



## **SSHHH! Should Trustees Speak Up About Quiet Trusts?**

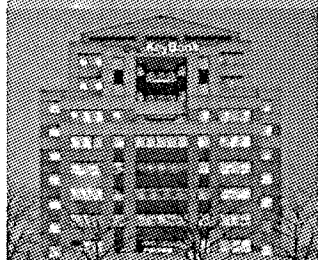
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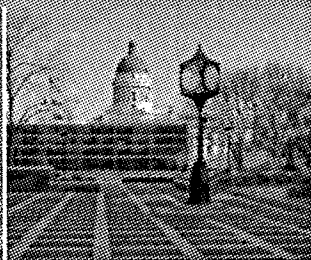
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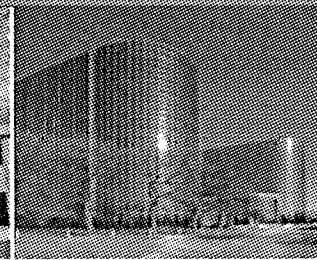
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# SSHHH! Should Trustees Speak Up About Quiet Trusts? Materials

## New York Statutes

1. SCPA 2309
2. SCPA 2306
3. Proposed New York Trust Code

## Other State Laws

4. Arkansas - A.C.A. 28-73-105
5. North Carolina - N.C. Gen. Stat. §36C-1-105
6. North Dakota - N.D. Cent. Code, §59-09-05
7. Delaware - 12 Del. C. §3339
8. Florida - Fla. Stat. §736.0306
9. Illinois - 760 ILCS 3/307

## Cases

10. *Friedrich v. Klaristenfel*, 195 A.D.3d 597 (2d Dept. 2021)
11. *Matter of Kassover*, 124 Misc.2d 630 (Surr. Ct. Nassau Co. 1984).

## Articles

12. Jennifer F. Hillman and Joseph La Ferlita, *SSHHH! Should Trustees Speak Up About Quiet Trusts?*, NYLJ January 31, 2022
13. Kent D. Schenkel, *Silent Trusts Are Trending: Will They Hold Trustees To Account?*, ACTEC Law Journal, Volume 47, Fall 2021.
14. Hon. C. Raymond Radigan and Jennifer F. Hillman, *Now, More Than Ever, New York Needs a Directed Trust Statute*, NYLJ, May 3, 2021
15. Joseph La Ferlita, *Moving Forward: Modernizing and Consolidating N.Y. Trust Law*, NYLJ, January 29, 2013

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NY CLS SCPA § 2309

Current through 2022 released Chapters 1-12

*New York Consolidated Laws Service > Surrogate's Court Procedure Act (Arts. 1 — 28) > Article 23  
Costs, Allowances and Commissions (§§ 2301 — 2313)*

**§ 2309. Commissions of trustees, of donees of powers during minority and of donees of powers in trust under wills of persons dying, or lifetime trusts established, after August 31, 1956.**

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1. On the settlement of the account of any trustee or donee of a power in trust under the will of a person dying after August 31, 1956, or under a lifetime trust established after August 31, 1956, the court must allow to him or her his or her reasonable and necessary expenses actually paid by him or her and if he or she be an attorney of this state and shall have rendered legal services in connection with his or her official duties, such compensation for his or her legal services as shall appear to the court to be just and reasonable and in addition thereto it must allow to the trustee or donee of a power in trust for his or her services as trustee or donee of a power in trust a commission from principal or from the property subject to the power in trust, for paying out all sums of money constituting principal or property subject to the power in trust at the rate of 1 per cent.
2. In addition to the commission allowed by subdivision 1 hereof a trustee or donee of a power in trust shall be entitled to annual commissions at the following rates:
  - (a) \$10.50 per \$1,000 or major fraction thereof on the first \$400,000 of principal or property subject to the power in trust.
  - (b) \$4.50 per \$1,000 or major fraction thereof on the next \$600,000 of principal or property subject to the power in trust.
  - (c) \$3.00 per \$1,000 or major fraction thereof on all additional principal or property subject to the power in trust.

Such annual commissions shall be computed either on the value of the principal of the trust or of the property subject to the power in trust at the end of the period for which the commissions are payable or, at the option of the trustee or donee of the power in trust, on the value of the principal of the trust or of the property subject to the power in trust at the beginning of such period, provided that the option elected by the trustee or donee of the power in trust for the first period for which such commissions are payable shall be used during the continuance of the trust or of the power in trust and shall be binding

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on any successor or substitute trustee or trustees, donee or donees. In the case of a trust which prior to January 1, 1994 computed annual commissions on the basis of a 12 month period (other than a calendar year), the trustee's prior election of such 12 month period shall be binding unless, prior to January 1, 1995, the trustee makes a new election to compute annual commissions on the basis of a calendar year either on the value of the principal of the trust at the end of, or at the option of the trustee at the beginning of, the calendar year for which the commissions were payable, which new election shall be used during the remaining continuance of the trust and shall be binding on any successor or substitute trustee or trustees. The computation shall be made on the basis of a 12-month period but the amount so computed payable to a trustee shall be proportionately reduced or increased for any payments made in partial distribution of the trust or the receipt of any additional property into the trust within such period and shall be proportionately reduced in any period for which such commissions are payable to the trustee if the period is less than 12 months. For the purpose of computing the annual commissions the value of any principal asset when received by the trust or donee of a power in trust shall be the presumptive value of the asset at the beginning and end of the period for which such commissions are payable. In computing the value of the principal of the trust or of the property subject to the power in trust the trustee or donee of the power in trust may use the presumptive value in respect of any principal asset or may use the actual value of the asset. On the settlement of the account of the trustee or donee of a power in trust any person interested may dispute the amount of any commission claimed or retained. The burden of proving that the actual value of any principal asset or asset subject to the power in trust differs from its presumptive value is upon the trustee or donee of a power in trust or other person claiming the difference.

3. Unless the will or lifetime trust instrument otherwise explicitly provides the annual commissions allowed by subdivision 2 shall be payable one-third from the income of the trust or property subject to the power in trust and two-thirds from the principal of the trust or property subject to the power in trust. However, in the case of a trust whose definition of income is governed by section 11-2.4 of the estates, powers and trusts law or a charitable remainder annuity trust or a charitable remainder unitrust, as defined in section six hundred sixty-four of the Internal Revenue Code of nineteen hundred eighty-six, as amended, such annual commissions shall be payable from the corpus of any such trust after allowance for the annuity or unitrust amounts and shall not be payable out of such annuity or unitrust amounts.

