UNIFORM PRINCIPAL & INCOME ACT

Summary Article 1

"Income" means money or property that a trustee receives which can be a portion of receipts from a sale, exchange or sale of a principal asset.

Article 103

Unless terms of trust clearly states an intention that trustee "shall or may" favor one or more of the beneficiaries a determination by the trustee is presumed to be fair and reasonable to all of the beneficiaries.

Fiduciary Discretion Comment

If a general discretionary power is conferred upon trustee, the exercise of that power is not subject to control by a court except to prevent an abuse of discretion.

Duty of Impartiality

The trustee duty of impartiality and balancing of competing interests and objectives are matters of judgment. These are not only determined at funding, but may change from time to time.

Section 104

Trustee may adjust between principal and income, if assets are managed as a prudent investor. These are subject to numerous factors.

Comments

Authorizes the trustee to make adjustments between principal and income that may be necessary, if the income of the trust's portfolio total return is too small or too large because of investment decisions made by the trustee under the prudent investor rule.

A fiduciary must administer trust impartially based on what is fair and reasonable to all beneficiaries, unless document states favoring one or more of the beneficiaries.

Factors to consider in exercising the power to adjust

If investment portfolio under prudent investor rule is invested for primarily capital appreciation rather than income, the trustee can decide at the same time the extent to which an adjustment from principal to income may be necessary. Reverse can be done as to investing for income.

Trust terms that limits a power to adjust.

An instrument executed before the adoption of this Act that directs the amounts that may or must be distributed or that prohibit the encroachment of principal should not be construed as forbidding the use of the power to adjust under Sec 104(a). Instruments drafted after adoption of the Act must specifically refer to the power to adjust, if the settler intends to forbid its use.

Section 105 Judicial Control of Discretionary Power

The court may not order a fiduciary to change a decision to exercise or not exercise a discretionary power unless the decision was an abuse of the fiduciary's discretion. A fiduciary's decision is not on abuse of discretion merely because the court would have exercised the power in a different manner or would not have exercised the power.

If it is determined the fiduciary did abuse its discretion, the court may place the income and remainder beneficiaries in the positions they would have occupied, if the discretion had not be abused.

The court may order funds paid out of the trust, if the amount distributed was too small. If the amount was too large, then funds will be withheld from future distributions to the beneficiary that received the funds. If not possible, then trustee will be liable to one or more of the beneficiaries.

A beneficiary who challenges the proposed exercise or non-exercise has the burden of establishing that it will result in an abuse of discretion.

Uniform Principal & Income Act

Revocable living trusts and irrevocable trusts that terminate and are followed by successor trusts were not addressed by RUPIA. With the prevalent use of revocable living trusts as will substitutes rules are needed to address these types of trusts. Articles 2 and 3 apply the probate estate rules to these types of trusts.

Article 2 Decedent's Estate or Terminating Income Interest

Section 201 Determination and Distribution of Income.

(1) A fiduciary must use the rules in Articles 3 through 5 and paragraph 5 of this section to determine the net income and net principal specifically given to a beneficiary for both estates and terminating income interests. It expands the rules to revocable living trusts.

(2) The remaining net income of a decedent's estate or a terminating income interest is determined using the rules in Articles 3 through 5 and the following:

> (A) Net income includes all income from property used to discharge liabilities.
>
> (B) A fiduciary may pay certain administration expenses and interest on death taxes from either income or principal. These expenses can only be paid from income if they do not reduce the estate tax marital deduction or charitable contributions deduction. The advantage is that if the fiduciary's decision is consistent with the deduction on the income tax return or estate tax return, it eliminates the need to adjust between principal and income. Administrative expenses included under this section: professional fees (attorney, accountants, fiduciary), court costs, and other administration costs.
>
> (C) A fiduciary must pay all other expenses not addressed in (2)(B) from principal. All other expenses include debts, funeral expenses, disposition of remains, family allowances, and death taxes and any related penalties.

(3) The beneficiary of an outright pecuniary gift is to receive interest when payment is delayed even if there is no provision in the will or trust document. It extends the provision which provides that a pecuniary gift under a will is to bear interest at the legal rate to pecuniary gifts from revocable living trusts. The interest is to be paid from net income but can be paid from principal if net income is insufficient.

