that would be transacted with an independent party.

Even where the presumption under subsection (c) does not apply, a transaction may still be voided by a beneficiary if the beneficiary proves that a conflict between personal and fiduciary interests existed and that the transaction was affected by the conflict. The right of a beneficiary to void a transaction affected by a conflict of interest is optional. If the transaction proves profitable to the trust and unprofitable to the trustee, the beneficiary will likely allow the transaction to stand. For a comparable provision regulating fiduciary investments by national banks, *see 12 C.F.R. § 9.12(a).*

As provided in subsection (b), no breach of the duty of loyalty occurs if the transaction was authorized by the terms of the trust or approved by the court, or if the beneficiary failed to commence a judicial proceeding within the time allowed or chose to ratify the transaction, either prior to or subsequent to its occurrence. In determining whether a beneficiary has consented to a transaction, the principles of representation from Chapter 3 [*T.C.A. §§ 35-15-301 -- 35-15-305*] may be applied.

Subdivision (b)(5), which is derived from section 3-713(1) of the Uniform Probate Code, allows a trustee to implement a contract or pursue a claim that the trustee entered into or acquired before the person became or contemplated becoming trustee. While this subsection allows the transaction to proceed without automatically being voidable by a beneficiary, the transaction is not necessarily free from scrutiny. In implementing the contract or pursuing the claim, the trustee must still complete the transaction in a way that avoids a conflict between the trustee's fiduciary and personal interests. Because avoiding such a conflict will frequently be difficult, the trustee should consider petitioning the court to appoint a special fiduciary, as authorized by subsection (i), to work out the details and complete the transaction.

Subsection (d) creates a presumption that a transaction between a trustee and a beneficiary not involving trust property is an abuse by the trustee of a confidential relationship with the beneficiary. This subsection has limited scope. If the trust has terminated, there must be proof that the trustee's influence with the beneficiary remained. Furthermore, whether or not the trust has terminated, there must be proof that the trustee obtained an advantage from the relationship. The fact the trustee profited is insufficient to show an abuse if a third party would have similarly profited in an arm's length transaction. Subsection (d) is based on *Cal. Prob. Code § 16004(c)*. *See also 2A Austin W. Scott & William F. Fratcher § 170.25 (4th ed. 1987)*, which states the same principle in a slightly different form: "Where he deals directly with the beneficiaries, the transaction may stand, but only if the trustee makes full disclosure and takes no advantage of his position and the transaction is in all respects fair and reasonable."

Subsection (e), which allows a beneficiary to void a transaction entered into by the trustee that involved an opportunity belonging to the trust, is based on *Restatement (Second) of Trusts* § 170 cmt. k (1959). While normally associated with corporations and with their directors and officers, what is usually referred to as the corporate opportunity doctrine also applies to other types of fiduciary. The doctrine prohibits the trustee's pursuit of certain business activities, such as entering into a business in direct competition with a business owned by the trust, or the purchasing of an investment that the facts suggest the trustee was expected to purchase for the trust. For discussion of the corporate opportunity doctrine, see Kenneth B. Davis, Jr., *Corporate Opportunity and Comparative Advantage*, 84 *Iowa L. Rev.* 211 (1999); and Richard A. Epstein, *Contract and Trust in Corporate Law: The Case of Corporate Opportunity*, 21 *Del. J. Corp. L.* 5 (1996). See also *Principles of Corporate Governance: Analysis and Recommendations* § 5.05 (American Law Inst. 1994).

Subsection (f) creates an exception to the no further inquiry rule for trustee investment in mutual funds. This exception applies even though the mutual fund company pays the financial service institution trustee a fee for providing investment advice and other services, such as custody, transfer agent, and distribution, that would otherwise be provided by agents of the fund. Mutual funds offer several advantages for fiduciary investing. By comparison with common trust funds, mutual fund shares may be distributed in-kind when trust interests terminate, avoiding liquidation and the associated recognition of gain for tax purposes. Mutual funds commonly offer daily pricing, which gives trustees and beneficiaries better information about performance. Because mutual funds can combine fiduciary and nonfiduciary accounts, they can achieve larger size, which can enhance diversification and produce economies of scale that can lower investment costs.

Mutual fund investment also has a number of potential disadvantages. It adds another layer of expense to the trust, and it causes the trustee to lose control over the nature and timing of transactions in the fund. Trustee investment in mutual funds sponsored by the trustee, its affiliate, or from which the trustee receives extra fees has given rise to litigation implicating the trustee's duty of loyalty, the duty to invest with prudence, and the right to receive only reasonable compensation. Because financial institution trustees ordinarily provide advisory services to and receive compensation from the very funds in which they invest trust assets, the contention is made that investing the assets of individual trusts in these funds is imprudent and motivated by the effort to generate additional fee income. Because the financial institution trustee often will also charge its regular fee for administering the trust, the contention is made that the financial institution trustee's total compensation, both direct and indirect, is excessive.

Subsection (f) attempts to retain the advantages of mutual funds while at the same time making clear that such investments are subject to traditional fiduciary responsibilities. Nearly all of the States have enacted statutes authorizing trustees to invest in funds from which the trustee might derive additional compensation. Portions of subsection (f) are based on these statutes. Subsection (f) makes clear that such dual investment-fee arrangements are not automatically presumed to involve a conflict between the trustee's personal and fiduciary interests, but subsection (f) does not otherwise waive or lessen a trustee's fiduciary obligations. The trustee, in deciding whether to invest in a mutual fund, must not place its own interests ahead of those of the beneficiaries. The investment decision must also comply with the enacting jurisdiction's prudent investor rule. To obtain the protection afforded by subsection (f), the trustee must disclose at least annually to the beneficiaries entitled to receive a copy of the trustee's annual report the rate and method by which the additional compensation was determined. Furthermore, the selection of a mutual fund, and the resulting delegation of certain of the trustee's functions, may be taken into account under section 708 [*T.C.A.* § 35-15-708] in setting the trustee's regular compensation. See also Uniform Prudent Investor Act sections 7 and 9 and Comments [*T.C.A.* § 35-14-109 and 35-14-111]; *Restatement (Third) of Trusts: Prudent Investor Rule* § 227 cmt. m (1992). Delivery of an investment prospectus on an annual basis to beneficiaries where the trustee receives compensation from an affiliated company is deemed to meet the annual notice required.

Subsection (f) applies whether the services to the fund are provided directly by the trustee or by an affiliate. While the term "affiliate" is not used in subsection (c), the individuals and entities listed there are examples of affiliates. The term is also used in the regulations under ERISA. An "affiliate" of a fiduciary includes (1) any person who directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with the fiduciary; (2) any officer, director, partner, employee, or relative of the fiduciary, and any corporation or partnership of which the fiduciary is an officer, director or partner. See 29 *C.F.R.* § 2510.3-21(e).

Subsection (g) addresses an overlap between trust and corporate law. It is based on *Restatement of Trusts (Second)* § 193 cmt. a (1959), which provides that "[i]t is the duty of the trustee in voting shares of stock to use proper care to promote the interest of the beneficiary," and that the fiduciary responsibility of a trustee in voting a control block "is heavier than where he holds only a small fraction of the shares." Similarly, the department of labor construes ERISA's duty of loyalty to make share voting a fiduciary function. See 29 *C.F.R.* § 2509.94-2. When the trust owns the entirety

of the shares of a corporation, the corporate assets are in effect trust assets that the trustee determines to hold in corporate form. The trustee may not use the corporate form to escape the fiduciary duties of trust law. Thus, for example, a trustee whose duty of impartiality would require the trustee to make current distributions for the support of current beneficiaries may not evade that duty by holding assets in corporate form and pleading the discretion of corporate directors to determine dividend policy. Rather, the trustee must vote for corporate directors who will follow a dividend policy consistent with the trustee's trust-law duty of impartiality.

Subsection (h) contains several exceptions to the general duty of loyalty, which apply if the transaction was fair to the beneficiaries. Subsection (h)(1) -- (h)(2) clarify that a trustee is free to contract about the terms of appointment and rate of compensation. Consistent with *Restatement (Second) of Trusts § 170* cmt. r (1959), subdivision (h)(3) authorizes a trustee to engage in a transaction involving another trust of which the trustee is also trustee, a transaction with a decedent's estate or a conservatorship estate of which the trustee is personal representative or conservator, or a transaction with another trust or other fiduciary relationship in which a beneficiary of the trust has an interest. The authority of a trustee to deposit funds in a financial institution operated by the trustee, as provided in subdivision (h)(4), is recognized in *Restatement (Second) of Trusts § 170* cmt. m (1959). The power to deposit funds in its own institution does not negate the trustee's responsibility to invest prudently, including the obligation to earn a reasonable rate of interest on deposits. Subdivision (h)(5) authorizes a trustee to advance money for the protection of the trust. Such advances usually are of small amounts and are made in emergencies or as a matter of convenience. Pursuant to subsection 709(b) [*T.C.A. § 35-15-709(b)*], the trustee has a lien against the trust property for any advances made.

2010 Amendment.

Subsection (f) through (i) clearly grant the express authority to use affiliates and related parties or affiliated delegates to manage assets and perform administrative functions. This increases flexibility and grants fiduciaries the ability to leverage expertise inside their broad organization. Versus the common law, the Restatement of Trusts (Third) and the "uniform" Uniform Trust Code and Uniform Prudent Investor Act, these provisions grant exceptions to the no further inquiry rule relative to conflicts of interests for investments and other transactions between affiliates so long as these transactions are fairly priced, are in accordance with the interests of the beneficiaries and the interests of the fiduciary appointment and otherwise comply with the Tennessee Uniform Prudent Investor Act. Under most circumstances, a fiduciary must disclose, at least annually (unless there has been no change) to the beneficiaries entitled to receive a copy of the trustee's annual report, the rate and method by which any additional compensation paid, earned or received from or by any affiliate was determined.

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Tenn. Code Ann. § 35-15-803 (2012)

35-15-803. Impartiality.

If a trust has two (2) or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.

HISTORY: Acts 2004, ch. 537, § 62.

NOTES:

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Cited:

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.

The duty of impartiality is an important aspect of the duty of loyalty. This section is identical to section 6 of the Uniform Prudent Investor Act [*T.C.A. § 35-14-106*], except that this section also applies to all aspects of trust administration and to decisions by a trustee with respect to distributions. The Prudent Investor Act [*T.C.A. § 35-14-101 et seq.*] is limited to duties with respect to the investment and management of trust property. The differing beneficial interests for which the trustee must act impartially include those of the current beneficiaries versus those of beneficiaries holding interests in the remainder; and among those currently eligible to receive distributions. In fulfilling the duty to act impartially, the trustee should be particularly sensitive to allocation of receipts and disbursements between income and principal and should consider, in an appropriate case, a reallocation of income to the principal account and vice versa, if allowable under local law. For an example of such authority, see Uniform Principal and Income Act § 104 (1997) [*T.C.A. § 35-6-104*].

The duty to act impartially does not mean that the trustee must treat the beneficiaries equally. Rather, the trustee must treat the beneficiaries equitably in light of the purposes and terms of the trust. A settlor who prefers that the trust-

tee, when making decisions, generally favor the interests of one beneficiary over those of others should provide appropriate guidance in the terms of the trust. *See Restatement (Second) of Trusts § 183 cmt. a (1959).*



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Tenn. Code Ann. § 35-15-804 (2012)

35-15-804. Prudent administration.

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

HISTORY: Acts 2004, ch. 537, § 60.

NOTES:

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Cited:

Glass v. Suntrust Bank, -- S.W.3d --, 2011 Tenn. App. LEXIS 459 (Tenn. Ct. App. Aug. 26, 2011).

NOTES TO DECISIONS

1. Unreasonable Actions Or Reckless Indifference.

1. Unreasonable Actions Or Reckless Indifference.

Grant of summary judgment in favor of the bank in the decedent's daughter's action against it was appropriate because there was nothing in the record indicating that the bank acted either unreasonably or with reckless indifference in carrying out its duties as trustee. *Wood v. Lowery*, 238 S.W.3d 747, 2007 Tenn. App. LEXIS 119 (Tenn. Ct. App. Mar. 6, 2007), appeal denied, -- S.W.3d --, 2007 Tenn. LEXIS 695 (Tenn. Aug. 13, 2007).

COMMENTS TO OFFICIAL TEXT

Section Comment.

The duty to administer a trust with prudence is a fundamental duty of the trustee. This duty does not depend on whether the trustee receives compensation. The duty may be altered by the terms of the trust. *See* section 105 [T.C.A. §

35-15-105]. This section is similar to section 2(a) of the Uniform Prudent Investor Act and Restatement (Third) of Trusts: Prudent Investor Rule § 227 (1992).

The language of this section diverges from the language of the previous Restatement. The prior Restatement can be read as applying the same standard -- "man of ordinary prudence would exercise in dealing with his own property"-- regardless of the type or purposes of the trust. *See Restatement (Second) of Trusts § 174 cmt. a* (1959). This section appropriately bases the standard on the purposes and other circumstances of the particular trust.

A settlor who wishes to modify the standard of care specified in this section is free to do so, but there is a limit. Section 1008 [*T.C.A. § 35-15-1008*] prohibits a settlor from exculpating a trustee from liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or to the interests of the beneficiaries.



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Tenn. Code Ann. § 35-15-805 (2012)

35-15-805. Costs of administration.

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

HISTORY: Acts 2004, ch. 537, § 63.

NOTES:

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section is similar to section 7 of the Uniform Prudent Investor Act [*T.C.A. § 35-14-107*] and is consistent with the rules concerning costs in Restatement (Third) of Trusts: Prudent Investor Rule § 227(c)(3)(1992). For related rules concerning compensation and reimbursement of trustees, see sections 708 and 709 [*T.C.A. § 35-15-708 and 35-15-709*]. The duty not to incur unreasonable costs applies when a trustee decides whether and how to delegate to agents, as well as to other aspects of trust administration. In deciding whether and how to delegate, the trustee must be alert to balancing projected benefits against the likely costs. To protect the beneficiary against excessive costs, the trustee should also be alert to adjusting compensation for functions which the trustee has delegated to others. The obligation to incur only necessary or appropriate costs of administration has long been part of the law of trusts. *See Restatement (Second) of Trusts § 188 (1959)*.

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Tenn. Code Ann. § 35-15-806 (2012)

35-15-806. Trustee's skills.