4. The commissions allowed by subdivision 2 may be retained by a trustee provided he or she furnishes annually as of a date no more than 30 days prior to the end of the trust year selected by the trustee, to each beneficiary currently receiving income, and to any other beneficiary interested in the income and to any person interested in the principal of the trust who shall make a demand therefor and by a donee of a power in trust if he or she furnishes annually as of a date no more than 30 days prior to the end of the calendar year to the beneficiary of the power in trust, a statement showing the principal assets on hand on that date, and at least annually or more frequently if the trustee or donee of the power in trust so elects, a statement showing all his or her receipts of income and principal or property subject to the power in trust during the period with respect to which the statement is rendered including the amount of any commissions retained

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and the basis upon which the commissions were computed. A trustee or donee of a power in trust shall not be deemed to have waived any commissions by reason of his or her failure to retain them at the time when he or she becomes entitled thereto; provided however that in the case of a trust commissions payable from income for any given trust year shall be allowed and retained only from income derived from the trust during that year and shall not be supplied from income on hand in respect of any other trust year and in the case of property subject to a power in trust commissions payable from income for any given calendar year shall be allowed and retained only from income derived from the property during that year and shall not be supplied from income on hand in respect of any other calendar year. If a beneficiary receiving income does not desire to be furnished with any such statements his or her advice to the trustee or to the donee of the power in trust to that effect in writing shall thereafter excuse the trustee or donee of the power in trust from furnishing such statement to the beneficiary unless and until the beneficiary requests such annual statements from the trustee or donee of the power in trust.

## 5.

- (a) During the continuance of a trust created solely for public, religious, charitable, scientific, literary, educational or fraternal uses and during the period of continuance of such a trust after the termination of a life use or uses the trustee shall be entitled to and may retain commissions from income in an amount annually equal to 6 per cent of income collected in each year.
- (b) In the case of a trust created solely for public, religious, charitable, scientific, literary, educational or fraternal uses the trustee shall not be entitled to any commission from principal.
- (c) In the case of such a trust which continues after the termination of the measuring life use or uses the trustee for the period of the measuring life use or uses shall be entitled to commissions from income and principal at the rates and according to the terms specified in subdivision 2 and except in respect of principal paid out to a charity or for charitable uses shall be entitled to a commission for distributing all sums of principal at the rate specified in subdivision 1.

## 6.

- (a) Subject to section 2313 regarding multiple commissions of executors, trustees, or donees of a power in trust created under wills of persons dying, or lifetime trusts established, after August 31, 1993, if the gross value of the principal of the trust or of the property subject to the power in trust accounted for amounts to \$400,000 or more and there is more than 1 trustee or donee each trustee or donee is entitled to the full compensation for paying out principal allowed herein to a sole trustee or donee unless there are more than 3, in which case the compensation to which 3 would be entitled must be apportioned among the trustees or donees of the power in trust according to the services rendered by them respectively unless they shall have agreed in writing among themselves to a different apportionment which, however, shall not provide for more than one full commission for any one of them. If the gross value of the principal of the trust or of the property subject to the power in trust accounted for is:

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- (i) less than \$100,000 and there is more than 1 trustee or donee of the power in trust, the full compensation for paying out principal allowed herein to a sole trustee or donee of the power in trust must be apportioned among them according to the services rendered by them respectively, or
- (ii) \$100,000 or more but less than \$400,000, each trustee or donee of the power in trust is entitled to the full compensation for paying out principal allowed herein to a sole trustee or donee of the power in trust unless there are more than 2 trustees or donees of the power in trust in which case the full compensation for paying out principal allowed herein to 2 trustees or donees of a power of trust must be apportioned among them according to the services rendered by them respectively, unless the trustees or donees of the power in trust shall have agreed in writing between or among themselves to a different apportionment which, however, shall not provide for more than one full commission for any one of them.
- (b) Subject to section 2313 regarding multiple commissions of executors, trustees, or donees of a power in trust created under wills of persons dying, or lifetime trusts established, after August 31, 1993, if the value of the principal of the trust or of the property subject to the power in trust for the purpose of computing the annual commissions allowed by subdivision 2 amounts to \$400,000 or more and there is more than one trustee or donee of a power in trust each trustee or donee of a power in trust is entitled to the full annual commission allowed herein to a sole trustee or donee of a power in trust unless there are more than 3, in which case the annual commissions to which 3 would be entitled must be apportioned among the trustees or donees of the power in trust according to the services rendered by them respectively unless the trustees or donees of the power in trust shall have agreed in writing among themselves to a different apportionment which, however, shall not provide for more than one full annual commission for any one of them. If the value of the principal of the trust or of the property subject to the power in trust for the purpose of computing the annual commission allowed by subdivision 2 amounts to:
- (i) less than \$100,000 and there is more than 1 trustee or donee of the power in trust, the annual commission allowed herein to a sole trustee or donee of a power in trust must be apportioned among the trustees or donees of the power in trust according to the services rendered by them respectively, or
- (ii) \$100,000 or more but less than \$400,000, each trustee or donee of the power in trust is entitled to the full annual commission allowed herein to a sole trustee or donee of a power in trust unless there are more than 2 trustees or donees of the power in trust in which case the full annual commissions allowed herein to 2 trustees or donees of a power in trust must be apportioned among them according to the services rendered by them respectively, unless the trustees or donees of the power in trust shall have agreed in writing between or among themselves to a different apportionment which, however, shall not provide for more than one full annual commission for any one of them. However, if from a trust or from property subject to a power in trust having a value of \$400,000 or more, or if from a trust or from property subject to a power in trust having a value of