(4) The fiduciary will distribute the net income remaining after all pecuniary gifts (including any interest) to the other beneficiaries using the provisions of Section 202.

(5) A fiduciary cannot reduce the amounts in paragraph (1) by disbursements from income or principal described in Sections 501 or 502 if the governing document or law requires these items to be made from assets other than the property described in paragraph (1). The amounts cannot be reduced by disbursements that the fiduciary

recovers or reasonably expects to be recovered from a third party. The amounts in paragraph (1) include all receipts and payments related to the property whether they accrued or became due before, on, or after the terminating event. The fiduciary must make a reasonable provision for any expenses that might arise after the property is distributed.

Section 202 Distribution to Residuary and Remainder Beneficiaries.

(a) Residuary and remainder beneficiaries are entitled to receive a portion of the net income equal to their proportionate share of undistributed principal assets. It uses asset values as of the distribution date instead of inventory value to determine the beneficiaries' proportionate interests.

(b) The following rules are used to determine a beneficiary's share of net income.

(1) The beneficiary is entitled to receive a portion of the net income equal to their proportionate interest in the undistributed principal assets immediately before the distribution date.
(2) Do not include property specifically given to a beneficiary or pecuniary amounts.
(3) Do not reduce the value of the assets by any unpaid principal obligation.
(4) The distribution date for purposes of calculating the value of the assets may be a date reasonably close to the actual distribution date. It does not have to be the actual distribution date.

(c) The fiduciary must keep adequate records of each beneficiary's interest in the net income. This is particularly critical if the fiduciary does not distribute all of the income to each beneficiary as of a distribution date.

(d) The fiduciary has the discretion to apply these rules to gain or loss realized from the disposition of assets during administration.

Uniform Principal & Income Act

Article 3 Apportionment at Beginning and End of Income Interest

Section 301 When Right to Income Begins and Ends.

(a) An income beneficiary is entitled to net income from the date on which the income interest begins. Income interest begins on the date specified in the trust. If not specified, on the date an asset becomes subject to a trust or successive income interest.

(b) Asset becomes subject to a trust:

(1) On the date transferred to the trust in the case of an asset transferred to a trust during the transferor's life.
(2) On the date of a testator's death in the case of an asset that becomes subject to a trust by reason of a will, even if there is an intervening period of administration.
(3) On the date of an individual's death in the case of an asset that is transferred to a fiduciary by a third party because of the individual's death.

(c) Asset becomes subject to a successive income interest on the day after the preceding income interest ends, even if there is an intervening period of administration to wind up the preceding income interest.

(d) Income interest ends on the day before an income beneficiary dies or another terminating event occurs, or on the last day of a period during which there is no beneficiary to whom a trustee may distribute income.

Section 302 Apportionment of Receipts and Disbursements When Decedent Dies or Income Interest Begins.

(a) An income receipt or disbursement is principal if it is due but unpaid before a decedent dies or before an asset becomes subject to a trust.

(b) A periodic payment is allocated entirely to income and is not apportioned if it is due and paid on or after date of death or after an asset becomes subject to a trust. If an income receipt or disbursement is not periodic, it is treated as accruing from day to day. The portion accrued before the date of death or an income interest begins must be allocated to principal and the balance must be allocated to income.

(c) Defines and clarifies due date. An item of income or an obligation is due on the date the payer is required to make a payment. It a payment date is not stated, there is no due date for purposes of this Act. If an entity fixes a date for determining its shareholders for purposes of distributions, this is the due date for purposes of this Act. If no date is fixed, the declaration date for the distribution is the due date. If payments are normally paid at regular intervals, this is considered a periodic payment.

Section 303 Apportionment When Income Interest Ends.

(a) "Undistributed income" means net income received before the date on which an income interest ends. The term does not include any accrued income or expenses such as periodic payments of interest, rent and dividends. It does not include net income that has been added or required to be added to principal under the terms of the trust.

(b) Undistributed income must be paid to a mandatory income beneficiary. However, if the beneficiary has an unqualified power to revoke more than five percent of the trust immediately before the income interest ends, the undistributed income from the portion of the trust that may be revoked must be added to principal. This exception allows a revocable living trust to distribute the assets to the trust.

(c) The trustee will prorate the final payment when their obligation to a pay a fixed annuity or a fixed fraction of the value of the trust's assets ends.