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

HISTORY: Acts 2004, ch. 537, § 64.

NOTES:

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section is similar to section 7-302 of the Uniform Probate Code, *Restatement (Second) of Trusts § 174 (1959)*, and section 2(f) of the Uniform Prudent Investor Act [*T.C.A. § 35-14-104(f)*]. Nothing in this section minimizes the rights of a trustee contained in section 708 [*T.C.A. § 35-15-708*].

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Tenn. Code Ann. § 35-15-807 (2012)

35-15-807. Delegation by trustee.

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

- (1) Selecting an agent;
- (2) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and
- (3) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

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

(c) A trustee who complies with subsection (a) is not liable to the beneficiaries for any act performed or omitted pursuant to written directions or to the trust for an action of the agent to whom the function was delegated.

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

HISTORY: Acts 2004, ch. 537, § 65.

NOTES:

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section permits trustees to delegate various aspects of trust administration to agents, subject to the standards of the section. The language is derived from section 9 of the Uniform Prudent Investor Act [*T.C.A. § 35-14-111*]. *See also* John H. Langbein, *Reversing the Nondelegation Rule of Trust-Investment Law*, 59 *Mo. L. Rev.* 105 (1994) (discussing prior law).

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

This section applies only to delegation to agents, not to delegation to a cotrustee. For the provision regulating delegation to a cotrustee, see subsection 703(e) [*T.C.A. § 35-15-703(e)*].

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Tenn. Code Ann. § 35-15-808 (2012)

35-15-808. Powers to direct.

(a) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust or contrary to the normal practice of the trustee in regard to the action requested.

(b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power.

(c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

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

(e) In so following the directions under this section, the trustee is protected from liability as provided in §§ 35-3-122 and 35-3-123.

HISTORY: Acts 2004, ch. 537, § 66.

NOTES:

COMMENTS TO OFFICIAL TEXT

Section Comment.

Subsection (a) is an application of subsection 603(a) [*T.C.A. § 35-15-603(a)*], which provides that a revocable trust is subject to the settlor's exclusive control as long as the settlor has capacity. Because of the settlor's degree of control, subsection (a) of this section authorizes a trustee to rely on a direction from the settlor even if it is contrary to the terms of the trust. The direction of the settlor might be regarded as an amendment of the trust. Subsection (a) has limited application upon a settlor's incapacity. An agent, conservator, or guardian has authority to give the trustee instructions contrary to the terms of the trust only if the agent, conservator, or guardian succeeds to the settlor's powers with respect to revocation, amendment, or distribution as provided in section 602(e) [*T.C.A. § 35-15-602(e)*].

Subsections (b) -- (d) ratify the use of trust protectors and advisers. Subsections (b) and (d) are based in part on *Restatement (Second) of Trusts § 185* (1959). Subsection (c) is similar to *Restatement (Third) of Trusts § 64(2)* (Tentative Draft No. 3, approved 2001). "Advisers" have long been used for certain trustee functions, such as the power to direct

investments or manage a closely-held business. "Trust protector," a term largely associated with offshore trust practice, is more recent and usually connotes the grant of greater powers, sometimes including the power to amend or terminate the trust. Subsection (c) ratifies the recent trend to grant third persons such broader powers.

A power to direct must be distinguished from a veto power. A power to direct involves action initiated and within the control of a third party. The trustee usually has no responsibility other than to carry out the direction when made. But if a third party holds a veto power, the trustee is responsible for initiating the decision, subject to the third party's approval. A trustee who administers a trust subject to a veto power occupies a position akin to that of a cotrustee and is responsible for taking appropriate action if the third party's refusal to consent would result in a serious breach of trust. *See Restatement (Second) of Trusts § 185 cmt. g (1959); subsection 703(g) [T.C.A. § 35-15-703(g)] (duties of cotrustees).*

Frequently, the person holding the power is directing the investment of the holder's own beneficial interest. Such self-directed accounts are particularly prevalent among trusts holding interests in employee benefit plans or individual retirement accounts. *See ERISA § 404(c) (29 U.S.C. § 1104(c)).* But for the type of donative trust which is the primary focus of this Code, the holder of the power to direct is frequently acting on behalf of others. In that event and as provided in subsection (d), the holder is presumptively acting in a fiduciary capacity with respect to the powers granted and can be held liable if the holder's conduct constitutes a breach of trust, whether through action or inaction. Like a trustee, liability cannot be imposed if the holder has not accepted the grant of the power either expressly or informally through exercise of the power. *See section 701 [T.C.A. § 35-15-701].*

Powers to direct are most effective when the trustee is not deterred from exercising the power by fear of possible liability. On the other hand, the trustee does have overall responsibility for seeing that the terms of the trust are honored. For this reason, subsection (b) imposes only minimal oversight responsibility on the trustee. A trustee must generally act in accordance with the direction.

The provisions of this section may be altered in the terms of the trust. *See Section 105 [T.C.A. § 35-15-105].* A settlor can provide that the trustee must accept the decision of the power holder without question. Or a settlor could provide that the holder of the power is not to be held to the standards of a fiduciary. A common technique for assuring that a settlor continues to be taxed on all of the income of an irrevocable trust is for the settlor to retain a nonfiduciary power of administration. *See I.R.C. § 675(4) [26 U.S.C. 675(4)].*

2010 Amendment.

The comments to *T.C.A. 35-15-808* include a sentence that is not consistent with the statute. The last sentence of the fifth paragraph of the comments should be deleted so that the fifth paragraph reads as follows:

"Powers to direct are most effective when the trustee is not deterred from exercising the power by fear of possible liability. On the other hand, the trustee does have overall responsibility for seeing that the terms of the trust are honored. For this reason, subsection (b) imposes only minimal oversight responsibility on the trustee. A trustee must generally act in accordance with the direction."

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GO TO THE TENNESSEE ANNOTATED STATUTES ARCHIVE DIRECTORY

Tenn. Code Ann. § 35-15-809 (2012)

35-15-809. Control and protection of trust property.

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

HISTORY: Acts 2004, ch. 537, § 67.

NOTES:

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Cited:

In re Estate of Stidham, -- S.W.3d --, 2012 Tenn. App. LEXIS 584 (Tenn. Ct. App. Aug. 23, 2012).

NOTES TO DECISIONS

1. When Duty Arises.

1. When Duty Arises.

Grant of summary judgment in favor of the bank in the decedent's daughter's action against it was appropriate because the bank's duty to assert control over the assets in question did not surface until a reasonable time after receiving trust assets. *Wood v. Lowery*, 238 S.W.3d 747, 2007 Tenn. App. LEXIS 119 (Tenn. Ct. App. Mar. 6, 2007), appeal denied, -- S.W.3d --, 2007 Tenn. LEXIS 695 (Tenn. Aug. 13, 2007).

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section codifies the substance of sections 175 and 176 of the *Restatement (Second) of Trusts* (1959). The duty to take control of and safeguard trust property is an aspect of the trustee's duty of prudent administration as provided in section 804 [T.C.A. § 35-15-804]. See also subdivisions 816(1) [T.C.A. § 35-15-816(b)(1)] (power to collect trust property), 816(11) [T.C.A. § 35-15-816(b)(11)] (power to insure trust property), and 816(12) [T.C.A. § 35-15-816(b)(12)] (power to abandon trust property). The duty to take control normally means that the trustee must take physical posses-

sion of tangible personal property and securities belonging to the trust, and must secure payment of any choses in action. *See Restatement (Second) of Trusts § 175 cmt. a, c & d (1959)*. This section, like the other sections in this part, is subject to alteration by the terms of the trust. *See* section 105 [*T.C.A. § 35-15-105*]. For example, the settlor may provide that the spouse may occupy the settlor's former residence rent free, in which event the spouse's occupancy would prevent the trustee from taking possession.



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GO TO THE TENNESSEE ANNOTATED STATUTES ARCHIVE DIRECTORY

Tenn. Code Ann. § 35-15-810 (2012)

35-15-810. Recordkeeping and identification of trust property.

- (a) A trustee shall keep adequate records of the administration of the trust.
- (b) A trustee shall keep trust property separate from the trustee's own property.
- (c) Except as otherwise provided in subsection (d), a trustee shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.
- (d) If the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of two or more separate trusts.

HISTORY: Acts 2004, ch. 537, § 68.

NOTES:

COMMENTS TO OFFICIAL TEXT

Section Comment.

The duty to keep adequate records stated in subsection (a) is implicit in the duty to act with prudence (section 804) [*T.C.A. § 35-15-804*] and the duty to report to beneficiaries (section 813) [*T.C.A. § 35-15-813*]. For an application, see *Green v. Lombard*, 343 A. 2d 905, 911 (*Md. Ct. Spec. App.* 1975). See also *Restatement (Second) of Trusts* §§ 172, 174 (1959).

The duty to earmark trust assets and the duty of a trustee not to mingle the assets of the trust with the trustee's own are closely related. Subsection (b), which addresses the duty not to mingle, is derived from *section 179 of the Restatement (Second) of Trusts* (1959). Subsection (c) makes the requirement that assets be earmarked more precise than that articulated in *Restatement (Second) § 179* by requiring that the interest of the trust must appear in the records of a third party, such as a bank, brokerage firm, or transfer agent. Because of the serious risk of mistake or misappropriation even if disclosure is made to the beneficiaries, showing the interest of the trust solely in the trustee's own internal records is insufficient. Section 816(b)(7)(B) [*T.C.A. § 35-15-816(b)(7)(B)*], which allows a trustee to hold securities in nominee form, is not inconsistent with this requirement. While securities held in nominee form are not specifically registered in the name of the trustee, they are properly earmarked because the trustee's holdings are indicated in the records maintained by an independent party, such as in an account at a brokerage firm.

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

Subsection (d), following the lead of a number of state statutes, allows a trustee to use the property of two or more trusts to make joint investments, even though under traditional principles a joint investment would violate the duty to earmark. A joint investment frequently is more economical than attempting to invest the funds of each trust separately. Also, the risk of misappropriation or mistake is less when the trust property is invested jointly with the property of another trust than when pooled with the property of the trustee or other person.

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GO TO THE TENNESSEE ANNOTATED STATUTES ARCHIVE DIRECTORY

Tenn. Code Ann. § 35-15-811 (2012)

35-15-811. Enforcement and defense of claims.

(a) A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.

(b) A trustee may abandon or assign any claim that it believes is unreasonable to enforce to one or more of the beneficiaries of the trust holding the claim.

HISTORY: Acts 2004, ch. 537, § 69.

NOTES:

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Cited:

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.

This section codifies the substance of *Sections 177 and 178 of the Restatement (Second) of Trusts* (1959). It may not be reasonable to enforce a claim depending upon the likelihood of recovery and the cost of suit and enforcement. It might also be reasonable to settle an action or suffer a default rather than to defend an action. *See also* subdivision 816(b)(14) [*T.C.A. § 35-15-816(b)(14)*] (power to pay, contest, settle, or release claims).



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GO TO THE TENNESSEE ANNOTATED STATUTES ARCHIVE DIRECTORY

Tenn. Code Ann. § 35-15-812 (2012)

35-15-812. Collecting trust property.

A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee, and to redress a breach of trust known to the trustee to have been committed by a former trustee. No successor trustee appointed after the examination of the accounts of a trustee or the waiver of the examination by the beneficiaries shall be responsible for the acts and omissions of the prior trustee.

HISTORY: Acts 2004, ch. 537, § 70.

NOTES:

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NOTES TO DECISIONS

1. When Duty Arises.

1. When Duty Arises.

Grant of summary judgment in favor of the bank in the decedent's daughter's action against it was appropriate because the bank's duty to assert control over the assets in question did not surface until a reasonable time after receiving trust assets. *Wood v. Lowery*, 238 S.W.3d 747, 2007 Tenn. App. LEXIS 119 (Tenn. Ct. App. Mar. 6, 2007), appeal denied, -- S.W.3d --, 2007 Tenn. LEXIS 695 (Tenn. Aug. 13, 2007).

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section is a specific application of Section 811 [*T.C.A. § 35-15-811*] on the duty to enforce claims, which includes a claim for trust property held by a former trustee or others, and a claim against a predecessor trustee for breach of trust. The duty imposed by this section is not absolute. Pursuit of a claim is not required if the amount of the claim, costs of suit and enforcement, and likelihood of recovery, make such action uneconomic. Unlike *Restatement (Second) of Trusts § 223* (1959), this section only requires a successor trustee to redress breaches of trust "known" to have been

committed by the predecessor. For the definition of "know," *see* section 104 [*T.C.A. § 35-15-104*]. Limiting the successor's obligation to known breaches is a common feature of state trust statutes. *See, e.g., Mo. Rev. Stat. § 456.187.2.*

As authorized by section 1009 [*T.C.A. § 35-15-1009*], the beneficiaries may relieve the trustee from potential liability for failing to pursue a claim against a predecessor trustee or other person holding trust property. The obligation to pursue a predecessor trustee can also be addressed in the terms of the trust. *See* section 105 [*T.C.A. § 35-15-105*].



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GO TO THE TENNESSEE ANNOTATED STATUTES ARCHIVE DIRECTORY*Tenn. Code Ann. § 35-15-813 (2012)***35-15-813. Duty to inform and report.**

(a) (1) A trustee shall keep the beneficiaries of the trust who are current mandatory or permissible distributees of trust income or principal, or both, reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.

(2) Unless unreasonable under the circumstances, a trustee shall respond in a reasonable amount of time to a qualified beneficiary's request for information related to the administration of the trust. Additionally, a qualified beneficiary shall reimburse the trustee for any reasonable expenses incurred in responding to requests for information.

(b) The trustee of an irrevocable or non-grantor trust within sixty (60) days after the acceptance and funding of a trust, excluding nominal funding for the trust to have corpus or the depositing of insurance policies on the life of a living person, shall notify each current income beneficiary and each vested ultimate beneficiary of a remainder interest that the trust has been established.

(1) The required notice shall:

(A) Be sent by first class mail or personal delivery; and

(B) Consist of either a complete copy of the document establishing the trust together with the trustee's name, address and telephone number or an abstract of the trust, whichever the trustee, in the trustee's absolute discretion, may choose.