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\$100,000, or more but less than \$400,000, as the case may be, at the beginning of a trust year or of the calendar year any payments in partial distribution of the trust or of the property subject to the power in trust shall be made during the trust or calendar year so as to reduce the trust or the property subject to the power in trust to a value of less than \$400,000 or \$100,000, as the case may be, at the end of the trust or calendar year, then the annual commissions allowed herein shall, on a proportionate basis, be those allowed to trustees of a trust or to donees of a power in trust over property having a value of \$400,000 or more, or of a trust or to donees of a power in trust over property having a value of \$100,000 or more but less than \$400,000, as the case may be, for the period from the beginning of the trust or calendar year to the date of the distribution and shall, on a proportionate basis, be those allowed to trustees of a trust or to donees of a power in trust over property having a value of either \$100,000 or more but less than \$400,000 or less than \$100,000, as the case may be, for the remainder of the trust or calendar year and the part of such commissions payable from principal and computed from the beginning of the trust or calendar year to the date of distribution shall be charged ratably to the property remaining in the trust or still subject to the power in trust after such distribution and to the property distributed from the trust or to the beneficiary of the power in trust on the basis of their respective values. Further, if during a trust or calendar year additional property shall be received into a trust which had a value of less than \$100,000 or by a donee of a power in trust the property subject to which had a value of less than \$100,000, or into a trust which had a value of \$100,000 or more but less than \$400,000 or by a donee of a power in trust the property subject to which had a value of \$100,000 or more but less than \$400,000, as the case may be, at the beginning of the trust year or calendar year, so that because of the additional property the trust or the property subject to the power in trust has a value of \$100,000 or more but less than \$400,000, or of \$400,000 or more, as the case may be, at the end of the trust or calendar year, then the annual commissions allowed herein to the trustee or to the donee of the power in trust shall, on a proportionate basis, be those allowed to trustees of a trust or to donees of a power in trust over property having a value of less than \$100,000, or to trustees of a trust or to donees of a power in trust over property having a value of \$100,000 or more but less than \$400,000, as the case may be, for the period from the beginning of the trust or calendar year to the date of the receipt of the additional property and shall, on a proportionate basis, be those allowed to trustees of a trust or to donees of a power in trust over property having a value of \$100,000 or more but less than \$400,000, or to trustees of a trust or to donees of a power in trust over property having \$400,000 or more, as the case may be, for the remainder of the trust or calendar year.

(c) Notwithstanding any provision of paragraphs (a) and (b) of this subdivision to the contrary, if during the continuance of a trust not measured at any time directly or indirectly by a life or lives or during the continuance of a trust after the termination of the measuring life or lives, the annual income of the trust amounts to \$4,000 or more and there is more than 1 trustee, each trustee is entitled to the full commissions allowed under subdivision 5 to a sole trustee unless there are more than 2, in which case



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the commissions to which 2 trustees would be entitled must be apportioned among the trustees according to the services rendered by them respectively unless they shall have agreed in writing among themselves to a different apportionment which, however, shall not provide for more than one full commission to any one of them. If the annual income of the trust amounts to less than \$4,000 and there is more than 1 trustee the commissions to which a sole trustee would be entitled under subdivision 5 must be apportioned among the trustees according to the services rendered by them respectively unless they shall have agreed in writing among themselves to a different apportionment.

7. Where a trustee or donee of a power in trust is for any reason entitled or required to collect the rents of and manage real property the net amount of rents collected and not the gross amount shall be used in making computation of commissions allowed by subdivision 5 and in addition to the commissions herein provided he or she shall be allowed and may retain for such services 6 percent of the gross rents collected, but there shall be only one such additional commission regardless of the number of trustees or donees of the power in trust. If there are 2 or more trustees or donees of the power in trust the additional commission herein provided for must be apportioned among them according to the services rendered by them respectively unless they shall have agreed in writing among themselves to a different apportionment.

8. If a trustee or donee of a power in trust is either authorized or required by the terms of the will to accumulate income for any purpose permitted by law he or she shall be entitled to commissions from the income so accumulated, including income derived from the investment of such accumulated income, at the rate of 2 percent of the first \$2,500 of such income distributed during the administration of the trust and 1 percent of all such income distributed in excess of \$2,500 and he or she may retain such commissions at the time or times such income is distributed.

9. The value of any property to be determined in such manner as directed by the court and the increment thereof received, distributed or delivered, shall be considered as money in making computation of commissions. Whenever any portion of the dividends, interests or rents payable to a trustee or to a donee of a power in trust is required by any law of the United States or other governmental unit to be withheld by the person paying it for income tax purposes, the amount so withheld shall be deemed to have been collected.

10. Where the will provides a specific compensation for a trustee or for a donee of a power in trust he or she is not entitled to any other allowances for his or her services.

11. For the purposes of this section, the term "trustee" shall mean any trustee who is not a corporate trustee and the term "donee of a power in trust" shall mean any such donee including a donee of a power during minority who is not a corporate fiduciary provided, however, that as used in subdivision 6 of this section, the term trustee shall include a corporate trustee and further provided that the term "property subject to the power in trust" shall include property subject to a power during minority.

## History

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## NY CLS SCPA § 2306

Current through 2022 released Chapters 1-12

*New York Consolidated Laws Service > Surrogate's Court Procedure Act (Arts. 1 — 28) > Article 23  
Costs, Allowances and Commissions (§§ 2301 — 2313)*

### **§ 2306. Annual statements to be furnished to beneficiaries**

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Any trustee, donee of a power during minority or donee of a power in trust who is not required to furnish annual statements under either 2308 or 2309 because he or she has not retained annual commissions shall nevertheless be required to furnish the annual statements referred to in those sections to any beneficiary receiving income or any person interested in the principal of the trust who shall request such statements, or in the case of a power during minority or of a power in trust, to the beneficiary of the power in trust, or to a person to whom a payment not exceeding \$10,000 could be made under subdivision 1 of section 2220 of this chapter.

### **History**

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Add, L 1966, ch 953, eff Sept 1, 1967; L 2019, ch 601, § 1, effective January 1, 2020.

Annotations

### **Notes**

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Prior Law:

Earlier statutes: SCA § 254.

Revision Notes:

Surr Ct Act § 254 with minor changes in phraseology. No change in substance is intended. See Report No. 7.11B, Legis Doc (1964) No. 19, pp. 684–690.

Editor's Notes

Laws 2019, ch 601, § 7, eff January 1, 2020, provides:

## NY CLS SCPA § 2306

§ 7. This act shall take effect on the first of January next succeeding the date on which it shall have become a law.