THE BYRNE CPA FIRM, P.A.

INTEROFFICE MEMORANDUM

TO: TRUST LAWS STUDY GROUP; UNIFORM ACTS SUBCOMMITTEE

FROM: TOM BYRNE JR., CPA

SUBJECT: UNIFORM PRINCIPAL & INCOME ACT OF 1997; PART 1 OF ARTICLE 4

DATE: AUGUST 14, 2009

SUMMARY OF UPIA ACCOUNTING FOCUS

The Uniform Principal and Income Act of 1997 (UPIA), as part of its overall emphasis to modernize trust laws by fully accommodating prudent investor principles, gives trustees updated accounting guidance along with administrative flexibility. The UPIA accounting guidance will support trustee's powers as outlined in the Uniform Prudent Investor Act, adopted by Mississippi in 2006. The UPIA is further modernized with a technical amendments added in 2008.

Trustees will gain full ability to invest under a "total return" perspective and to account for the trust's activities in a more consistent and practical manner. The accounting for principal and income will be more consistent, both from one trust to another, and between trusts and other entities.

The new accounting guidelines will better reflect the economic and business realities of transactions. The UPIA accounting procedures will corroborate with the "total return" investment principles, and together with the trustee's newfound "power to adjust" will better balance and serve all trust settlers and beneficiaries (both income and remainder interests).

SPECIFIC ACCOUNTING & TAX REPORTING PROVISIONS

In basic terms, UPIA Article 4 outlines that all receipts are to be accounted for as income, except for specifically enumerated transactions. UPIA § 401 applies new receipt accounting guidelines to cover receipts from traditional corporations, flow-through entities (Subchapter S corporations, partnerships, LLCs) and from other trusts. The most dramatic change in § 401 stands to be the simple clarification that only actual distributions received from a flow-through entity will be accounted for as income.

UPIA § 401 also provides some bright-line tests for major distributions from an entity that will give fiduciaries some welcome guidance in handling complex business transactions. Additionally, § 401 addresses for the first time real estate investment trusts and regulated investment companies. § 401 synthesized the accounting for short-term capital dividends with tax accounting, changing them from principal to income receipts.

UPIA § 403 creates a workable structure for operating and accounting for unincorporated entities, plugging a major short-coming in current law. UPIA § 406 creates a good provision for zero-coupon bonds. UPIA § 408 provides a practical materiality safe-harbor for fiduciaries.

UPIA § 412 outlines a logical approach to timber accounting, although it highlights the need for fiduciaries to employ modern timber management practices and measurement tools. UPIA § 414 and 415 addresses the accounting for contemporary investment vehicles including options, asset-backed securities and derivatives.

UPIA § 410 and 411 may have a substantial impact as a game-changer for oil & gas activities. This section creates a 90 percent rule that allocates 90% of royalties to principal (with the remainder to income). UPIA § 411 and 412 effectively eliminates the "open mine" rule for royalty interests in oil, gas and timber; and UPIA § 413 largely eliminates the "underproductive property" rule.

UPIA § 409 (with the 2008 amendment) actually aligns accounting for deferred compensation payments with tax accounting by incorporating the IRS' safe harbor for marital deduction trusts. UPIA § 409 gives a fiduciary some certainty in the accounting for deferred comp payments that are otherwise ambiguous.

Accounting and tax reporting matters are also addressed in other sections of the UPIA. UPIA § 303 establishes a readily-determinable rule that limits income due an income beneficiary's estate to that income actually received as of the time of death. UPIA § 505 (as amended) addresses a problematic area by requiring the trustee to compensate beneficiaries for the trust's income tax deductions made available because of the trust's required distributions, and giving the trustee's an algebraic formula to execute this requirement. UPIA § 503 eliminates the requirement for the fiduciary to charge depreciation against income. While welcome for fiduciaries, this will create another divergence between trust accounting and the tax treatment, with the potential for unanticipated logistical problems. UPIA § 502 address the accounting for disbursements made under recent environmental regulations.

QUESTIONS AND CONCERNS

A. The timber accounting provisions will require the fiduciary to gather far more information than they have traditionally to properly account for timber receipts.

B. The accounting for the difference between reported income from "flow-through" entities and the cash distributions is a major paradigm shift that may have unintended implications in practice, particularly during the typical year-end trust accounting and tax reporting cycle. I believe it may be an improvement over current practices, but it is truly different, and I would like to explore some examples of this rule in practice before it becomes Mississippi law.