(2) The abstract shall contain:

(A) The name, address and telephone number of each trustee; and

(B) If for a current income beneficiary:

(i) The number of other current income beneficiaries;

(ii) Whether distributions of income are required or discretionary;

(iii) Whether distributions of principal are permitted and, if so, for what purpose or purposes;

(iv) An estimate of the value of the trust at the date of the notice from which distributions may be made;

and

(v) An estimate of the income that may be distributable to the beneficiary; and

(C) If for a remainder beneficiary:

- (i) The number of other remainder beneficiaries;
- (ii) An estimate of the value of the trust at the date of the notice; and
- (iii) The conditions which must be met before the beneficiary's share is distributable.

(c) Upon the termination of an interest of any one (1) or more of the current income beneficiaries, the trustee shall similarly notify the income beneficiaries who are takers of the terminated interest of their interest by sending or delivering them the notice required in subsection (b).

(d) A beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. A beneficiary, with respect to future reports and other information, may withdraw a waiver previously given.

(e) Subsections (a) and (b) shall not apply to the extent that the terms of the trust provide otherwise or the settlor of the trust directs otherwise in a writing delivered to the trustee.

(f) Subdivision (a)(1) and subsection (b) do not apply to a trust created under a trust agreement that became irrevocable before July 1, 2004. Trust law in effect prior to July 1, 2004, regarding the subject matter of subdivision (a)(1) and subsection (b) shall continue to apply to those trusts.

(g) If the trustee of a trust is bound by any written confidentiality restrictions with respect to an asset of a trust, a trustee may require that any beneficiary who is eligible to receive information pursuant to this or any other section of this title about such asset shall agree in writing to be bound by the confidentiality restrictions that bind the trustee before receiving such information from the trustee.

HISTORY: Acts 2004, ch. 537, § 71; 2007, ch. 24, §§ 28-30; 2010, ch. 725, § 9.

NOTES: Amendments.

The 2007 amendment, in (a), redesignated the former first and second sentences as (1) and (2), respectively, deleted "qualified" preceding "beneficiaries" in (1), inserted "who are current mandatory or permissible distributees of trust income or principal, or both," in (1), substituted "shall respond in a reasonable amount of time to a qualified beneficiary's request" for "shall promptly respond to a beneficiary's request" in the first sentence in (2), and added the second sentence in (2); deleted "Unless the settlor directs otherwise in a writing delivered to the trustee," at the beginning of (b); and added (e) and (f).

The 2010 amendment added (g).

Effective Dates.

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

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

Cross-References.

Confidentiality of public records, § 10-7-504.

Section to Section References.

This section is referred to in § 35-15-802.

Law Reviews.

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

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0.5. Accounting.

0.5. Accounting.

Co-trustee's failure to provide an accounting and appraisal of a real property sale and annual statements did not constitute negligence because although a trustee was required to keep the beneficiaries reasonably informed about the administration of the trust, there was no requirement of an accounting to the beneficiaries. *Kennard v. AmSouth Bank*, -- S.W.3d --, 2008 Tenn. App. LEXIS 73 (Tenn. Ct. App. Feb. 12, 2008).

COMMENTS TO OFFICIAL TEXT**Section Comment.**

The duty to keep the beneficiaries reasonably informed of the administration of the trust is a fundamental duty of a trustee. The term "reasonable" is used several times in this section. This term connotes a sensible and not excessive amount of information. For the common law duty to keep the beneficiaries informed, *see Restatement (Second) of Trusts Section 173* (1959). This section makes the duty to keep the beneficiaries informed more precise by limiting it to the qualified beneficiaries. For the definition of qualified beneficiary, *see § 35-15-103(13)*. The result of this limitation is that the information need not be furnished to beneficiaries with remote remainder interests unless they have filed a specific request with the trustee. *See § 35-15-109(a)* (request for notice). In no event does this limitation affect the rights of the current income beneficiary(ies) who is designated whether, explicitly or implicitly, as the primary beneficiary(ies) by the trust document.

Additionally, a qualified beneficiary shall reimburse the trustee for any reasonable expenses incurred in responding to requests for information.

In determining if a beneficiary's request for trust information is reasonable, the trustee may consider any of the following factors in determining whether a response is necessary and the extent of the information to be furnished:

provisions of the trust document or other settlor written instructions concerning the providing of information;

the relationship between the beneficiary requesting information and the other beneficiaries;

the nature of the information requested;

the frequency with which the beneficiary has or is requesting information;

whether providing any of the requested information would violate any privacy rights of other beneficiaries;

whether the requesting beneficiary is receiving statements on the trust account;

the likelihood that the requesting beneficiary will eventually receive an interest in the trust;

the cost of providing the requested information and whether the requesting beneficiary is willing to pay the cost.

The trustee may require a prepayment of a fixed cost as a prerequisite to beginning to accumulate the information;

the availability of the information requested; and

any other factors the trustees deems appropriate.

The trustee is under a duty to communicate to a qualified beneficiary information about the administration of the trust that is reasonably necessary to enable the beneficiary to enforce the beneficiary's rights and to prevent or redress a breach of trust. *See Restatement (Second) of Trusts § 173* cmt. c (1959). Ordinarily, the trustee is not under a duty to furnish information to a beneficiary in the absence of a specific request for the information. *See Restatement (Second) of Trusts § 173* cmt. d (1959). However, special circumstances may require that the trustee provide additional information. For example, if the trustee is dealing with the beneficiary on the trustee's own account, the trustee must communicate material facts relating to the transaction that the trustee knows or should know. *See Restatement (Second) of Trusts § 173* cmt. d (1959). Furthermore, to enable the beneficiaries to take action to protect their interests, the trustee may be required to provide advance notice of transactions involving real estate, closely-held business interests, and other assets that are difficult to value or to replace. *See In re Green Charitable Trust*, 431 N.W. 2d 492 (Mich. Ct. App. 1988); *Allard v. Pacific National Bank*, 663 P.2d 104 (Wash. 1983). The trustee is justified in not providing such ad-

vance disclosure if disclosure is forbidden by other law, as under federal securities laws, or if disclosure would be seriously detrimental to the interests of the beneficiaries, for example, when disclosure would cause the loss of the only serious buyer.

Supporting the principle that a beneficiary should be allowed to make an independent assessment of what information is relevant to protecting the beneficiary's interest, subdivision (b)(1) requires the trustee on request to furnish a beneficiary with a complete copy of the trust instrument or an abstract of the trust. For a case reaching the same result, see *Fletcher v. Fletcher*, 480 S.E. 2d 488 (Va. Ct. App. 1997). Subdivision (b)(1) is contrary to section 7-303(b) of the Uniform Probate Code, which provides that "[u]pon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest..."

The drafters of this Code decided to leave open for further consideration by the courts the extent to which a trustee may claim attorney-client privilege against a beneficiary seeking discovery of attorney-client communications between the trustee and the trustee's attorney. The courts are split because of the important values that are in tension on this question. "The [attorney-client] privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383 (1981). On the other hand, subsection (a) of this section requires that a trustee keep the qualified beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests, which could include facts that the trustee has revealed only to the trustee's attorney. There is authority for the view that the trustee is estopped from pleading attorney-client privilege in such circumstances. In the leading case, *Riggs National Bank v. Zimmer*, 355 A.2d 709, 713 (Del. Ch. 1976), the court reasoned that the beneficiary, not the trustee, is the attorney's client: "As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client..." This beneficiary-as-client theory has been criticized on the ground that it conflicts with the trustee's fiduciary duty to implement the intentions of the settlor, which are sometimes in tension with the wishes of one or more beneficiaries. See Louis H. Hamel, Jr., *Trustee's Privileged Counsel: A Rebuttal*, 21 ACTEC Notes 156 (1995); Charles F. Gibbs & Cindy D. Hanson, *The Fiduciary Exception to a Trustee's Attorney/Client Privilege*, 21 ACTEC Notes 236 (1995). Prominent decisions in California and Texas have refused to follow Delaware in recognizing an exception for the beneficiary against the trustee's attorney-client privilege. *Wells Fargo Bank v. Superior Court (Boltwood)*, 990 P.2d 591 (Cal. 2000); *Huie v. De Shazo*, 922 S.W. 2d 920 (Tex. 1996). The beneficiary-as-client theory continues to be applied to ERISA trusts. See, e.g., *United States v. Mett*, 178 F.3d 1058, 1062-64 (9th Cir. 1999). However, in a pension trust the beneficiaries are the settlors of their own trust because the trust is funded with their own earnings. Accordingly, in ERISA attorney-client cases "[t]here are no competing interests such as other stockholders or the intentions of the Settlor." Gibbs & Hanson, 21 ACTEC Notes at 238. For further discussion of the attorney-client privilege and whether there is a duty to disclose to the beneficiaries, see ACTEC Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.2 (3d ed. 1999); Rust E. Reid et al., *Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary*, 30 Real Prop. Prob. & Tr. J. 541 (1996).

To enable beneficiaries to protect their interests effectively, it is essential that they know the identity of the trustee. Unless the settlor has instructed the trustee otherwise, subsection (b) requires that a trustee inform the current income and vested ultimate beneficiaries within sixty (60) days of the trustee's acceptance of office and of the trustee's name, address and telephone number.

The Tennessee Uniform Trust Code employs the term "report" instead of "accounting" in order to negate any inference that the report must be prepared in any particular format or with a high degree of formality. The reporting requirement might even be satisfied by providing the beneficiaries with copies of the trust's income tax returns and monthly brokerage account statements if the information on those returns and statements is complete and sufficiently clear. The key factor is not the format chosen but whether the report provides the beneficiaries with the information necessary to protect their interests. For model account forms, together with practical advice on how to prepare reports, see Robert Whitman, *Fiduciary Accounting Guide* (2d ed. 1998).

Subsection (d) allows trustee reports and other required information to be waived by a beneficiary. A beneficiary may also withdraw a consent. However, a waiver of a trustee's report or other information does not relieve the trustee from accountability and potential liability for matters that the report or other information would have disclosed.

2007 Amendment.

The amendment allows the settlor to waive the requirement that a trustee keep the beneficiaries informed and respond to requests for information. Additionally under *T.C.A. § 35-15-303* a settlor may designate in writing a representative to receive various notices and represent and bind such beneficiaries. The designation of a representative by a

settlor may occur subsequent to the execution of the trust instrument, however, it must meet the notice requirements of this Section. If the settlor designates a representative to receive notices, the designation should specify that the representative is to receive any reports from the trustee on behalf of the individual beneficiary. Also *See* repealed T.C.A. § 35-50-119 for past requirements regarding notification to beneficiaries prior to July 1, 2004, the effective date of the Tennessee Uniform Trust Code.

2010 Amendment.

Subsection (g) provides that if a trustee is required to keep certain information regarding trust assets confidential the trustee can be assured that he/she can carry out their duty to inform and report to beneficiaries without fear of indirectly breaching the trustee's duty of confidentiality. This is often (but not exclusively) of special importance when a closely held asset is held by a trust.



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GO TO THE TENNESSEE ANNOTATED STATUTES ARCHIVE DIRECTORY

Tenn. Code Ann. § 35-15-814 (2012)

35-15-814. Discretionary powers -- Tax savings.

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

(b) Subject to subsection (d), and unless the terms of the trust expressly indicate that a rule in this subsection (b) does not apply:

(1) A person other than a settlor who is a beneficiary and trustee of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee's personal benefit may exercise the power only in accordance with an ascertainable standard; and

(2) A trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

(c) A power whose exercise is limited or prohibited by subsection (b) may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.

(d) Subsection (b) does not apply to:

(1) A power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined in *section 2056(b)(5) or 2523(e) of the Internal Revenue Code of 1986 [26 U.S.C. § 2056(b)(5) or 26 U.S.C. § 2523(e)]*, as in effect on July 1, 2004, or as later amended, was previously allowed;

(2) Any trust during any period that the trust may be revoked or amended by its settlor; or

(3) A trust if contributions to the trust qualify for the annual exclusion under *section 2503(c) of the Internal Revenue Code of 1986 [26 U.S.C. § 2503(c)]*, as in effect on July 1, 2004, or as later amended.

HISTORY: Acts 2004, ch. 537, § 72; 2007, ch. 24, § 31.

NOTES: Amendments.

The 2007 amendment deleted "relating to the trustee's individual health, education, support, or maintenance within the meaning of *section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code of 1986*, as in effect on July 1, 2004, or as later amended" from the end of (b)(1).

Effective Dates.

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

COMMENTS TO OFFICIAL TEXT**Section Comment.**

Despite the breadth of discretion purportedly granted by the wording of a trust, no grant of discretion to a trustee, whether with respect to management or distribution, is ever absolute. A grant of discretion establishes a range within which the trustee may act. The greater the grant of discretion, the broader the range. Pursuant to subsection (a), a trustee's exercise of discretion must always be in good faith. Consistent with the trustee's duty to administer the trust (*see* Section 801 [*T.C.A. § 35-15-801*]), the trustee's exercise must also be in accordance with the terms and purposes of the trust and the interests of the beneficiaries. "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust. *See* Section 103(8) [*T.C.A. § 35-15-103(8)*]. Subsection (a) does not otherwise address the obligations of a trustee to make distributions, leaving that issue to the case law. Regarding the standards for exercising discretion and construing particular language of discretion with numerous case citations, see Restatement (Third) of Trusts § 50 (Tentative Draft No.2, approved 1999); *Restatement (Second) of Trusts § 187* (1959). See also Edward C. Halbach, Jr., Problems of Discretion in Discretionary Trusts, *61 Colum. J. Rev.* 1425 (1961). Under these standards, whether the trustee has a duty in a given situation to make a distribution depends on the exact language used, whether the standard grants discretion and its breadth, whether this discretion is coupled with a standard, whether the beneficiary has other available resources, and, more broadly, the overriding purposes of the trust. For example, distilling the results of scores of cases, the Restatement (Third) of Trusts concludes that there is a presumption that the "trustee's discretion should be exercised in a manner that will avoid either disqualifying the beneficiary for other benefits or expending trust funds for purposes for which public funds would otherwise be available." *Restatement (Third) of Trusts Section 50* cmt. e & Reporter's Notes (Tentative Draft No. 2, 1999).

Subsection (a) requires a trustee to exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. Similar to *Restatement (Second) of Trusts Section 187* (1959), subsection (a) does not impose an obligation that a trustee's decision is within the bounds of a reasonable judgment, although such an interpretive standard may be imposed by the courts if the document adds a standard whereby the reasonableness of the trustee's judgment can be tested. *Restated (Second) of Trusts Section 187* cmt. f (1959).