### Amendment Notes

The 2019 amendment by ch 601, § 1, added “donee of a power during minority or donee of a power in trust”, substituted “he or she” for “he”, and added “or in the case of a power during minority or of a power in trust, to the beneficiary of the power in trust, or to a person to whom a payment not exceeding \$10,000 could be made under subdivision 1 of section 2220 of this chapter.”

## Commentary

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### Committee Comments

#### 2019 Recommendations of the Surrogate’s Court Advisory Committee:

The Committee recommends an amendment to the SCPA to create rules governing the commissions of donees of powers in trust, including donees of powers during minority, identical to the existing rules governing commissions of trustees.

The concept of a “power in trust” is long established in New York law and were given great importance by the Revised Statutes enacted in 1829-1830. Under those statutes, trusts could be created for only limited purposes and failed attempts to create trusts created instead powers in trust in the purported trustees. Current law in EPTL 10-3.1(b) refers to “a power during minority to manage property vested in an infant” as one of the powers which is not a power of appointment but to which the provisions of Article 10 generally apply. Such a donee is included in the definition of “fiduciary” in the EPTL (EPTL 2-1.7) and in the SCPA (103(21)) (both referring to “donee of a power during minority”).

It is clear, however, that donees of a power in trust are not limited to donees holding the power during the minority of the beneficiary. Although the express statutory references to powers in trust refer only to powers to manage property vested in an infant, EPTL 10-10.1, which expressly retains as the law of New York the common law of powers except as modified by Article 10, the statement by the Bennett Commission that this provision does not invalidate other powers not specifically mentioned<sup>1</sup>, and case law<sup>2</sup> clearly indicate that a power in trust to manage property vested in an incapacitated person does exist under New York law.

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<sup>1</sup> 4th Report of Temporary State Comm. on Modernization, Revision and Simplification of Law of Estates, Fourth Report, N.Y. Legis. Doc., 1965, No. 19, at 24.

<sup>2</sup> See Matter of Schaper, 151 Misc.2d 923, 574 N.Y.S.2d 137 (Sur. Ct. New York County 1991).

## NY CLS SCPA § 2306

The question of compensation of such donees of the various powers to manage property belonging to others is not clearly answered by our statutes. *Matter of Chase Manhattan Bank (Golding)*<sup>3</sup> authorized advance payment of commissions under SCPA 2311 to a corporate trustee acting as donee of a power to manage property during minority under a lifetime trust. The court also ordered that the calculation of commissions was to be made under SCPA 2307 which governs payments to fiduciaries other than trustees because the donee was not a trustee. The court did suggest that commissions would more appropriately be calculated under SCPA 2308 and 2309, which govern commissions of trustees. Today SCPA 2312 governing the commissions of corporate trustees would be relevant to the compensation of corporate donees.

The amendments to the SCPA make the provisions applicable to trustees' commissions applicable to all donees of powers to manage property whether during minority or vested in an incapacitated person or of any other sort, with one exception. Under New York law, a failed attempt to appoint by will an individual to be the guardian of the property of an infant result in the nominated person being a donee of a power to manage property during minority. Under SCPA 1714, this donee "has all the rights and duties of a guardian and shall be entitled to receive the commissions allowed to a guardian." Donees governed by SCPA 1714 are excluded from the changes made by this proposal.

The specific sections of the SCPA to be amended are 2308, 2309, and 2312 governing trustees' commissions, thus codifying *Chase Manhattan Bank (Golding)* and extending its holding to other donees of a powers in trust, and 2313 dealing with multiple commissions of executors or trustees under wills and lifetime trusts established after August 31, 1993.<sup>4</sup>

The amendments to SCPA 2308, 2309, and 2312 use the language "donee of a power to in trust" in order to make sure that every sort of power in trust that could still exist under the common law is included in the new provisions. Each section has also been amended to make it clear that the new language includes donees of powers during minority. The phrase "donee of a power in trust" has been added to every reference to "trustee" except in those provisions dealing with trustees of charitable trusts and those providing for the transition from the previous rules governing commissions. Because donees of a power in trust will be entitled to trustees' commissions only from the enactment of these amendments, the transition rules are not relevant. The term "property subject to the power in trust" has been used as the equivalent of "trust property" and the term "calendar year" has been added to references to "trust year" because the property subject to the power does indeed belong to the beneficiary of the power, the items of income and deduction attributable to it would be included in the beneficiary's gross income

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<sup>3</sup> 129 Misc.2d 952, 494 N.Y.S.2d 660 (Sur. Ct. New York County 1985).

<sup>4</sup> The proposed amendments deal only with the computation of commissions and do not deal with the question of jurisdiction over donees of powers created in lifetime trusts that was at the heart of the question in *Matter of Chase Manhattan Bank (Golding)*. Codifying that part of the holding requires changing the phrase "from which his letters issued" with the phrase "the court having jurisdiction over the estate or trust" in SCPA 2011 which, as the opinion in *Matter of Chase Manhattan Bank (Golding)* points out, is the meaning of the phrase under CPLR 8005. Such an amendment is beyond the remit of this project.

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reported on form 1040 and the tax year would indeed be the calendar year. Finally, consideration should be given to making the amendments applicable to donees of powers during minority and of other powers in trust effective on January 1 of the year following their enactment, thus making transition rules unnecessary.

## Research References & Practice Aids

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### Jurisprudences:

106 NY Jur 2d Trusts § 381. .

### Treatises

#### Matthew Bender's New York Civil Practice:

6 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶2306.01.

*Warren's Heaton on Surrogates' Court § 46.05.* Powers and Duties Specific to a Trustee.

*Warren's Heaton on Surrogates' Court § 100.01.* Voluntary Accounting by Trustee .

#### Warren's Heaton on Surrogate's Court Practice:

*Warren's Heaton on Surrogates' Court § 103.03.* Commissions of Non-Corporate Trustees Under Will of a Person Dying, or Under a Lifetime (Inter Vivos) Trust Created, on or Before August 31, 1956.