C. The royalty provisions stand to have a major impact for trusts and estates holding significant royalty interests, not a rare circumstance in Mississippi. Some royalty rich states have retained the 27½ percent depletion allowance while otherwise adopting UPIA.

D. Alabama, among others, has largely replaced the word "trustee" with the word "fiduciary" in their adoption of UPIA. This may be a helpful clarification that Mississippi should consider.

SUMMARY

There seems to be little doubt that the UPIA offers Mississippi substantial improvement to the framework for trust accounting, not the least of which is consistency with most other states. UPIA appears to be the collective wisdom of 40 years of developments in trust administration. It will provide trustees with accounting clarity, consistency and simplicity.

Part 2 - Receipts Not Normally Apportioned

Section 404. Principal Receipts

A trustee shall allocate to principal:

1. Assets received from transferor during the transferor's lifetime;
   Assets received from a decedent's estate;
   Assets received from a trust with a terminating income interest
2. Money or other property received from the sale or change in form of a principal asset, including realized profit (Applicable MS Code 91-17-7 (2)(h) is similar)
3. Proceeds taken by eminent domain (Applicable MS Code 91-17-7 (b) is similar)

Section 405. Rental Property

Amounts received as rent of real or personal property should be allocated to income. (Applicable MS Code 91-17-7 (1)(a) and 91-17-9 (2)(6) is similar)

Comment: any portion of a lease payment that is reimbursement of principal expenditures for improvements may be used to transfer from income to reimburse principal.

Section 406. Obligation To Pay Money

a) Any amount received as interest should be allocated to income. This also includes amounts received as consideration for prepaying principal. (Applicable MS Code 91-17-7 (1)(b) is similar)

b) Trustee shall allocate to principal amounts received from the sale or redemption of an obligation more than one year after it is purchased. This includes any amount received at maturity which is in excess of the purchase price. If the obligation is paid within one year of purchase then any amount received in excess of its purchase price or its value when acquired by the Trust must be allocated to income. (Applicable MS Code 91-17-7 (2)(a) does not distinguish between assets held more than or less than one year)

Comment:

Discount Obligations Subsection (b) applies to all obligations issued at a discount. (treasury bills, savings bonds, zero coupon bonds, discount bonds that pay interest during part of the period before maturity) In order to have one rule that applies to all discount obligations, the Act eliminates the provision in the 1962 Act for the payment to principal of an amount equal to the increase in value of the US Series E bonds. Subsection (b) also applies to inflation-indexed bonds (TIPS) - any increase in principal due to inflation after issuance is principal, upon redemption, if the bond matures more than one year after it is acquired. If it matures within one year, all of the increase, including any attributed to inflation adjustment, is income.

Effect of Section 104. In deciding whether to adjust between principal and income, as granted in §104(a), the trustee may consider the effect on the portfolio as a whole of having a portion of the assets invested in bonds that do not pay interest currently.

(Applicable MS Code 91-17-7 (1)(e) and 19-17-15 Bond Premium and Discount. (1) No provision shall be made for amortization of bond premiums or for accumulation for discount. (2) The increment in value of a bond or other obligation for the payment of money payable at a future time in accordance with a fixed schedule of appreciation in excess of the price is distributable as income.)

<u>Section 407</u>. <u>Insurance Policies</u> and <u>Similar Contracts</u>

a) Trustee shall allocate principal proceeds of a life insurance policy to principal. Trustee shall allocate dividends on an insurance policy to income if premiums are paid from income and to principal if premiums are paid from principal.

b) Proceeds from an insurance contract that insures against loss of occupancy, loss of income, or loss of profits shall be allocated to income.

Part 3, Article 4 – Receipts Normally Apportioned

FDIC policy dictates, "At least once during the calendar year, all assets held in discretionary accounts should be reviewed and evaluated in light of governing instruments and individual account circumstances." If trust departments hold unique assets, even in non discretionary accounts, reliable valuations must be obtained annually. Asset pricing on timber interests, royalties, closely held businesses, limited partnership interests, hedge funds, patents and copyrights, oil and mineral interests, etc. while an integral part of portfolio construction (and fee calculation) is beyond the expertise of most trust department personnel. Trust management routinely seeks outside expertise, evaluations, and appraisals, increasing costs. Trustees hope to avoid transfer of principal and income with investment choices. Most trust departments in Mississippi will not see nor accept the majority of the assets addressed in the article.