The obligation of a trustee to act in good faith is a fundamental concept of fiduciary law although there are different ways that it can be expressed. Sometimes different formulations appear in the same source. Scott, in his treatise on trusts, states that the court will not interfere with the trustee's exercise of discretion if the trustee "acts in good faith and does not act capriciously," but Scott then states that the court will interfere if the trustee "acts dishonestly or in good faith, or where he acts from an improper motive." 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts Section 187.2* (4th ed. 1988).

Sometimes different formulations are used in the same case:

[If] the "sole discretion" vested in and exercised by the trustees in this case...were exercised fraudulently, in bad faith or in an abuse of discretion, it is subject to review. Whether good faith has been exercised, or whether fraud, bad faith or an abuse of discretion has been committed is always subject to consideration by the court upon appropriate allegations and proof.

An abuse by the trustee of the discretion granted in the terms of the trust is a breach of trust that can result in surcharge. *See* subsection 1001(b) [*T.C.A. § 35-15-1001(b)*] (remedies for breach of trust). The standard stated in subsection (a) applies only to powers which are to be exercised in a fiduciary as opposed to a nonfiduciary capacity.

Subsections (b) through (d) rewrite the terms of a trust that might otherwise result in adverse estate and gift tax consequences to a beneficiary-trustee. This Code does not generally address the subject of tax curative provisions. These are provisions that automatically rewrite the terms of trusts that might otherwise fail to qualify for probable intended tax benefits. Such provisions, because they apply to all trusts using or failing to use specified language, are often overbroad, applying not only to trusts intended to qualify for tax benefits but also to smaller trust situations where taxes are not a concern. Enacting tax-curative provisions also requires special diligence by state legislatures to make certain that these provisions are periodically amended to account for the frequent changes in federal tax law. Furthermore, many failures to draft with sufficient care may be correctable by including a tax savings clause in the terms of the trust or by seeking modification of the trust using one or more of the methods authorized by sections 411-417 [*T.C.A. §*

35-15-411 -- 35-15-417]. Notwithstanding these reasons, the unintended inclusion of the trust in the beneficiary-trustee's gross estate is a frequent enough occurrence that the drafters concluded that it is a topic that this Code should address. It is also a topic on which numerous states have enacted corrective statutes.

A tax curative provision differs from a statute such as section 416 [T.C.A. § 35-15-416] of this Code, which allows a court to modify a trust to achieve an intended tax benefit. Absent Congressional or regulatory authority authorizing the specific modification, a lower court decree in state court modifying a trust is controlling for federal estate tax purposes only if the decree was issued before the taxing event, which in the case of the estate tax would be the decedent's death. *See Rev. Rul. 73-142, 1973-1 C.B. 405.* There is specific federal authority authorizing modification of trusts for a number of reasons (*see* Section Comment to section 416 [T.C.A. § 35-15-416]) but not on the specific issues addressed in this section. Subsections (b) through (d), by interpreting the original language of the trust instrument in a way that qualifies for intended tax benefits, obviates the need to seek a later modification of the trust.

Subdivision (b)(1) states the main rule. Unless the terms of the trust expressly indicate that the rule in this subdivision is not to apply, the power to make discretionary distributions to a beneficiary-trustee is automatically limited by the requisite ascertainable standard necessary to avoid inclusion of the trust in the trustee's gross estate or result in a taxable gift upon the trustee's release or exercise of the power. Trusts of which the trustee-beneficiary is also a settlor are not subject to this subdivision. In such a case, limiting the discretion of a settlor-trustee to an ascertainable standard would not be sufficient to avoid inclusion of the trust in the settlor's gross estate. *See generally* John J. Regan, Rebecca C. Morgan & David M. English, *Tax, Estate and Financial Planning for the Elderly* § 17.07[2][h]. Furthermore, the inadvertent inclusion of a trust in a settlor-trustee's gross estate is a far less frequent and better understood occurrence than is the inadvertent inclusion of the trust in the estate of a nonsettlor trustee-beneficiary.

Subdivision (b)(2) addresses a common trap, the trustee who is not a beneficiary but who has power to make discretionary distributions to those to whom the trustee owes a legal obligation of support. Discretion to make distributions to those to whom the trustee owes a legal obligation of support, such as to the trustee's minor children, results in inclusion of the trust in the trustee's gross estate even if the power is limited by an ascertainable standard. The applicable regulation provides that the ascertainable standard exception applies only to distributions for the benefit of the decedent, not to distributions to those to whom the decedent owes a legal obligation of support. *See Treas. Reg. § 20.2041-1(c)(2).*

Subsection (c) deals with cotrustees and adopts the common planning technique of granting the broader discretion only to the independent trustee. Cotrustees who are beneficiaries of the trust or who have a legal obligation to support a beneficiary may exercise the power only as limited by subsection (b). If all trustees are so limited, the court may appoint a special fiduciary to make a decision as to whether a broader exercise is appropriate.

Subsection (d) excludes certain trusts from the operation of this section. Trusts qualifying for the marital deduction will be includable in the surviving spouse's gross estate regardless of whether this section applies. Consequently, if the spouse is acting as trustee, there is no need to limit the power of the spouse-trustee to make discretionary distributions for the spouse's benefit. Similar reasoning applies to the revocable trust, which, because of the settlor's power to revoke, is automatically includable in the settlor's gross estate even if the settlor is not named as a beneficiary.

QTIP marital trusts are subject to this section, however. QTIP trusts qualify for the marital deduction only if so elected on the federal estate tax return. Excluding a QTIP for which an election has been made from the operation of this section would allow the terms of the trust to be modified after the settlor's death. By not making the QTIP election, an otherwise unascertainable standard would be limited. By making the QTIP election, the trustee's discretion would not be curtailed. This ability to modify a trust depending on elections made on the federal estate tax return could itself constitute a taxable power of appointment resulting in inclusion of the trust in the surviving spouse's gross estate.

The exclusion of the section 2503(c) [26 U.S.C. § 2503(c)] minors trust is necessary to avoid loss of gift tax benefits. While preventing a trustee from distributing trust funds in discharge of a legal obligation of support would keep the trust out of the trustee's gross estate, such a restriction might result in loss of the gift tax annual exclusion for contributions to the trust, even if the trustee were otherwise granted unlimited discretion. *See Rev. Rul. 69-345, 1969-1 C.B. 226.*

2007 Amendment.

The amendment substitutes "ascertainable standard" which is now a defined term in Section 103(21) [T.C.A. § 35-15-103(2)], for the former and identical definition in this section. No substantive change is intended.

Trusts



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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 8 Duties and Powers of Trustee

GO TO THE TENNESSEE ANNOTATED STATUTES ARCHIVE DIRECTORY

Tenn. Code Ann. § 35-15-815 (2012)

35-15-815. General powers of trustee.

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

(1) Powers conferred by the terms of the trust; and

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

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

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

(C) Any other powers conferred by this chapter.

(b) The exercise of a power is subject to the fiduciary duties prescribed by this part.

HISTORY: Acts 2004, ch. 537, § 73.

NOTES: Section to Section References.

This section is referred to in § 35-15-816.

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section is intended to grant trustees the broadest possible powers, but to be exercised always in accordance with the duties of the trustee and any limitations stated in the terms of the trust. This broad authority is denoted by granting the trustee the powers of an unmarried competent owner of individually owned property, unlimited by restrictions that might be placed on it by marriage, disability, or cotenancy.

The powers conferred elsewhere in this Code that are subsumed under this section include all of the specific powers listed in section 816 [*T.C.A. § 35-15-816*] as well as other powers described elsewhere in this Code. *See* subsection 108(c) [*T.C.A. § 35-15-108(c)*] (transfer of principal place of administration), subsection 414(a) [*T.C.A. § 35-15-414(a)*] (termination of uneconomic trust with value less than one hundred thousand dollars (\$100,000)), section 417 [*T.C.A. § 35-15-417*] (combination and division of trusts), subsection 703(e) [*T.C.A. § 35-15-703(e)*] (delegation to cotrustee),

subsection 802(h) [*T.C.A. § 35-15-802(k)*] (exception to duty of loyalty), section 807 [*T.C.A. § 35-15-807*] (delegation to agent of powers and duties), subsection 810(d) [*T.C.A. § 35-15-810(d)*] (joint investments), and part 9 (Uniform Prudent Investor Act) [*T.C.A. § 35-15-901*]. The powers conferred by this Code may be exercised without court approval. If court approval of the exercise of a power is desired, a petition for court approval should be filed.

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

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*** Current through the 2012 Regular Session ***
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Title 35 Fiduciaries And Trust Estates
Chapter 15 Tennessee Uniform Trust Code
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GO TO THE TENNESSEE ANNOTATED STATUTES ARCHIVE DIRECTORY

Tenn. Code Ann. § 35-15-816 (2012)

35-15-816. Specific powers of trustee.

(a) Any references contained in a will or trust incorporating by reference the powers enumerated in § 35-50-110 as they relate to a trustee will incorporate by reference the powers contained in this section.

(b) Unless the terms of the instrument expressly provide otherwise and without limiting the authority conferred by § 35-15-815, a trustee may:

- (1) Collect trust property and accept or reject additions to the trust property from a settlor or any other person;
- (2) Acquire or sell property, for cash or on credit, at public or private sale;
- (3) Exchange, partition, or otherwise change the character of trust property;
- (4) Deposit trust money in an account in a regulated financial-service institution;
- (5) Borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;
- (6) With respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, or other form of business or enterprise, continue the business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization or contributing additional capital;
- (7) With respect to stocks or other securities, exercise the rights of an absolute owner, including the right to:
 - (A) Vote, or give proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement;
 - (B) Hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;
 - (C) Pay calls, assessments, and other sums chargeable or accruing against the securities, and sell or exercise stock subscription or conversion rights; and
 - (D) Deposit the securities with a depository or other regulated financial service institution;
- (8) With respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party

walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries;

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

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

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

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

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

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

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

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

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

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

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

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

(16) Exercise elections with respect to federal, state, and local taxes;

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

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

(19) Pledge trust property to guarantee loans made by others to the beneficiary; provided, however, that this power shall not apply to any beneficiary's interest that is subject to a spendthrift provision;

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

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

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

(B) Paying it to the beneficiary's custodian under the Uniform Transfers to Minors Act, compiled in title 35, chapter 7, part 2, and, for that purpose, creating a custodianship or custodial trust;

(C) If the trustee does not know of a conservator, guardian, custodian, or custodial trustee, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf; or

(D) Managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution;

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

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

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

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

(26) On termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it; and

(27) Unless the terms of the instrument expressly provide otherwise:

(A) A trustee who has authority, under the terms of a testamentary instrument or irrevocable inter vivos trust agreement, to invade the principal of a trust to make distributions to, or for the benefit of, one or more proper objects of the exercise of the power, may instead exercise such authority by appointing all or part of the principal of the trust in favor of a trustee of a trust under an instrument other than that under which the power to invade is created or under the same instrument; provided, however, that the exercise of such authority:

(i) Does not reduce any fixed income interest of any income beneficiary of the trust; and

(ii) Is in favor of the proper objects of the exercise of the power;

(B) The exercise of the power to invade the principal of the trust under subdivision (b)(27)(A) shall be by an instrument in writing, signed and acknowledged by the trustee and filed with the records of the trust;

(C) The exercise of the power to invade principal of the trust under subdivision (b)(27)(A) shall not extend the permissible period of the rule against perpetuities that applies to the trust; and

(D) The provisions of this section shall not be construed to abridge the right of any trustee who has a power of invasion to appoint property in further trust that arises under any other statute or under common law.

HISTORY: Acts 2004, ch. 537, § 74; 2005, ch. 99, § 9.

NOTES: Compiler's Notes.

Acts 2005, ch. 99, § 14 provided that is the intent of the general assembly that, notwithstanding the decision of *Arnold v. Davis*, 2004 Tenn. App. LEXIS 389 (Tenn. Ct. App. June 17, 2004), the provisions of § 9 of this act reflects existing law, and all trusts entered into prior to this act remain valid and in full effect.

Law Reviews.

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

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section enumerates specific powers commonly included in trust instruments and in trustee powers legislation. All the powers listed are subject to alteration in the terms of the trust. *See* section 105 [*T.C.A. § 35-15-105*]. The powers listed are also subsumed under the general authority granted in subdivision 815(a)(2) [*T.C.A. § 35-15-815(a)(2)*] to exercise all powers over the trust property which an unmarried competent owner has over individually owned property, and any other powers appropriate to achieve the proper management, investment, and distribution of the trust property. The powers listed add little of substance not already granted by section 815 [*T.C.A. § 35-15-815*] and powers conferred elsewhere in the Code, which are listed in the Section Comment to section 815 [*T.C.A. § 35-15-815*]. While the committee drafting this Code discussed dropping the list of specific powers, it concluded that the demand of third parties to see language expressly authorizing specific transactions justified retention of a detailed list.

As provided in subsection 815(b) [*T.C.A. § 35-15-815(b)*], the exercise of a power is subject to fiduciary duties except as modified in the terms of the trust. The fact that the trustee has a power does not imply a duty that the power must be exercised.

Many of the powers listed in this section are similar to the powers listed in Section 3 of the Uniform Trustees' Powers Act (1964). Several are new, however, and other powers drawn from that Act have been updated. The powers enumerated in this section may be divided into categories. Certain powers, such as the powers to acquire or sell property, borrow money, and deal with real estate, securities, and business interests, are powers that any individual can exercise. Other powers, such as the power to collect trust property, are by their very nature only applicable to trustees. Other specific powers, particularly those listed in other sections of the Tennessee Uniform Trust Code, modify a trustee duty that would otherwise apply. *See, e.g.*, subsections 802(h) [*T.C.A. § 35-15-802(k)*] (exceptions to duty of loyalty) and 810(d) [*T.C.A. § 35-15-810(d)*] (joint investments as exception to earmarking requirement).

Subdivision (b)(1) authorizes a trustee to collect trust property and collect or decline additions to the trust property. The power to collect trust property is an incident of the trustee's duty to administer the trust as provided in section 801 [*T.C.A. § 35-15-801*]. The trustee has a duty to enforce claims as provided in section 811 [*T.C.A. § 35-15-811*], the successful prosecution of which can result in collection of trust property. Pursuant to Section 812 [*T.C.A. § 35-15-812*], the trustee also has a duty to collect trust property from a former trustee or other person holding trust property. For an application of the power to reject additions to the trust property, *see* subdivision 816(13) [*T.C.A. § 35-15-816(13)*] (power to decline property with possible environmental liability).