### Hierarchy Notes:

*NY CLS SCPA, Art. 23*

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STATE OF NEW YORK

[XXXX]

20[XX]-20[XX] Regular Sessions

IN ASSEMBLY

[•], 20[XX]

Introduced by [•]

AN ACT to amend the estates, powers and trusts law, the surrogate's court procedure act, the banking law and the civil practice, law and rules in relation to a new trust code

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The Estates, Powers and Trusts Law is amended by adding a new article 7-A to read as follows:

ARTICLE 7-A  
NEW YORK TRUST CODE  
SUMMARY OF ARTICLE

Part 1. In General

Section 7-A-1.1 Short title.

- 7-A-1.2 Scope.
- 7-A-1.2-A Purchase-money resulting trust abolished.
- 7-A-1.3 Definitions.
- 7-A-1.4 Knowledge.
- 7-A-1.5 Default and mandatory rules.
- 7-A-1.6 Common Law and principles of equity.
- 7-A-1.7 Governing law.
- 7-A-1.8 Principal place of administration.
- 7-A-1.9 Methods and waiver of notice.
- 7-A-1.10 Others treated as qualified beneficiaries.
- 7-A-1.11 Nonjudicial settlement agreements.
- 7-A-1.12 [Reserved].

EXPLANATION—Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

Part 2. Judicial Proceedings

Section 7-A-2.1 Role of court in administration of trust.

7-A-2.2 Jurisdiction over trustee and beneficiary.

Part 3. Representation [Reserved]

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

Section 7-A-4.1 Methods of creating trust.

- 7-A-4.2 General requirements for trust creation.
- 7-A-4.2-A Specific rules for creation of lifetime trusts.
- 7-A-4.1-B Trustee of passive trust not to take.



- 7-A-4.2-C When trust interests not to merge.
- 7-A-4.3 Trusts created in jurisdictions outside of New York.
- 7-A-4.4 Trust purposes.
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PART 1. In General

§ 7-A-1.1 Short title

This article may be cited as the New York Trust Code.

§ 7-A-1.2 Scope

(a) This article applies to express trusts (as defined by section 7-A-1.3(8)), to resulting trusts, and where expressly made applicable to bank accounts in trust form.

(b) This article does not apply to constructive trusts.

(c) Cross-reference. Article 8 also applies to charitable trusts.

§ 7-A-1.2-A Purchase-money resulting trust abolished

A disposition of property to one person for a valuable consideration paid, in whole or in part, by another is presumed fraudulent as against the creditors of the payor at the time of such disposition and, unless the presumption is rebutted, a trust results in favor of such creditors to the extent necessary to satisfy their claims; but title to the property vests in the transferee and no trust results to the payor unless the transferee either:

(a) Takes such property, in his own name, as an absolute transfer without the consent or knowledge of the payor; or

(b) In violation of some trust, purchases the property so transferred with money or property belonging to another.

§ 7-A-1.3 Definitions

In this article:

(1) "Action," with respect to an act of a trustee, includes a failure to act.

(2) "Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code.

(3) "Beneficiary" means a person that:

(A) has a present or future beneficial interest in a trust, vested or contingent, including a person who would be entitled to trust property if a resulting trust arose, or

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

(4) "Breach of trust" means a violation by a trustee or trust director of a duty imposed on that trustee or trust director or trustee by the terms of the trust, this article, or law of this state other than this article.

(5) "Charitable trust" means a trust, or portion of a trust, created for a charitable purpose described in section 8-1.1.

(6) "Creator" means a person defined in section 1-2.2.

(7) "Environmental law" means a federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.

(8) "Express trust," is defined as follows:

(A) Except as provided in paragraph (B), an express trust means a fiduciary relationship with respect to property arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for:

(i) one or more persons, at least one of whom is not the sole trustee, or

(ii) the benefit of charity, or

(iii) the care of an animal as provided in section 7-A-4.8, or

(iv) a noncharitable purpose as provided in section 7-A-4.9,

and includes a trust created pursuant to any other statute, judgment, or decree that requires the trust to be administered in the manner of an express trust.

(B) An express trust shall not include a trust for the benefit of creditors, a business trust where certificates of beneficial interest are issued to the beneficiary, an investment trust, voting trust, a security instrument such as a deed of trust and a mortgage, a liquidation or reorganization trust, a trust for the sole purpose of paying dividends, interest, interest coupons, salaries, wages, pensions or profits, a trust created as an individual retirement account pursuant to section 408(a) of the Internal Revenue Code, instruments wherein persons are mere nominees for others, any other type of trust created for a business or commercial purpose, or a bank account in trust form.

(9) "Guardian for property" means a guardian for property management as appointed under SCPA article 17 or 17A or under article 81 of the mental hygiene law or any person appointed by a court outside of New York for property management of an incapacitated person. The term does not include a guardian ad litem.

(10) "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust.

(11) "Internal Revenue Code" means the United States Internal Revenue Code of 1986, as amended. Such references, however, shall be deemed to constitute references to any corresponding provisions of any subsequent federal tax code.

(12) "Irrevocable trust" means a trust that is not a revocable trust.

(13) "Jurisdiction," with respect to a geographic area, includes a State or country, or similar governmental entity.

(14) "Lifetime trust" means an express trust, including all amendments thereto, created other than by will.

(15) "Person" means a person as defined in section 1-2.12. As the context indicates, person may include more than one person.

(16) "Power of withdrawal" means a presently exercisable general power of appointment, as defined in sections 10-3.2(b) and 10-3.3(b) other than a power:  
(A) limited by an ascertainable standard; or (B) exercisable by any person only upon consent of a person holding a substantial adverse interest.

(17) "Property" means property as defined by section 1-2.15.

(18) "Qualified beneficiary" means a beneficiary who, on the date the beneficiary's status as qualified beneficiary is determined:

(A) is entitled to receive or is a permissible recipient of trust income or principal; or

(B) would be entitled to receive or would be a permissible recipient of trust income or principal if the interests of the recipients described in subparagraph (A) terminated on that date without causing the trust to terminate; or

(C) would be entitled to receive or would be a permissible recipient of trust income or principal if the trust terminated on that date.

(19) "Resulting trust" means a trust that arises in favor of the settlor or the settlor's successor's interest on the failure of an express trust in whole or in part.

(20) "Revocable" as applied to a trust, means revocable by a trust contributor without the consent of a person holding a substantial adverse interest.