Fiduciaries' investment guidance is found primarily in the terms of the governing document. Not only do the investments have to follow the terms of the document, they must be suitable to the needs of the beneficiaries and terms of the trust. A trustee must consider the following in determining investment suitability: financial situation of the trust and the beneficiaries, current investment portfolio (if any), income needs and timing of the needs, tax bracket, and investment objective and risk tolerance. Diversification is an explicit duty. Many of the listed investments while not considered inherently imprudent may not necessarily be suitable. The Uniform Principal & Income Act allows fiduciaries to take greater investment risk in developing a portfolio; however, speculation and outright risk taking is not approved, nor sanctioned in FDIC examination guidelines. Derivatives, options, minerals, etc. while affording diversification, subject the trustee to criticism and possible liability. Intrinsically speculative investments are prohibited. Mineral interests, for example would require specific language in the trust document or written consent of all interested parties.

As creative investment products continue to be marketed to increase total return, the trustee is still under a duty to adhere to the governing document and individual account circumstances. Trust management's investment philosophy, standards of practice and Board of Director oversight dictate a trust department's investment policy. Investment management responsibilities in discretionary accounts, particularly employee benefit accounts require even greater discretion and disclosure.

Section 408 gives the trustee enough flexibility- good
Section 410 is clearer than the annuity approach - good
Section 411 allows the trustee to allocate a larger portion to principal to purchase additional income producing assets - good
Section 412. Bank policy would be to refuse the trust or hire timber experts.
Section 413 allows for reasonable time and considers prior distributions - good
Section 414 Derivatives and options would not be found in the majority of Ms Trust departments.
Section 415 Trust accounting systems do not predict nor tract future income streams

While the Uniform Principal and Income Act addresses these above investment options, few will be found in small trust department's discretionary account portfolios. Trustee flexibility is paramount as so often the trustee relies on third party valuations and accountings. Individual account liquidity needs, trust accounting and pricing services, broker due diligence, statement analysis all increase trustees' risk. There are too many investment alternatives to accept unnecessary risk when the risk can be avoided and still produce reasonable rates of return. Trust administration is difficult because grantors and beneficiaries are difficult. Reasonableness, documentation of investment decisions and establishment of policies and procedures will continue to give the fiduciary protection with clear allocation rules. The current proposed act helps clarify certain allocations and gives fiduciaries flexibility in others as well as increased investment diversity.

Ann Guice, CTFA, CFMP
Senior Vice President/Trust Officer

SUMMARY
UNIFORM PRINCIPAL AND INCOME ACT
ARTICLE 5
ALLOCATION OF DISBURSEMENTS DURING ADMINISTRATION OF TRUST

SECTION 501. DISBURSEMENTS FROM INCOME.

This section provides for the distributions to be made from trust income and is similar, although not identical to, MCA § 91-17-21(1). Such distributions include: one-half of the regular compensation of the trustee and any person providing investment advisory or custodial services; one-half of expenses relating to accounting, judicial proceedings or other matters involving both income and remainder interests; other ordinary expenses in connection with the administration, management, or preservation of trust property and distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal, and expenses of a proceeding or other matters that concerns primarily the income interest; and recurring insurance premiums covering loss of assets or the loss of income from assets (for exampled fire insurance).

SECTION 502. DISBURSEMENTS FROM PRINCIPAL.

This section provides for disbursements that are to be charged to trust principal. Again, in general, these are similar, but not identical, to those contained under current Mississippi law in § 91-17-27(3), and include the following: the remaining one-half of trustee and other fees and expenses described in Section 501; all of the trustee's compensation calculated on principal as a fee for acceptance, distribution, or termination, and disbursements made to prepare property for sale; principal payments on trust debt; expenses of a proceeding that primarily concerns principal; insurance premiums not described in Section 501, for example, *life insurance and title insurance*; estate, inheritance, and other transfer taxes; and distributions relating to environmental matters.

This section also requires the trustee to transfer from principal to income an amount equal to any income from a principal asset that is paid directly to a creditor in reduction of the principal balance of an obligation on which such asset is pledged.