Subdivision (b)(2) authorizes a trustee to sell trust property, for cash or on credit, at public or private sale. Under the Restatement, a power of sale is implied unless limited in the terms of the trust. Restatement (Third) of Trusts: Prudent Investor Rule § 190 (1992). In arranging a sale, a trustee must comply with the duty to act prudently as provided in section 801 [*T.C.A. § 35-15-801*]. This duty may dictate that the sale be made with security.

Subdivision (b)(4) authorizes a trustee to deposit funds in an account in a regulated financial service institution. This includes the right of a financial institution trustee to deposit funds in its own banking department as authorized by subdivision 802(h)(4) [*T.C.A. § 35-15-802(k)(4)*].

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

Subdivision (b)(6) authorizes the trustee to continue, contribute additional capital to, or change the form of a business. Any such decision by the trustee must be made in light of the standards of prudent investment stated in part 9 [*T.C.A. § 35-15-901*].

Subdivision (b)(7), regarding powers with respect to securities, codifies and amplifies the principles of *Restatement (Second) of Trusts § 193* (1959).

Subdivision (b)(9), authorizing the leasing of property, negates the older view, reflected in *Restatement (Second) of Trusts § 189* cmt. c (1959), that a trustee could not lease property beyond the duration of the trust. Whether a longer term lease is appropriate is judged by the standards of prudence applicable to all investments.

Subdivision (b)(10), authorizing a trustee to grant options with respect to sales, leases or other dispositions of property, negates the older view, reflected in *Restatement (Second) of Trusts § 190* cmt. k (1959), that a trustee could not grant another person an option to purchase trust property. Like any other investment decision, whether the granting of an option is appropriate is a question of prudence under the standards of part 9 [*T.C.A. § 35-15-901*].

Subdivision (b)(11), authorizing a trustee to purchase insurance, empowers a trustee to implement the duty to protect trust property. *See* section 809 [T.C.A. § 35-15-809]. The trustee may also insure beneficiaries, agents, and the trustee against liability, including liability for breach of trust.

Subdivision (b)(13) is one of several provisions in the Tennessee Uniform Trust Code designed to address trustee concerns about possible liability for violations of environmental law. This subdivision collects all the powers relating to environmental concerns in one place even though some of the powers, such as the powers to pay expenses, compromise claims, and decline property, overlap with other subdivisions of this section (decline property, subdivision (b)(1); compromise claims, subdivision (b)(14); pay expenses, subdivision (b)(15)). Numerous States have legislated on the subject of environmental liability of fiduciaries. For a representative state statute, see *Tex. Prop. Code Ann. § 113.025*. *See also* subdivision 701(c)(2) [T.C.A. § 35-15-701(c)(2)] (designated trustee may inspect property to determine potential violation of environmental or other law or for any purpose) and subsection 1010(b) [T.C.A. § 35-15-1010(b), now repealed] (trustee not personally liable for violation of environmental law arising from ownership or control of trust property).

Subdivision (b)(14) authorizes a trustee to pay, contest, settle, or release claims. Section 811 [T.C.A. § 35-15-811] requires that a trustee need take only "reasonable" steps to enforce claims, meaning that a trustee may release a claim not only when it is uncollectible, but also when collection would be uneconomic. *See Restatement (Second) of Trusts § 192* (1959) (power to compromise, arbitrate and abandon claims).

Subdivision (b)(15), among other things, authorizes a trustee to pay compensation to the trustee and agents without prior approval of court. Regarding the standard for setting trustee compensation, *see* section 708 [T.C.A. § 35-15-708]. *See also* section 709 (repayment of trustee expenditures).

Subdivision (b)(16) authorizes a trustee to make elections with respect to taxes. The Tennessee Uniform Trust Code leaves to other law the issue of whether the trustee, in making such elections, must make compensating adjustments in the beneficiaries' interests.

Subdivision (b)(17) authorizes a trustee to take action with respect to employee benefit or retirement plans, or annuities or life insurance payable to the trustee. Typically, these will be beneficiary designations which the settlor has made payable to the trustee, but this Code also allows the trustee to acquire ownership of annuities or life insurance.

Subdivisions (b)(18) and (b)(19) allow a trustee to make loans to a beneficiary or to guarantee loans of a beneficiary upon such terms and conditions as the trustee considers fair and reasonable. The determination of what is fair and reasonable must be made in light of the fiduciary duties of the trustee and the purposes of the trust. Frequently, a trustee will make loans to a beneficiary which might be considered less than prudent in an ordinary commercial sense although of great benefit to the beneficiary and which help carry out the trust purposes. If the trustee requires security for the loan to the beneficiary, adequate security under this subdivision may consist of a charge on the beneficiary's interest in the trust. *See Restatement (Second) of Trusts § 255* (1959). However, the interest of a beneficiary subject to a spendthrift restraint may not be pledged as security for a loan. *See* section 502 [T.C.A. § 35-15-502].

Subdivision (b)(20) authorizes the appointment of ancillary trustees in jurisdictions in which the regularly appointed trustee is unable or unwilling to act. Normally, an ancillary trustee will be appointed only when there is a need to manage real estate located in another jurisdiction. This subdivision allows the regularly appointed trustee to select the ancillary trustee and to confer on the ancillary trustee such powers and duties as may be necessary. The appointment of ancillary trustees is a topic which a settlor may wish to address in the terms of the trust.

Subdivision (b)(21) authorizes a trustee to make payments to another person for the use or benefit of a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated. Although an adult relative or other person receiving funds is required to spend it on the beneficiary's behalf, it is preferable that the trustee make the distribution to a person having more formal fiduciary responsibilities. For this reason, payment may be made to an adult relative only if the trustee does not know of a conservator, guardian, custodian, or custodial trustee capable of acting for the beneficiary.

Subdivision (b)(22) authorizes a trustee to make non-pro-rata distributions and allocate particular assets in proportionate or disproportionate shares. This power provides needed flexibility and lessens the risk that a non-pro-rata distribution will be treated as a taxable sale.

Subdivision (b)(23) authorizes a trustee to resolve disputes through mediation or arbitration. The drafters of this Code encourage the use of such alternate methods for resolving disputes. Arbitration is a form of nonjudicial settlement agreement authorized by section 111 [T.C.A. § 35-15-111]. In representing beneficiaries and others in connection with

arbitration or mediation, the representation principles of part 3 [*T.C.A. § 35-15-301 -- 35-15-305*] may be applied. Settlers wishing to encourage use of alternate dispute resolution may draft to provide it. For sample language, *see* American Arbitration Association, *Arbitration Rules for Wills and Trusts* (1995).

Subdivision (b)(24) authorizes a trustee to prosecute or defend an action. As to the propriety of reimbursement for attorney's fees and other expenses of an action or judicial proceeding, *see* section 709 and Section Comment [*T.C.A. § 35-15-709*]. *See also* section 811 [*T.C.A. § 35-15-811*] (duty to defend actions).

Subdivision (b)(26), which is similar to *section 344 of the Restatement (Second) of Trusts* (1959), clarifies that even though the trust has terminated, the trustee retains the powers needed to wind up the administration of the trust and distribute the remaining trust property.

Subdivision (b)(27) authorizes a trustee who possesses a discretionary power to distribute principal outright to trust beneficiaries to exercise that power in further trust.

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

Title 35 Fiduciaries And Trust Estates
 Chapter 15 Tennessee Uniform Trust Code
 Part 8 Duties and Powers of Trustee

GO TO THE TENNESSEE ANNOTATED STATUTES ARCHIVE DIRECTORY

Tenn. Code Ann. § 35-15-817 (2012)

35-15-817. Distribution upon termination.

(a) Upon termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. The right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within thirty (30) days after the proposal was sent but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection. For the purpose of determining the date a proposed distribution was sent, where exact confirmation is unavailable, it can be assumed it was received five (5) days after the date of mailing.

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

(c) A release by a beneficiary of a trustee from liability for breach of trust is invalid to the extent:

(1) It was induced by improper conduct of the trustee; or

(2) The beneficiary, at the time of the release, did not know of the beneficiary's rights or of the material facts relating to the breach.

HISTORY: Acts 2004, ch. 537, § 75.

NOTES:

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section contains several independent provisions governing distribution upon termination. Other provisions of the Tennessee Uniform Trust Code relevant to distribution upon termination include subdivision 816(b)(26) [*T.C.A. § 35-15-816(b)(26)*] (powers upon termination to windup administration and distribution), and section 1005 [*T.C.A. § 35-15-1005*] (limitation of action against trustee).

Subsection (a) is based on section 3-906(b) of the Uniform Probate Code. It addresses the dilemma that sometimes arises when the trustee is reluctant to make distribution until the beneficiary approves but the beneficiary is reluctant to approve until the assets are in hand. The procedure made available under subsection (a) facilitates the making of non-pro-rata distributions. However, whenever practicable it is normally better practice to obtain the advance written

consent of the beneficiaries to a proposed plan of distribution. Similar to other notices under the Code, the right of a beneficiary to object may be barred by delivery of the proposal to another person if that other person may represent and bind the beneficiary as provided in Article 3.

The failure of a beneficiary to object to a plan of distribution pursuant to subsection (a) is not a release as provided in subsection (c) or Section 1009 [T.C.A. § 35-15-1009]. A release requires an affirmative act by a beneficiary and is not accomplished upon a mere failure to object. Furthermore, a failure of a beneficiary to object does not preclude the beneficiary from bringing an action with respect to matters not disclosed in the proposal for distribution.

Subsection (b) recognizes that upon an event terminating or partially terminating a trust, expeditious distribution should be encouraged to the extent reasonable under the circumstances. However, a trustee is entitled to retain a reasonable reserve for payment of debts, expenses, and taxes. Sometimes these reserves must be quite large, for example, upon the death of the beneficiary of a QTIP trust that is subject to federal estate tax in the beneficiary's estate. Not infrequently, a substantial reserve must be retained until the estate tax audit is concluded several years after the beneficiary's death.

Subsection (c) is an application of section 1009 [T.C.A. § 35-15-1009]. Section 1009 [T.C.A. § 35-15-1009] addresses the validity of any type of release that a beneficiary might give. Subsection (c) is more limited, dealing only with releases given upon termination of the trust. Factors affecting the validity of a release include adequacy of disclosure, whether the beneficiary had a legal incapacity, and was not represented under Article 3 [T.C.A. 35-15-301 to 35-15-306], and whether the trustee engaged in any improper conduct. See *Restatement (Second) of Trusts* § 216 (1959). Comment Amended in 2007.

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Title 35 Fiduciaries And Trust Estates
 Chapter 15 Tennessee Uniform Trust Code
 Part 9 "Uniform Prudent Investor Act" Incorporated

GO TO THE TENNESSEE ANNOTATED STATUTES ARCHIVE DIRECTORY

Tenn. Code Ann. § 35-15-901 (2012)

35-15-901. Prudent Investor Act incorporated by reference.

Title 35, chapter 14 is incorporated in this chapter by reference.

HISTORY: Acts 2004, ch. 537, § 76.

NOTES:

COMMENTS TO OFFICIAL TEXT

General Comment.

Because of the widespread adoption of the Uniform Prudent Investor Act [*T.C.A. § 35-14-101 et seq.*], no effort has been made to disassemble and integrate the Uniform Prudent Investor Act [*T.C.A. § 35-14-101 et seq.*] into the Uniform Trust Code. States adopting the Uniform Trust Code that have previously enacted the Prudent Investor Act are encouraged to reenact their version of the Prudent Investor Act as part 9 of the Uniform Trust Code. Reenacting the Uniform Prudent Investor Act [*T.C.A. § 35-14-101 et seq.*] as a unit will preserve uniformity with states that have enacted the Uniform Prudent Investor Act [*T.C.A. § 35-14-101 et seq.*] in free-standing form.

The Uniform Prudent Investor Act [*T.C.A. § 35-14-101 et seq.*] prescribes a series of duties relevant to the investment and management of trust property. The Uniform Trust Code, part 8 [*T.C.A. § 35-15-801 -- 35-15-817*] contains duties and powers of a trustee relevant to the investment, administration, and distribution of trust property. There is therefore significant overlap between part 8 [*T.C.A. § 35-15-801 -- 35-15-817*] and the Prudent Investor Act [*T.C.A. § 35-14-101 et seq.*]. Where the Uniform Prudent Investor Act and Uniform Trust Code are duplicative, enacting jurisdictions are encouraged to enact the Uniform Prudent Investor Act [*T.C.A. § 35-14-101 et seq.*] in this part but without the provisions already addressed in part 8 of the Uniform Trust Code [*T.C.A. § 35-15-801 -- 35-15-817*].

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Chapter 15 Tennessee Uniform Trust Code
Part 10 Liability of Trustees and Rights of Persons Dealing with Trustee

GO TO THE TENNESSEE ANNOTATED STATUTES ARCHIVE DIRECTORY

Tenn. Code Ann. § 35-15-1001 (2012)

35-15-1001. Remedies for breach of trust.

- (a) A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.
- (b) To remedy a breach of trust that has occurred or may occur, the court may:
- (1) Compel the trustee to perform the trustee's duties;
 - (2) Enjoin the trustee from committing a breach of trust;
 - (3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means;
 - (4) Order a trustee to account;
 - (5) Appoint a special fiduciary to take possession of the trust property and administer the trust;
 - (6) Suspend the trustee;
 - (7) Remove the trustee as provided in § 35-15-706;
 - (8) Reduce or deny compensation to the trustee;
 - (9) Subject to § 35-15-1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or
 - (10) Order any other appropriate relief whether provided elsewhere in this chapter, available at common law or under equity principles.

HISTORY: Acts 2004, ch. 537, § 77.

NOTES: Section to Section References.

This section is referred to in § 35-15-706.

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Cited:

Kennard v. AmSouth Bank, -- S.W.3d --, 2008 Tenn. App. LEXIS 73 (Tenn. Ct. App. Feb. 12, 2008).