(21) "Settlor" means the person, including the testator, who

(A) initially transfers property of the person to a trustee; or

(B) declares as the owner of property that the person holds identifiable property as trustee; or

(C) exercises a power of appointment in favor of a trustee, where the terms of such trust are created in connection with the exercise of the power of appointment, including the exercise by a trustee of a discretionary power in favor of a trustee.

For purposes of this subdivision, if a person authorized to act on behalf of a person acts with respect to property owned by that person, the person owning the property shall be deemed to have taken the action.

(D) Cross-references. See sections 3-3.7 (devise to trustee) and 13-3.3 (beneficiary designation of trustee).

(22) "Spendthrift provision" means the restraint on the voluntary transfer of a beneficiary's interest as provided by the terms of a trust or by application of sections 7-A-5.1 and 7-A-5.2 and the restraint on involuntary transfer of a beneficiary's interest as provided by any statutory rule restraining the involuntary transfer of a beneficiary's interest. "Terms of a trust" includes any provision stating that the interest of a beneficiary is held subject to a "spendthrift trust" or words of similar import.

(23) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band recognized by federal law or formally acknowledged by a State.

(24) "Terms of a trust" means

(a) except as otherwise provided in paragraph (b), the manifestation of the settlor's intent regarding a trust's provisions as:

(i) expressed in the trust instrument; or

(ii) established by other evidence that would be admissible in a judicial proceeding; or

(b) the trust's provisions as established, determined, or amended by:

(i) a trustee or trust director in accord with applicable law; or

(ii) court order; or

(iii) nonjudicial settlement agreement under section 7-A-1.11.

(25) "Testamentary trust" means an express trust created under a will.

(26) "Trust," unless otherwise provided, means a lifetime trust and a testamentary trust but does not include a resulting trust.

(27) "Trust contributor" means

(A) a settlor as defined by subdivision (20) other than a person who exercises, or who is considered to exercise, a special power of appointment in favor of a trustee; or

(B) a person who transfers or is deemed to transfer property owned by that person to the trustee of an existing trust, except to the extent another person has the power to revoke or has a non-lapsing power of withdrawal over the transferred property.

For purposes of paragraph (B):

(i) The exercise of a presently exercisable general power of appointment is deemed to be a transfer of property owned by the powerholder, and

(ii) a person is deemed to transfer property owned by that person if the person's fiduciary actually transfers the property to, or exercises a power of appointment in favor of, a trustee

(C) if more than one person contributes property to the trustee of an existing trust, each person is the trust contributor of the portion of the trust property attributable to that person's contribution, except to the extent another person has the power to revoke or has a non-lapsing power of withdrawal over that portion.

(28) "Trust director" means a person that is granted a power of direction, as defined by section 7-A-9.2(3), to the extent the power is exercisable while the person is not serving as a trustee. The person is a trust director whether or not the terms of the trust refer to the person as a trust director and whether or not the person is a beneficiary, settlor or trust contributor (other than a settlor) of the trust.

(29) "Trust instrument" means a properly executed instrument that contains terms of the trust, including any amendments thereto.

(30) "Trustee" means a person who has accepted an appointment as trustee or has been issued letters of trusteeship. "Trustee" includes an original, additional, and successor trustee, and a co-trustee.

(31) "Willful misconduct" means intentional wrongdoing, not mere negligence, gross negligence or recklessness and "wrongdoing" means malicious conduct or conduct designed to defraud or seek an unconscionable advantage.

§ 7-A-1.4 Knowledge

(a) Subject to paragraph (b), a person has knowledge of a fact if the person:

(1) has actual knowledge of it;

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

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

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

§ 7-A-1.5 Default and mandatory rules

(a) Except as otherwise provided in the terms of the trust, court order or decree or other applicable law, this article governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.

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

- (1) the rules regarding knowledge (as provided in section 7-A-1.4
- (2) the rules for the governing law of a trust (as provided in section 7-A-1.7);
- (3) the rules regarding the principal place of administration (as provided in section 7-A-1.8);
- (4) the rules regarding notice (as provided in section 7-A-1.9);
- (5) the rules regarding other qualified beneficiaries (as provided in section 7-A-1.10);
- (6) the rules for judicial proceedings (as provided in sections 7-A-2.1 and 7-A-2.2);
- (7) the requirements for creating and amending a trust (as provided in sections 7-A-4.1 to 7-A-4.9-A);
- (8) the rules for commencing a proceeding (as provided in section 7-A-4.10(b)) and the limitations on modification and termination (as provided in section 7-A-4.10(c));
- (9) the power of the court to amend or revoke a trust under section 7-A-4.11(c), to modify or terminate a trust under section 7-A-4.12 and sections 7-A-14 through 7-A-4.16 or to combine or divide trusts under section 7-A-4.17;
- (10) the rights of creditors of trust beneficiaries (as provided in part 5);
- (11) the rules regarding the capacity of trust contributors in revocable trusts (as provided in section 7-A-6.1);
- (12) the power of the court to require, dispense with, or modify or terminate a bond (as provided in sections 7-A-7.2(b) and 9.16(b));
- (13) the rules regarding willful misconduct (as provided in sections 7-A-7.3-A(a)(2), 7-A-9.8(b) and (c) and 7-A-9.9(c) and (d);
- (14) the liability and other requirements of an authorized trustee (as provided in section 7-A-7.3-A(b);
- (15) the requirement that a trustee of a testamentary trust provide the court with written notice of resignation (as provided in section 7-A-7.5(d));
- (16) the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust (as provided in section 7-A-8.1). See section 8.14(a) (requiring trustee's actions to be made in good faith);
- (17) the duty to administer the trust, including the duty to exercise reasonable care (as provided in section 7-A-8.4). See sections 7.3(h), 8.5, 8.9, 8.11, 8.12, 10.6 and 10.7 (involving or requiring reasonableness by trustee);
- (18) the duties relating to delegation if a delegation is made (as provided in section 7-A-8.7);
- (19) the duties relating to recordkeeping and identification of property (as provided in section 7-A-8.10);
- (20) Beginning at the death of the later to die of the settlor or the settlor's surviving spouse or after 21 years if the settlor is not an individual, the duty under section 7-A-8.13(a) to respond to the reasonable request of a beneficiary of an irrevocable trust for information related to the administration of a trust;
- (21) Beginning at the death of the later to die of the settlor or the settlor's surviving spouse, or after 21 years if the settlor is not an individual, the duty under section 7-A-8.13(b)(2) and (3) to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their right to request information related to the administration of the trust;
- (22) the duty under section 7-A-8.19(g) and the restrictions on powers (as provided in section 7-A-8.19);
- (23) the duties and liabilities of a trust director (as provided in section 7-A-9.7);