SECTION 503. TRANSFERS FROM INCOME TO PRINCIPAL FOR DEPRECIATION.

This section provides that a trustee <u>may</u>, in its discretion, reimburse a reasonable amount to principal for the depreciation on a principal asset from its net cash receipts. This is not applicable to any real property or tangible personal property used or made available for use by a beneficiary. Also not applicable during estate administration or if the trustee is accounting under § 403 for a business or activity. Current Mississippi law provides for a reasonable depreciation allowance under MCA § 91-17-27(1)(b).

SECTION 504. TRANSFERS FROM INCOME TO REIMBURSE PRINCIPAL.

This section provides that a trustee may, in its discretion, transfer an appropriate amount from income to reimburse principal or provide a reserve for future principal disbursements if the trustee has not been or does not expect to be reimbursed by a third party.

Principal disbursements include the following:

(1) An amount chargeable to income but paid from principal because it is unusually large, including extraordinary repairs;
(2) Capital improvements to a principal asset;
(3) Disbursements made to prepare property for rental;
(4) Periodic payments on an obligation secured by a principal asset to the extent the amount transferred from income for depreciation is less than the periodic payment;
(5) Environmental matters charged to principal under Section 502(a)(7).

By comparison, current Mississippi law permits the trustee to pay unusual amounts by means of reserve over a reasonable period of time under § 91-17-27(2).

SECTION 505. INCOME TAXES.

Taxes based on receipts allocated to income must be paid from income. Taxes based on receipts allocated to principal must be paid from principal. A trust's tax on its share of an entity's taxable income is required to be paid from income or principal to the extent the receipts from the entity are allocable to each. To the extent the trust is taxable on income of the entity which exceeds the amount of total receipts from the entity, the tax must be paid from principal.

Subsection 505(d) requires the trust to increase the receipts payable to a beneficiary to the extent the trust's taxes are reduced by the distribution of those receipts to the beneficiary. Thus the amount of taxes will be reduced due to the deduction to the trust for the amount distributed to the beneficiary. This in turn increases the amount distributable to the beneficiary making the taxes and distributable amount an interrelated calculation. The comments to the 2008 amendments to the Uniform Act included an algebraic formula for calculating the amount of taxes and distribution.

SECTION 506. ADJUSTMENTS BETWEEN PRINCIPAL AND INCOME.

A fiduciary is permitted to make adjustments between income and principal to offset economic or tax benefits between the beneficiaries resulting from tax elections, distributions or taxation of income of an entity's income that is not distributed.

Requires mandatory adjustment from income to principal for benefits resulting from reductions in the estate tax marital deduction or charitable deduction resulting from deductions claimed on the income tax return as opposed to the estate tax return.

To: Lynne Green

From: Bubba Neely

Re: Article 6 of the Uniform Principal and Interest Act

Article 6 of the Uniform Principal and Income Act contains provisions relating to the construction of the act, severability, repeal of existing law, effective date, applicability to existing trusts and estates and transitional provisions that relate to marital deduction trusts.

Section 601 provides that in applying and construing the act consideration must be given to the need to promote uniformity of the law among the states that enact it.

Section 602 contains a severability clause.

Section 603 is a repeal provision. The uniform act leaves blanks in this section to be filled in by the adopting state. The existing Revised Uniform Principal and Income Law (Sections 91-17-1 through 91-17-31) appear to be the only provisions in Mississippi Law that need to be repealed.

Section 604 is an effective date clause. An effective date of January 1, 2011, would probably be the earliest practical date that the act should take effect.

Section 605 provides that the act applies to every trust or decedents estate existing on the effective date of the act except as otherwise expressly provided in the will or the trust.

Section 606 provides for the application of Section 409 of the act to trusts described in Section 409(d) of the act (marital deduction trusts that qualify under Section 2056(b)(7) and Section 2056(b)(5) of the Internal Revenue Code). Section 409 provides for the allocation of payments from deferred compensation, annuities and similar payments. Section 606 provides that Section 409 applies to the above described marital deduction trusts from and after:

(1) The date of the decedent's death if the trust is not funded as of the effective date of the act.

(2) The date of the decedent's death If the trust is initially funded in the calendar year in which the act takes effect .

(3) January 1 of the year the act takes effect if the trust is not described in (1) or (2).