NOTES TO DECISIONS

1. Illustrative Cases.

1. Illustrative Cases.

Beneficiary's breach-of-fiduciary claim against trustees was properly dismissed on partial summary judgment; as the payments he sought were contrary to the terms of the trust documents, and the trustees followed the directions of the trusts, pursuant to *T.C.A. § 35-15-1006*, they could not be found to have breached their fiduciary duties to him. *Cartwright v. Capital*, -- S.W.3d --, 2012 Tenn. App. LEXIS 369 (Tenn. Ct. App. June 5, 2012).

COMMENTS TO OFFICIAL TEXT

General Comment.

Sections 1001 through 1009 [*T.C.A. §§ 35-15-1001 -- 35-15-1009*] identify the remedies for breach of trust, describe how money damages are to be determined, and specify potential defenses. Section 1001 [*T.C.A. § 35-15-1001*] lists the remedies for breach of trust and specifies when a breach of trust occurs. A breach of trust occurs when the trustee breaches one of the duties contained in part 8 [*T.C.A. § 35-15-801 -- 35-15-817*] or elsewhere in the Code. The remedies for breach of trust in section 1001 [*T.C.A. § 35-15-1001*] are broad and flexible. Section 1002 [*T.C.A. § 35-15-1002*] provides how money damages for breach of trust are to be determined. The standard for determining money damages rests on two principles: (1) the trust should be restored to the position it would have been in had the harm not occurred; and (2) the trustee should not be permitted to profit from the trustee's own wrong. Section 1003 [*T.C.A. § 35-15-1003*] holds a trustee accountable for profits made from the trust even in the absence of a breach of trust. Section 1004 [*T.C.A. § 35-15-1004*] reaffirms the court's power in equity to award costs and attorney's fees as justice requires.

Sections 1005 through 1009 [*T.C.A. §§ 35-15-1005 -- 35-15-1009*] deal with potential defenses. Section 1005 [*T.C.A. § 35-15-1005*] provides a statute of limitations on actions against a trustee. Section 1006 [*T.C.A. § 35-15-1006*] protects a trustee who acts in reasonable reliance on the terms of a written trust instrument. Section 1007 [*T.C.A. § 35-15-1007*] protects a trustee who has exercised reasonable care to ascertain the happening of events that might affect distribution, such as a beneficiary's marriage or death. Section 1008 [*T.C.A. § 35-15-1008*] describes the effect and limits on the use of an exculpatory clause. Section 1009 [*T.C.A. § 35-15-1009*] deals with the standards for recognizing beneficiary approval of acts of the trustee that might otherwise constitute a breach of trust.

Sections 1010 through 1013 [*T.C.A. §§ 35-15-1010 -- 1013*] address trustee relations with persons other than beneficiaries. The emphasis is on encouraging third parties to engage in commercial transactions to the same extent as if the property were not held in trust. Section 1010 [*T.C.A. § 35-15-1010*] negates personal liability on contracts entered into by the trustee if the fiduciary capacity was properly disclosed. The trustee is also relieved from liability for torts committed in the course of administration unless the trustee was personally at fault. Section 1011 [*T.C.A. § 35-15-1011*] negates personal liability for contracts entered into by partnerships in which the trustee is a general partner as long as the fiduciary capacity was disclosed in the contract or partnership certificate. Section 1012 [*T.C.A. § 35-15-1012*] protects persons other than beneficiaries who deal with a trustee in good faith and without knowledge that the trustee is exceeding or improperly exercising a power. Section 1013 [*T.C.A. § 35-15-1013*] permits a third party to rely on a certification of trust, thereby reducing the need for a third party to request a copy of the complete trust instrument.

Much of this part is not subject to override in the terms of the trust. The settlor may not limit the rights of persons other than beneficiaries as provided in sections 1010 through 1013 [*T.C.A. §§ 35-15-1010 -- 35-15-1013*], nor interfere with the court's ability to take such action to remedy a breach of trust as may be necessary in the interests of justice. *See* section 105 [*T.C.A. § 35-15-105*].

Section Comment.

This section codifies the remedies available to rectify or to prevent a breach of trust for violation of a duty owed to a beneficiary. The duties that a trustee might breach include those contained in part 8 [*T.C.A. §§ 35-15-801 -- 35-15-817*] in addition to those specified elsewhere in the Tennessee Uniform Trust Code.

This section identifies the available remedies but does not attempt to cover the refinements and exceptions developed in case law. The availability of a remedy in a particular circumstance will be determined not only by this Code but also by the common law of trusts and principles of equity. *See* section 106 [T.C.A. § 35-15-106].

Beneficiaries and cotrustees have standing to bring a petition to remedy a breach of trust. Following a successor trustee's acceptance of office, a successor trustee has standing to sue a predecessor for breach of trust. *See Restatement (Second) of Trusts § 200* (1959). A person who may represent a beneficiary's interest under part 3 [T.C.A. §§ 35-15-301 -- 35-15-305] would have standing to bring a petition on behalf of the person represented. In the case of a charitable trust, those with standing include the state attorney general, a charitable organization expressly designated to receive distributions under the terms of the trust, and other persons with a special interest. *See* section 110 [T.C.A. § 35-15-110] & *Restatement (Second) of Trusts § 391* (1959). A person appointed to enforce a trust for an animal or a trust for a non-charitable purpose would have standing to sue for a breach of trust. *See* subsection 110(b), and sections 408 and 409 [T.C.A. §§ 35-15-110(b), 35-15-408, and 35-15-409].

Traditionally, remedies for breach of trust at law were limited to suits to enforce unconditional obligations to pay money or deliver chattels. *See Restatement (Second) of Trusts § 198* (1959). Otherwise, remedies for breach of trust were exclusively equitable, and as such, punitive damages were not available and findings of fact were made by the judge and not a jury. *See Restatement (Second) of Trusts § 197* (1959). The Tennessee Uniform Trust Code does not preclude the possibility that a particular enacting jurisdiction might not follow these norms.

The remedies identified in this section are derived from *Restatement (Second) of Trusts § 199* (1959). The reference to payment of money in subdivision (b)(3) includes liability that might be characterized as damages, restitution, or surcharge. For the measure of liability, *see* section 1002 [T.C.A. § 35-15-1002]. Subdivision (b)(5) makes explicit the court's authority to appoint a special fiduciary, also sometimes referred to as a receiver. *See Restatement (Second) of Trusts § 199(d)* (1959). The authority of the court to appoint a special fiduciary is not limited to actions alleging breach of trust but is available whenever the court, exercising its equitable jurisdiction, concludes that an appointment would promote administration of the trust. *See* subsection 704(d) [T.C.A. § 35-15-704(d)] (special fiduciary may be appointed whenever court considers such appointment necessary for administration).

Subdivision (b)(8), which allows the court to reduce or deny compensation, is in accord with *Restatement (Second) of Trusts § 243* (1959). For the factors to consider in setting a trustee's compensation absent breach of trust, *see* section 708 and Section Comment [T.C.A. § 35-15-708]. In deciding whether to reduce or deny a trustee compensation, the court may wish to consider: (1) whether the trustee acted in good faith; (2) whether the breach of trust was intentional; (3) the nature of the breach and the extent of the loss; (4) whether the trustee has restored the loss; and (5) the value of the trustee's services to the trust. *See Restatement (Second) of Trusts § 243 cmt. c* (1959).

The authority under subdivision (b)(9) to set aside wrongful acts of the trustee is a corollary of the power to enjoin a threatened breach as provided in subdivision (b)(2). However, in setting aside the wrongful acts of the trustee the court may not impair the rights of bona fide purchasers protected under section 1012 [T.C.A. § 35-15-1012]. *See Restatement (Second) of Trusts § 284* (1959).



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GO TO THE TENNESSEE ANNOTATED STATUTES ARCHIVE DIRECTORY

Tenn. Code Ann. § 35-15-1002 (2012)

35-15-1002. Damages for breach of trust.

(a) Except as otherwise provided in § 35-3-117(a)-(d) with regard to investment of trust funds or elsewhere in this chapter, a trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of:

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

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

(b) Except as otherwise provided in this subsection (b), if more than one (1) trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

HISTORY: Acts 2004, ch. 537, § 78.

NOTES:

COMMENTS TO OFFICIAL TEXT

Section Comment.

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

For extensive commentary on the determination of damages, traditionally known as trustee surcharge, with numerous specific applications, see Restatement (Third) of Trusts: Prudent Investor Rule §§ 205-213 (1992). For the use of benchmark portfolios to determine damages, see Restatement (Third) of Trusts: Prudent Investor Rule Reporter's Notes to §§ 205 and 208 -- 211 (1992). On the authority of a court of equity to reduce or excuse damages for breach of trust, see *Restatement (Second) of Trusts § 205 cmt. g (1959)*.

For purposes of this section and section 1003 [T.C.A. § 35-15-1003], "profit" does not include the trustee's compensation. A trustee who has committed a breach of trust is entitled to reasonable compensation for administering the trust unless the court reduces or denies the trustee compensation pursuant to subdivision 1001(b)(8) [T.C.A. § 35-15-1001(b)(8)].

Subsection (b) is based on *Restatement (Second) of Trusts* § 258 (1959). Cotrustees are jointly and severally liable for a breach of trust if there was joint participation in the breach. Joint and several liability also is imposed on a nonparticipating cotrustee who, as provided in subsection 703(g) [T.C.A. § 35-15-703(g)], failed to exercise reasonable care: (1) to prevent a cotrustee from committing a serious breach of trust, or (2) to compel a cotrustee to redress a serious breach of trust. Joint and several liability normally carries with it a right in any trustee to seek contribution from a cotrustee to the extent the trustee has paid more than the trustee's proportionate share of the liability. Subsection (b), consistent with *Restatement (Second) of Trusts* § 258 (1959), creates an exception. A trustee who was substantially more at fault or committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries is not entitled to contribution from the other trustees.

Determining degrees of comparative fault is a question of fact. The fact that one trustee was more culpable or more active than another does not necessarily establish that this trustee was substantially more at fault. Nor is a trustee substantially less at fault because the trustee did not actively participate in the breach. See *Restatement (Second) of Trusts* § 258 cmt. e(195). Among the factors to consider: (1) Did the trustee fraudulently induce the other trustee to join in the breach? (2) Did the trustee commit the breach intentionally while the other trustee was at most negligent? (3) Did the trustee, because of greater experience or expertise, control the actions of the other trustee? (4) Did the trustee alone commit the breach with liability imposed on the other trustee only because of an improper delegation or failure to properly monitor the actions of the cotrustee? See *Restatement (Second) of Trusts* § 258 cmt. d (1959).

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Tenn. Code Ann. § 35-15-1003 (2012)

35-15-1003. Damages in absence of breach.

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

HISTORY: Acts 2004, ch. 537, § 79.

NOTES:

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Cited:

Kennard v. AmSouth Bank, -- S.W.3d --, 2008 Tenn. App. LEXIS 73 (Tenn. Ct. App. Feb. 12, 2008).

COMMENTS TO OFFICIAL TEXT

Section Comment.

A trustee is not an insurer. Similar to *Restatement (Second) of Trusts § 204 (1959)*, this section provides that absent a breach of trust a trustee is not liable for a loss or depreciation in the value of the trust property or for failure to make a profit.



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Tenn. Code Ann. § 35-15-1004 (2012)

35-15-1004. Attorney's fees and costs.

(a) In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

(b) In a nonjudicial proceeding involving the administration of a trust, the trustee may pay fees, other reasonable costs and expenses from the trust assets where all of the parties to the proceeding agree in writing.

(c) In a mediation or arbitration proceeding involving the administration of a trust, the mediator or arbitrator may award fees, other reasonable costs and expenses against the assets of the trust.

HISTORY: Acts 2004, ch. 537, § 80.

NOTES:

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Cited:

Morrow v. Suntrust Bank, -- S.W.3d --, 2011 Tenn. App. LEXIS 37 (Tenn. Ct. App. Jan. 31, 2011).

NOTES TO DECISIONS

1. Award Appropriate. 2. Appellate Attorney's Fees.

1. Award Appropriate.

Award of attorney fees to the father in his action seeking to remove his daughter as trustee of an irrevocable trust that the father created was appropriate under *T.C.A. § 35-15-1004* because the replacement of his daughter as trustee benefitted all of the beneficiaries and the services provided by the father's attorneys benefitted the trust. *Duke v. Simmons*, -- S.W.3d --, 2009 Tenn. App. LEXIS 174 (Tenn. Ct. App. Apr. 30, 2009).

In a beneficiary's suit against the trustees, as portions of his initial brief were stricken due to its lack of appropriate citations to the record and relevant authority, and he was permitted to file a supplemental statement of facts, the trustees were awarded the attorneys' fees and costs they incurred in responding to the supplemental statement of facts, to be paid

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

2. Appellate Attorney's Fees.

Trustee was awarded appellate attorney's fees under *T.C.A. § 35-15-1004(a)* where an attorney's petition to turn over the remaining trust assets was barred by res judicata. *In re Estate of Goza*, -- S.W.3d --, 2012 Tenn. App. LEXIS 231 (Tenn. Ct. App. Apr. 11, 2012).

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section, which is based on Massachusetts General Laws chapter 215, § 45, codifies the court's historic authority to award costs and fees, including reasonable attorney's fees, in judicial proceedings grounded in equity. The court may award a party its own fees and costs from the trust. The court may also charge a party's costs and fees against another party to the litigation. Generally, litigation expenses were at common law chargeable against another party only in the case of egregious conduct such as bad faith or fraud. With respect to a party's own fees, section 709 [*T.C.A. § 35-15-709*] authorizes a trustee to recover expenditures properly incurred in the administration of the trust. The court may award a beneficiary litigation costs if the litigation is deemed beneficial to the trust. Sometimes, litigation brought by a beneficiary involves an allegation that the trustee has committed a breach of trust. On other occasions, the suit by the beneficiary is brought because of the trustee's failure to take action against a third party, such as to recover property properly belonging to the trust. For the authority of a beneficiary to bring an action when the trustee fails to take action against a third party, see *Restatement (Second) of Trusts* §§ 281-282 (1959). For the case law on the award of attorney's fees and other litigation costs, see 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* §§ 188.4 (4th ed. 1988). This section recognizes that there is also a need to allow the payment of fees, expenses and costs from trust assets in non-judicial proceedings, arbitrations and mediations.



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GO TO THE TENNESSEE ANNOTATED STATUTES ARCHIVE DIRECTORY

Tenn. Code Ann. § 35-15-1005 (2012)

35-15-1005. Limitation of action against trustee.