(24) the submission of the trust director to jurisdiction (as provided in section 7-A-9.13);

(25) the rules for the computation of damages (as provided in section 7-A-10.2);

(26) the effect of an exculpatory provision (as provided in 7-A-10.8);

(27) the rights under sections 7-A-10.10 through 7-A-10.13 of a person other than a trustee or beneficiary;

(28) periods of limitation for commencing a judicial proceeding, including sections 7-A-6.4, 7-A-10.5 and 7-A-9.11 and

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

§ 7-A-1.6 Common law and principles of equity

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

§ 7-A-1.7 Governing law

(a) As used in this section:

(1) "Real property" means land or any estate in land, including leaseholds, fixtures and mortgages or other liens thereon.

(2) "Personal property" means any property other than real property, including tangible and intangible things.

(3) "Intrinsic validity" relates to the rules of substantive law by which a jurisdiction determines the legality of a disposition in trust, including the general capacity of the settlor and the rule against perpetuities.

(4) "Effect" relates to the legal consequences attributed under the law of a jurisdiction to a valid disposition in trust.

(5) "Interpretation" relates to the procedure of applying the law of a jurisdiction to determine the meaning of language employed by the settlor where the settlor's intention is not otherwise ascertainable.

(6) "Local law" means the law which the courts of the jurisdiction apply in adjudicating legal questions that have no relation to another jurisdiction.

Notwithstanding the definition of "real property" in this paragraph, whether an estate in, leasehold of, fixture, mortgage or other lien on land is real or personal is determined by the local law of the jurisdiction in which the land is situated.

(b) The intrinsic validity, effect, interpretation and amendment of any term of a lifetime trust, created by a domiciliary or non-domiciliary, and the revocation of a lifetime trust, by a domiciliary or non-domiciliary, shall be governed by:

(1) the law of the jurisdiction designated in the trust instrument unless the designation of that jurisdiction's law is contrary to a mandatory trust rule under section 7-A-1.5(b) or a strong public policy, including the rule against perpetuities, of the jurisdiction having the most significant relationship to the matter at issue, in which case subparagraph (2) shall apply. This state shall not be the jurisdiction having the most significant relationship to any matter at issue that does not involve real property located in this state where the trust instrument designates the law of a jurisdiction other than this state provided none of the trustees are domiciled in this state, whether or not this state is the domicile of the settlor or of any of the beneficiaries; or

(2) in the absence of a controlling designation in the trust instrument, the law of the jurisdiction where the settlor was domiciled at the time the instrument was executed, except that

(i) with respect to real property the law of the situs shall govern, and

(ii) with respect to the interpretation of the terms of the trust applying to personal property the local law of the jurisdiction in which the settlor was domiciled at the time of execution shall govern.



(c) Notwithstanding anything to the contrary in paragraph (b), whenever a person, not domiciled in this state, creates a lifetime trust which provides that one or more terms shall be governed by the laws of this state, such provision shall be given effect by using the local law of this state to determine the intrinsic validity, effect, interpretation and amendment of the designated term or terms and the revocation of a lifetime trust with respect to:

(1) any trust property situated in this state at the time the trust is created;

(2) any trust property situated in this state at the time such property is added to the trust; and

(3) personal property, wherever situated, if the trustee of the trust is a person residing, incorporated or authorized to do business in this state or a national bank having an office in this state.

(d) The law governing any aspect of the administration of a trust, created by a domiciliary or non-domiciliary, is the law so designated in the trust instrument unless the designation of that jurisdiction's law is contrary to a mandatory trust rule under section 7-A-1.5(b) or a strong public policy of the jurisdiction of the trust's principal place of administration, as determined by section 7-A-1.8. If the terms of the trust do not designate the governing law, both of the following apply:

(1) The law of the trust's principal place of administration, as determined under section 7-A-1.8, governs the administration of the trust.

(2) If the trust's principal place of administration is transferred to another jurisdiction under section 7-A-1.8, the law of the new principal place of administration of the trust governs the administration of the trust from the time of the transfer.

(e) Notwithstanding anything to the contrary in paragraph (d), whenever a person, not domiciled in this state, creates a trust which provides that one or more terms for trust administration shall be governed by the laws of this state, such provision shall be given effect by using the local law of this state with respect to:

(1) any trust property situated in this state at the time the trust is created;

(2) any trust property situated in this state at the time such property is added to the trust; and

(3) personal property, wherever situated, if the trustee of the trust is a person residing, incorporated or authorized to do business in this state or a national bank having an office in this state.

(f) Cross-reference. See section 3-5.1 (relating to the choice of law rules involving testamentary trusts) and section 7-A-4.3 (relating to the formal validity of lifetime trusts).

§ 7-A-1.8 Principal place of administration

(a) The terms of a trust designating the principal place of administration of the trust are valid only if there is a sufficient connection with the designated jurisdiction. Without precluding other means for establishing a sufficient connection with the designated jurisdiction, terms of a trust designating the principal place of administration are valid and controlling if:

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

(2) a trust director's usual place of business is located in or a trust director is a resident of the designated jurisdiction; or

(3) all or part of the administration occurs in the designated jurisdiction.

(b) Unless designated under paragraph (a):

(1) If there is one trustee, the principal place of administration of a trust is the trustee's usual place of business for administering trusts or, if the trustee has no such usual place of business, the trustee's residence.

(2) If there are two or more co-trustees, the principal place of administration is:

(A) If there is only one corporate co-trustee, the usual place of business for administering trusts of that trustee;

(B) If there is more than one corporate co-trustee, the place agreed upon by the co-trustees where any corporate co-trustee has its the usual place of business for administering trusts or if the co-trustees do not agree, the place where a majority of the trust administration occurs, or if there is no such place, as a court may determine;

(C) If there is no corporate co-trustee, the place agreed upon by the co-trustees where any co-trustee carries on the work of trust administration or if the co-trustees do not agree, the place where a majority of the trust administration occurs or if there is no such place, as a court may determine.