(a) A beneficiary may not commence a proceeding against a trustee for breach of trust more than one (1) year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed facts indicating the existence of a potential claim for breach of trust.

(b) A report adequately discloses facts indicating the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or the beneficiary's representative knows of the potential claim or has sufficient information to be presumed to know of it, or to be put on notice to inquire into its existence.

(c) If subsection (a) does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within three (3) years after the first to occur of:

- (1) The removal, resignation, or death of the trustee;
- (2) The termination of the beneficiary's interest in the trust; or
- (3) The termination of the trust.

HISTORY: Acts 2004, ch. 537, § 81.

NOTES: Section to Section References.

This section is referred to in § 35-15-802.

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NOTES TO DECISIONS

1. Inquiry Notice.

1. Inquiry Notice.

Although the letter from the bank provided notice of the trust's proposed investment in the fund, it did not require a reasonable trier of fact to conclude that the co-trustee was on motive to inquire into the existence of a potential claim for breach of trust. *T.C.A. § 35-15-1005(b)*. The bank had not proffered evidence that the co-trustee had inquiry notice

about a possible breach of trust that was so powerful that no reasonable jury would be free to disbelieve it; therefore, the bank was not entitled to summary judgment on its breach of trust claim based on the statute of limitations affirmative defense. *Parris v. Regions Bank*, -- F. Supp. 2d --, 2011 U.S. Dist. LEXIS 92167 (W.D. Tenn. Aug. 17, 2011).

COMMENTS TO OFFICIAL TEXT

Section Comment.

The one-year and three year limitations periods under this section are not the only means for barring an action by a beneficiary. A beneficiary may be foreclosed by consent, release, or ratification as provided in section 1009 [T.C.A. § 35-15-1009]. Claims may also be barred by principles such as estoppel and laches arising in equity under the common law of trusts. See section 106 [T.C.A. § 35-15-106].

The representative referred to in subsection (a) is the person who may represent and bind a beneficiary as provided in part 3 [T.C.A. §§ 35-15-301 -- 35-15-305]. During the time that a trust is revocable and the settlor has capacity, the person holding the power to revoke is the one who must receive the report. See subsection 603(a) [T.C.A. § 35-15-603(a)] (rights of settlor of revocable trust).

This section addresses only the issue of when the clock will start to run for purposes of the statute of limitations. If the trustee wishes to foreclose possible claims immediately, a consent to the report or other information may be obtained pursuant to section 1009 [T.C.A. § 35-15-1009]. For the provisions relating to the duty to report to beneficiaries, see section 813 [T.C.A. § 35-15-803].

Subsection (a) applies only if the trustee has furnished a report. The one-year statute of limitations does not begin to run against a beneficiary who has waived the furnishing of a report as provided in section 813(d) [T.C.A. § 35-15-813(d)].

Subsection (c) is intended to provide some ultimate repose for actions against a trustee. It applies to cases in which the trustee has failed to report to the beneficiaries or the report did not meet the disclosure requirements of subsection (b). It also applies to beneficiaries who did not receive notice of the report, whether personally or through representation. While the three (3) year limitations period will normally begin to run on termination of the trust, it can also begin earlier. If a trustee leaves office prior to the termination of the trust, the limitations period for actions against that particular trustee begins to run on the date the trustee leaves office. If a beneficiary receives a final distribution prior to the date the trust terminates, the limitations period for actions by that particular beneficiary begins to run on the date of final distribution.

If a trusteeship terminates by reason of death, a claim against the trustee's estate for breach of fiduciary duty would, like other claims against the trustee's estate, be barred by a probate creditor's claim statute even though the statutory period prescribed by this section has not yet expired.

This section does not specifically provide that the statutes of limitations under this section are tolled for fraud or other misdeeds, the drafters preferring to leave the resolution of this question to other law of the state.



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GO TO THE TENNESSEE ANNOTATED STATUTES ARCHIVE DIRECTORY*Tenn. Code Ann. § 35-15-1006 (2012)***35-15-1006. Reliance on trust instrument.**

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

HISTORY: Acts 2004, ch. 537, § 82.

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NOTES TO DECISIONS

0.5. Breach of Trust.

0.5. Breach of Trust.

Co-trustee's alleged mishandling of a real property sale did not constitute breach of trust because the co-trustee acted in reasonable reliance on the trust's terms, which empowered the trustees with full power and authority to sell the property. *Kennard v. AmSouth Bank*, -- S.W.3d --, 2008 Tenn. App. LEXIS 73 (Tenn. Ct. App. Feb. 12, 2008).

Beneficiary's breach-of-fiduciary claim against trustees was properly dismissed on partial summary judgment; as the payments he sought were contrary to the terms of the trust documents, and the trustees followed the directions of the trusts, pursuant to *T.C.A. § 35-15-1006*, they could not be found to have breached their fiduciary duties to him. *Cartwright v. Capital*, -- S.W.3d --, 2012 Tenn. App. LEXIS 369 (Tenn. Ct. App. June 5, 2012).

COMMENTS TO OFFICIAL TEXT**Section Comment.**

It sometimes happens that the intended terms of the trust differ from the apparent meaning of the trust instrument. This can occur because the court, in determining the terms of the trust, is allowed to consider evidence extrinsic to the trust instrument. *See* subdivision 103(18) [*T.C.A. § 35-15-103(19)*] (definition of "terms of a trust"). Furthermore, if a trust is reformed on account of mistake of fact or law, as authorized by section 415 [*T.C.A. § 35-15-415*], provisions of

a trust instrument can be deleted or contradicted and provisions not in the trust instrument may be added. The concept of the "terms of a trust," both as defined in this Tennessee Uniform Trust Code and as used in the doctrine of reformation, is intended to effectuate the principle that a trust should be administered and distributed in accordance with the settlor's intent. However, a trustee should also be able to administer a trust with some dispatch and without concern that a reasonable reliance on the terms of the trust instrument is misplaced. This section protects a trustee who so relies on a trust instrument but only to the extent the breach of trust resulted from such reliance. This section is similar to section 1(b) of the Uniform Prudent Investor Act [*T.C.A. § 35-14-103(b)*], which protects a trustee from liability to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

This section protects a trustee only if the trustee's reliance is reasonable. For example, a trustee's reliance on the trust instrument would not be justified if the trustee is aware of a prior court decree or binding nonjudicial settlement agreement clarifying or changing the terms of the trust.



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Tenn. Code Ann. § 35-15-1007 (2012)

35-15-1007. Event affecting administration or distribution.

If the happening of an event, including marriage, divorce, performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge.

HISTORY: Acts 2004, ch. 537, § 83.

NOTES:

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section, which is based on *Washington Revised Code § 11.98.100*, is designed to encourage trustees to administer trusts expeditiously and without undue concern about liability for failure to ascertain external facts, often of a personal nature, that might affect administration or distribution of the trust. The common law, contrary to this section, imposed absolute liability against a trustee for misdelivery regardless of the trustee's level of care. *See Restatement (Second) of Trusts § 226 (1959)*. The events listed in this section are not exclusive. A trustee who has exercised reasonable care to ascertain the occurrence of other events, such as the attainment by a beneficiary of a certain age, is also protected from liability.

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GO TO THE TENNESSEE ANNOTATED STATUTES ARCHIVE DIRECTORY*Tenn. Code Ann. § 35-15-1008 (2012)***35-15-1008. Exculpation of trustee.**

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

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

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

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

HISTORY: Acts 2004, ch. 537, § 84.**NOTES: Section to Section References.**

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

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1. Bad Faith Or Reckless Indifference.

1. Bad Faith Or Reckless Indifference.

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

COMMENTS TO OFFICIAL TEXT

Section Comment.

Even if the terms of the trust attempt to completely exculpate a trustee for the trustee's acts, the trustee must always comply with a certain minimum standard. As provided in subsection (a), a trustee must always act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. Subsection (a) is consistent with the standards expressed in section 105 and subsection 814(a) [T.C.A. §§ 35-15-105 and 35-15-814(a)], which, similar to this section, place limits on the power of a settlor to negate trustee duties. This section is also similar to *section 222 of the Restatement (Second) of Trusts* (1959), except that this Code, unlike the Restatement, allows a settlor to exculpate a trustee for a profit that the trustee made from the trust.

Subsection (b) disapproves of cases such as *Marsman v. Nasca*, 573 N.E.2d 1025 (Mass. App. Ct. 1991), which held that an exculpatory clause in a trust instrument drafted by the trustee was valid because the beneficiary could not prove that the clause was inserted as a result of an abuse of a fiduciary relationship. For a later case where sufficient proof of abuse was present, see *Rutanan v. Ballard*, 678 N.E.2d 133 (Mass. 1997). Subsection (b) responds to the danger that the insertion of such a clause by the fiduciary or its agent may have been undisclosed or inadequately understood by the settlor. To overcome the presumption of abuse in subsection (b), the trustee must establish that the clause was fair and that its existence and contents were adequately communicated to the settlor. In determining whether the clause was fair, the court may wish to examine: (1) the extent of the prior relationship between the settlor and trustee; (2) whether the settlor received independent advice; (3) the sophistication of the settlor with respect to business and fiduciary matters; (4) the trustee's reasons for inserting the clause; and (5) the scope of the particular provision inserted. See *Restatement (Second) of Trusts* § 222 cmt. d (1959).

The requirements of subsection (b) are satisfied if the settlor was represented by independent counsel. If the settlor was represented by independent counsel, the settlor's attorney is considered the drafter of the instrument even if the attorney used the trustee's form. Because the settlor's attorney is an agent of the settlor, disclosure of an exculpatory term to the settlor's attorney is disclosure to the settlor.



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Tenn. Code Ann. § 35-15-1009 (2012)

35-15-1009. Beneficiary's consent, release, or ratification.

A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented in writing to the conduct or transaction constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:

- (1) The consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or
- (2) At the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.

HISTORY: Acts 2004, ch. 537, § 85.

NOTES: Section to Section References.

This section is referred to in § 35-15-802.

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section is based on *sections 216 through 218 of the Restatement (Second) of Trusts (1959)*. A consent, release, or affirmance under this section may occur either before or after the approved conduct. This section requires an affirmative act by the beneficiary. A failure to object is not sufficient. *See Restatement (Second) of Trusts § 216 cmt. a (1959)*. A consent is binding on a consenting beneficiary although other beneficiaries have not consented. *See Restatement (Second) of Trusts § 216 cmt. g (1959)*. To constitute a valid consent, the beneficiary must know of the beneficiary's rights and of the material facts relating to the breach. *See Restatement (Second) of Trusts § 216 cmt. k (1959)*. If the beneficiary's approval involves a self-dealing transaction, the approval is binding only if the transaction was fair and reasonable. *See Restatement (Second) of Trusts §§ 170(2), 216(3) & cmt. n (1959)*.

An approval by the settlor of a revocable trust or by the holder of a presently exercisable power of withdrawal binds all the beneficiaries. *See section 603 [T.C.A. § 35-15-603]*. A beneficiary is also bound to the extent an approval is given by a person authorized to represent the beneficiary as provided in part 3 [*T.C.A. §§ 35-15-301 -- 35-15-305*].

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Tenn. Code Ann. § 35-15-1010 (2012)

35-15-1010. Limitation on personal liability of trustee.

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

(b) Except as otherwise provided in subsection (a) or (c), the debts, obligations and liabilities incurred by a trustee by reason of the ownership, management or control of trust property in the trustee's fiduciary capacity, shall be enforceable solely against the trust and its property, without any obligation or liability personally being borne by any trustee of such trust.

(c) A trustee is personally liable for torts committed in the course of administering a trust only if the trustee is personally at fault on account of the trustee's own willful misconduct proven by clear and convincing evidence.

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

HISTORY: Acts 2004, ch. 537, § 86; 2010, ch. 725, § 10.

NOTES: Amendments.

The 2010 amendment deleted former (b) which read: "A trustee is personally liable for torts committed in the course of administering a trust, or for obligations arising from ownership or control of trust property, including liability for violation of environmental law, only if the trustee is personally at fault."; added present (b) and (c); and redesignated former (c) as present (d).

Effective Dates.

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

Section to Section References.

Sections 35-15-1010 -- 35-15-1013 are referred to in § 35-15-105.

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section is based on section 7-306 of the Uniform Probate Code. However, unlike the Uniform Probate Code, which requires that the contract both disclose the representative capacity and identify the trust, subsection (a) protects a trustee who reveals the fiduciary relationship either by indicating a signature as trustee or by simply referring to the trust. The protection afforded the trustee by this section applies only to contracts that are properly entered into in the trustee's fiduciary capacity, meaning that the trustee is exercising an available power and is not violating a duty. This section does not excuse any liability the trustee may have for breach of trust.

Subsections (b) and (c) address trustee liability arising from ownership or control of trust property and for torts occurring incident to the administration of the trust. The trustee will not be personally liable for debts, obligations and liabilities incurred by reason of the trustee's ownership, management and control of trust property in the trustee's fiduciary capacity. The trustee will be personally liable for torts committed in the course of administering a trust only if the trustee was personally at fault on account of the trustee's willful misconduct. This is contrary to *Restatement (Second) of Trusts* § 264 (1959), which imposes liability on a trustee regardless of fault, including liability for acts of agents under respondeat superior. Responding to a particular concern of trustees, subsection (b) specifically protects a trustee from personal liability for violations of environmental law such as CERCLA (42 U.S.C. § 9607) or its state law counterparts, unless the trustee was personally at fault. See also subdivisions 701(c)(2) [T.C.A. § 35-15-701(c)(2)] (nominated trustee may investigate trust property to determine potential violation of environmental law without having accepted trusteeship) and 816(b)(13) [T.C.A. § 35-15-816(b)(13)] (trustee powers with respect to possible liability for violation of environmental law).

Subsection (d) alters the common law rule that a trustee could not be sued in a representative capacity if the trust estate was not liable.

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Tenn. Code Ann. § 35-15-1011 (2012)

35-15-1011. Interest as general partner.

(a) Except as otherwise provided in subsection (c) or unless personal liability is imposed in the contract, a trustee who holds an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership after the trust's acquisition of the interest if the fiduciary capacity was disclosed in the contract or in a statement previously filed pursuant to the Uniform Partnership Act, compiled in title 61, chapter 1, or the Uniform Limited Partnership Act, compiled in title 61, chapter 2.

(b) Except as otherwise provided in subsection (c), a trustee who holds an interest as a general partner is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault on account of the trustee's own willful misconduct proven by clear and convincing evidence.

(c) The immunity provided by this section does not apply if an interest in the partnership is held by the trustee in a capacity other than that of trustee.

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

HISTORY: Acts 2004, ch. 537, § 87; 2010, ch. 725, §§ 11, 12.

NOTES: Amendments.

The 2010 amendment added "on account of the trustee's own willful misconduct proven by clear and convincing evidence" to the end of (b); and deleted "or is held by the trustee's spouse or one (1) or more of the trustee's descendants, siblings, or parents, or the spouse of any of them" from the end of (c).

Effective Dates.

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

Section to Section References.

Sections 35-15-1010 -- 35-15-1013 are referred to in § 35-15-105.

COMMENTS TO OFFICIAL TEXT

Section Comment.

Section 1010 [*T.C.A. § 35-15-1010*] protects a trustee from personal liability on contracts that the trustee enters into on behalf of the trust. That is the purpose of this section, which is modeled after *Ohio Revised Code § 1339.65*. Subsection (a) protects the trustee from personal liability for such partnership obligations whether the trustee signed the contract or it was signed by another general partner. Subsection (b) protects a trustee from personal liability for torts committed by the partnership unless the trustee was personally at fault. Protection from the partnership's contractual obligations is available under subsection (a) only if the other party is on notice of the fiduciary relationship, either in the contract itself or in the partnership certificate on file.

Special protection is not needed for other business interests that the trustee may own, such as an interest as a limited partner, a membership interest in an LLC, or an interest as a corporate shareholder. In these cases the nature of the entity or the interest owned by the trustee carries with it its own limitation on liability.

Certain exceptions apply. The section is not intended to be used as a device for individuals or their families to shield assets from creditor claims. Consequently, subsection (c) excludes from the protections provided by this section trustees who own an interest in the partnership in another capacity.

Nor can a revocable trust be used as a device for avoiding claims against the partnership. Subsection (d) imposes personal liability on the settlor for partnership contracts and other obligations of the partnership the same as if the settlor were a general partner.

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Tenn. Code Ann. § 35-15-1012 (2012)

35-15-1012. Protection of person dealing with trustee.

(a) A person other than a beneficiary who in "good faith", as defined in § 47-1-201, assists a trustee, or who in "good faith" and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers is protected from liability as if the trustee properly exercised the power.

(b) A person other than a beneficiary who in "good faith" deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise.

(c) A person who in "good faith" delivers assets to a trustee need not ensure their proper application.

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

(e) Comparable protective provisions of other laws, see §§ 47-8-101 -- 47-8-407, relating to commercial transactions or transfer of securities by fiduciaries prevail over the protection provided by this section.

HISTORY: Acts 2004, ch. 537, § 88.

NOTES: Section to Section References.

Sections 35-15-1010 -- 35-15-1013 are referred to in § 35-15-105.

This section is referred to in §§ 35-15-802, 35-15-1001.

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section is derived from section 7 of the Uniform Trustee Powers Act.

Subsection (a) protects two different classes; persons other than beneficiaries who assist a trustee with a transaction, and persons other than beneficiaries who deal with the trustee for value. As long as the assistance was provided or the transaction was entered into in good faith and without knowledge, third persons in either category are protected in the transaction even if the trustee was exceeding or improperly exercising the power. For the definition of "know," see section 104 [*T.C.A. § 35-15-104*]. This Code does not define "good faith" for purposes of this and the next section. That

term is defined at *T.C.A. § 47-1-201(19)*. The definition provided there is consistent with the purpose of this section, which is to treat commercial transactions with trustees similar to other commercial transactions.

Subsection (b) confirms that a third party who is acting in good faith is not charged with a duty to inquire into the extent of a trustee's powers or the propriety of their exercise. The third party may assume that the trustee has the necessary power. Consequently, there is no need to request or examine a copy of the trust instrument. A third party who wishes assurance that the trustee has the necessary authority instead should request a certification of trust as provided in section 1013 [*T.C.A. § 35-15-1013*]. Subsection (b), and the comparable provisions enacted in numerous states, are intended to negate the rule, followed by some courts, that a third party is charged with constructive notice of the trust instrument and its contents. The cases are collected in George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 897 (Rev. 2d ed. 1995); and 4 Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 297 (4th ed. 1989).

Subsection (c) protects any person, including a beneficiary, who in good faith delivers property to a trustee. The standard of protection in the Restatement is phrased differently although the result is similar. Under *Restatement (Second) of Trusts* § 321 (1959), the person delivering property to a trustee is liable if at the time of the delivery the person had notice that the trustee was misapplying or intending to misapply the property.

Subsection (d) extends the protections afforded by the section to assistance provided to or dealings for value with a former trustee. The third party is protected the same as if the former trustee still held the office.

Subsection (e) clarifies that a statute relating to commercial transactions controls whenever both it and this section could apply to a transaction. Consequently, the protections provided by this section are superseded by *T.C.A. §§ 47-8-101* through *47-8-407*. The principal statutes in question are the various chapters of the Uniform Commercial Code, including Chapter 8 on the transfer of securities, as well as the Uniform Simplification of Fiduciary Securities Transfer Act.

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Tenn. Code Ann. § 35-15-1013 (2012)

35-15-1013. Certification of trust.

(a) Instead of furnishing a copy of the trust instrument to any person to evidence the existence and validity of the trust, the trustee may furnish to such person a certification of trust, signed by the trustee or trustees having signatory authority as identified in subdivision (a)(5) and attested by a notary public and shall contain the following:

- (1) An affirmation of the current existence of the trust and the date on which the trust came into existence;
- (2) The identity of the settlor or settlors, the currently acting trustee or trustees, and the named successor trustee or trustees of the trust or a statement that no successor is named;
- (3) The administrative or managerial powers of the trustee, or both;
- (4) The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
- (5) When there are multiple trustees or multiple successor trustees, the signature authority of the trustees indicating whether all or less than all of the currently acting trustees are required to sign in order to exercise various powers of the trustee;
- (6) Where there are successor trustees designated, a statement detailing the conditions for their succession or a statement that a third party may rely on the authority of one (1) or more successors without proof of their succession;
- (7) The trust's identification number, whether a social security or an employer identification number, but only if the trust's identification number is essential to the transaction for which the request for the trust document was made;
- (8) The manner in which trust assets should properly be titled; and
- (9) A statement that, to the best of the trustee's knowledge, the trust has not been revoked, modified or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

(b) The certification of trust shall not be required to contain the dispositive provisions of the trust that set forth the distribution of the trust estate.

(c) The trustee offering the certification of trust may provide copies of all or any part of the trust document and amendments, if any. Nothing in this section is intended to require or imply an obligation to provide dispositive provisions of the trust or a copy of the entire trust document and amendments.

(d) A person who acts in reliance on a certification of trust without actual knowledge that the representations contained therein are incorrect is not liable to any person for so acting. A person who does not have actual knowledge that the facts contained in the certification of trust are incorrect may assume without inquiry the existence of the facts contained in the certification of trust. Actual knowledge shall not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying on the trust certification. Nothing contained in this section shall limit the rights of the beneficiaries of the trust against the trustee. Any person relying on the certification of trust shall be indemnified from the assets of the trust to the extent of the share of the trust attributable to the beneficiary or beneficiaries bringing any action against the person for any costs, damage, attorney fees or other expenses incurred in defending any action against the person arising for the transaction to which a certification of trust related.

(e) A person's failure to request a certification of trust does not affect the protections provided that person in this section. No inference that the person has not acted in good faith or that the person was negligent may be drawn from the failure of the person to request a certification of trust. Nothing in this section is intended to create an implication that a person is liable for acting in reliance on a certification of trust under circumstances where the requirements of this section are not satisfied.

(f) Nothing in this section shall be construed to require a third party, when presented with a trust certificate, to enter into a contract with a trustee relating to trust assets or obligations, or to preclude a third party from demanding as a precondition to any contract that the trustee provide additional information in order to clarify any ambiguities or inconsistencies in the trust certificate.

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

HISTORY: Acts 2004, ch. 537, § 89; 2007, ch. 24, § 32.

NOTES: Amendments.

The 2007 amendment, in the introductory paragraph of (a), deleted "in the form of a sworn declaration" following "certification of trust" and inserted "and attested by a notary public".

Effective Dates.

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

Section to Section References.

Sections 35-15-1010 -- 35-15-1013 are referred to in § 35-15-105.

COMMENTS TO OFFICIAL TEXT

Section Comment.

This section is an incorporation of *T.C.A. § 35-50-126* [repealed] with the addition of subsection (g) and is designed to protect the privacy of a trust instrument by discouraging requests from persons other than beneficiaries for complete copies of the instrument in order to verify a trustee's authority. Contrary to the standard UTC § 1013, there is no penalty imposed on the third party for requesting a copy of the full trust instrument in bad faith. Even absent this section, such requests are usually unnecessary. Pursuant to subsection 1012(b) [*T.C.A. § 35-15-1012(b)*], a third person proceeding in good faith is not required to inquire into the extent of the trustee's powers or the propriety of their exercise. This section adds another layer of protection.

Third persons frequently insist on receiving a copy of the complete trust instrument solely to verify a specific and narrow authority of the trustee to engage in a particular transaction. While a testamentary trust, because it is created under a will, is a matter of public record, an inter vivos trust instrument is private. Such privacy is compromised, however, if the trust instrument must be distributed to third persons. A certification of trust is a document signed by a currently acting trustee that may include excerpts from the trust instrument necessary to facilitate the particular transaction. A certification provides the third party with an assurance of authority without having to disclose the trust's dispositive provisions. Nor is there a need for third persons who may already have a copy of the instrument to pry into its provisions. Persons acting in reliance on a certification may assume the truth of the certification even if they have a complete copy of the trust instrument in their possession.

Subsection (a) specifies the required contents of a certification. Subsection (b) clarifies that the certification need not include the trust's dispositive terms. A certification, however, normally will contain the administrative terms of the trust relevant to the transaction. Subsections (d), (e) and (f) protect a third party who relies on the certification. The third party may assume that the certification is true, and is not charged with constructive knowledge of the terms of the trust instrument even if the third party has a copy.

The Tennessee Uniform Trust Code leaves to other law the issues of whether and how damages for a bad faith refusal are to be computed and whether attorney's fees might be recoverable. For a discussion of the meaning of "good faith," *see* section 1012 Section Comment [*T.C.A. § 35-15-1012*].

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Tenn. Code Ann. § 35-15-1101 (2012)

35-15-1101. Uniformity of application and construction.

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

HISTORY: Acts 2004, ch. 537, § 90.

NOTES:

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Tenn. Code Ann. § 35-15-1102 (2012)

35-15-1102. Electronic records and signatures.

The provisions of this chapter governing the legal effect, validity, or enforceability of electronic records or electronic signatures, and of contracts formed or performed with the use of such records or signatures, conform to the requirements of section 102 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7002, and supersede, modify, and limit the requirements of the Electronic Signatures in Global and National Commerce Act.

HISTORY: Acts 2004, ch. 537, § 91.

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

This section, which is being inserted in all Uniform Acts approved in 2000 or later, preempts the federal Electronic Signatures in Global and National Commerce Act. Subdivision 102(a)(2)(B) of that Act provides that the federal law can be preempted by a later statute of the state that specifically refers to the federal law. The effect of this section, when enacted as part of this Code, is to leave to state law the procedures for obtaining and validating an electronic signature. The Tennessee Uniform Trust Code does not require that any document be in paper form, allowing all documents under this Code to be transmitted in electronic form. A properly directed electronic message is a valid method of notice under the Code as long as it is reasonably suitable under the circumstances and likely to result in receipt of the notice or document. *See* subsection 109(a) [*T.C.A. § 35-15-109(a)*].

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Tenn. Code Ann. § 35-15-1103 (2012)

35-15-1103. Application to existing relationships.

(a) Except as otherwise provided in this chapter, on July 1, 2004:

(1) This chapter applies to all trusts created before, on, or after July 1, 2004;

(2) This chapter applies to all judicial proceedings concerning trusts commenced on or after July 1, 2004;

(3) This chapter applies to judicial proceedings concerning trusts commenced before July 1, 2004, unless the court finds that application of a particular provision of this chapter would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this chapter does not apply and the superseded law applies;

(4) Any rule of construction or presumption provided in this chapter applies to trust instruments executed before July 1, 2004, unless there is a clear indication of a contrary intent in the terms of the trust; and

(5) An act done before July 1, 2004, is not affected by this chapter.

(b) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before July 1, 2004, that statute continues to apply to the right even if it has been repealed or superseded.

HISTORY: Acts 2004, ch. 537, § 94.

NOTES:

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Cited:

Tenn. Div. of the United Daughters of the Confederacy v. Vanderbilt Univ., 174 S.W.3d 98, 2005 Tenn. App. LEXIS 272 (Tenn. Ct. App. 2005); *Atkins v. Marks*, 288 S.W.3d 356, 2008 Tenn. App. LEXIS 349 (Tenn. Ct. App. June 11, 2008).

COMMENTS TO OFFICIAL TEXT**Section Comment.**

The Tennessee Uniform Trust Code is intended to have the widest possible effect within constitutional limitations. Specifically, the Tennessee Uniform Trust Code applies to all trusts whenever created, to judicial proceedings concerning trusts commenced on or after its effective date, and unless the court otherwise orders, to judicial proceedings in progress on the effective date. In addition, any rules of construction or presumption provided in the Tennessee Uniform Trust Code apply to preexisting trusts unless there is a clear indication of a contrary intent in the trust's terms. By applying the Tennessee Uniform Trust Code to preexisting trusts, the need to know two (2) bodies of law will quickly lessen.

This Tennessee Uniform Trust Code cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this Tennessee Uniform Trust Code. Nor is an act done before the effective date of the Tennessee Uniform Trust Code affected by the Tennessee Uniform Trust Code's enactment.

The Tennessee Uniform Trust Code contains an additional effective date provision. Pursuant to subsection 602(a) [*T.C.A. § 35-15-602(a)*], prior law will determine whether a trust executed prior to the effective date of the Tennessee Uniform Trust Code is presumed to be revocable or irrevocable.

For a comparable uniform law effective date provision, see Uniform Probate Code § 8-101.