(c) Notwithstanding paragraph (b), if a corporate trustee is designated as the trustee of a trust and the corporate trustee has offices in multiple states and performs administrative functions for the trust in multiple states, the corporate trustee may designate which is the corporate trustee's usual place of business for administering trusts with respect to a particular trust by providing notice to the qualified beneficiaries and trust directors. The notice is valid and controlling if the corporate trustee has a connection to the jurisdiction designated in the notice, including an office where trustee services are performed and the actual performance of some administrative functions for that particular trust take place in that particular jurisdiction. The subsequent transfer of some of the administrative functions of the corporate trustee to another state or states does not transfer the principal place of administration as long as the corporate trustee continues to maintain an office and perform some administrative functions in the jurisdiction designated in the notice and the corporate trustee does not notify the qualified beneficiaries of a change in the principal place of administration pursuant to paragraph (f).

(d) A trustee may transfer the trust's principal place of administration of a testamentary trust to another State or to a jurisdiction outside of the United States upon the approval of the Court that has most recently issued letters of trusteeship to the trustee of the trust.

(e) A trustee may transfer the principal place of administration of a lifetime trust to another State or to a jurisdiction outside of the United States:

(1) upon the approval of any Court that has jurisdiction over the trustee;  
or

(2) without the approval of any Court and in the absence of any objection by a qualified beneficiary; or

(3) without the approval of any Court or of any beneficiary if the terms of the trust so provide.

(f) A trustee shall notify the qualified beneficiaries of a proposed transfer of a trust's principal place of administration not less than 60 days (and in the case of a charitable trust not less than 90 days) before initiating the transfer. The notice of proposed transfer must include:

(1) the name of the jurisdiction to which the principal place of administration is to be transferred;

(2) The address and phone number of the new location at which the trustee can be contacted;

(3) an explanation of the reasons for the proposed transfer;

(4) the date on which the proposed transfer is anticipated to occur; and

(5) the date, not less than 45 days (and in the case of a charitable trust not less than 60 days) after the giving of the notice, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.

(g) In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the trust property to

a successor trustee designated in the terms of the trust or appointed pursuant to section 7-A-7.4.

(h) If there are two or more co-trustees of a trust, decisions made with respect to actions described in this section are governed by section 7-A-7.3.

(i) Nothing in this section shall limit the application of section 7-A-8.19 to any trust.

(j) Notwithstanding any other provision of this article, the trustee has no duty to inform beneficiaries about the availability of this section and further has no duty to review the trust instrument to determine whether any action should be taken under this section unless requested to do so in writing by a beneficiary then entitled to receive reports and information related to the administration of the trust.

§ 7-A-1.9 Methods and waiver of notice

(a) Notice to a person under this article or the sending of a document to a person under this article must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document to the person's last known place of residence or place of business include (but are not limited to) first-class mail, special mail service, personal delivery, or sending to an email address provided by the intended recipient.

(b) Notice otherwise required under this article or a document otherwise required to be sent under this article need not be provided to a person whose identity or location is unknown to and not reasonably ascertainable by the trustee.

(c) Notice under this article or the sending of a document under this article may be waived by the person to be notified or sent the document.

(d) Notice to an incapacitated person may be given to any guardian for property of such incapacitated person or to a parent or other person with whom such incapacitated person resides.

(e) Notice of a judicial proceeding must be given as provided in the SCPA and other applicable rules of civil procedure.

(f) The notice provision of section 7-A-8.19(i)(2) with respect to the exercise of the power to appoint to an appointed trust under paragraph (a) or (b) of section 7-A-8.19 shall apply in lieu of the notice provision this section.  
§ 7-A-1.10 Others treated as qualified beneficiaries

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

(1) is entitled to receive or is a permissible recipient of trust income or principal;

(2) would be entitled to receive or is a permissible recipient of trust income or principal upon the termination of the interests of others entitled to receive or permissible recipients then receiving or eligible to receive distributions; or

(3) would be entitled to receive or is a permissible recipient of trust income or principal if the trust terminated on that date.

(b) A person appointed to enforce a trust created for the care of an animal or another noncharitable purpose as provided in section 7-A-4.8 or 7-A-4.9 has the rights of a qualified beneficiary under this article.

(c) The attorney general of this State has the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in this State. Nothing in this subdivision shall limit the rights of the attorney general under any other provision of law.

§ 7-A-1.11 Nonjudicial settlement agreements

(a) For purposes of this section, "interested persons" means persons whose consent would be required in order to achieve a binding settlement were the

settlement to be approved by the court determined by taking into account SCPA 315 as if the settlement were the result of a proceeding in which process was required to be served on all persons interested in the trust. The following persons if not described by the foregoing sentence shall be deemed interested persons: the settlor if no adverse income or transfer tax results would arise from the settlor's participation and the currently serving trustee or trustees.

(b) Except as otherwise provided in paragraph (c), interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving the trust.

(c) A nonjudicial settlement agreement is valid only to the extent it (1) does not violate the purposes of the trust unless the settlor is a party to the agreement and (2) includes terms and conditions that could be approved by the court pursuant to this article or other applicable law. In the case of a charitable trust, a nonjudicial settlement agreement is not valid unless the attorney general is a party to the agreement or provides a written statement of no objection to the agreement. Notwithstanding the prior sentence, a nonjudicial settlement agreement shall not be used to transfer the principal place of administration of a testamentary trust or accomplish any of the following actions for which court approval is specifically required: trust termination under section 7-A-4.12(b), modification of dispositive provisions under section 7-A-4.12(b), cy pres reformation under section 8-1.1(c), removal from this state of trust property in a testamentary trust under SCPA 710(4), and appointment of a successor or co-trustee of a testamentary trust under section SCPA 706(2) and 1502.

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

- (1) the interpretation or construction of the terms of the trust;
- (2) the approval of a trustee's report or accounting;
- (3) direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;
- (4) the resignation or appointment of a trustee and the determination of a trustee's compensation;
- (5) transfer of the principal place of administration of a lifetime trust; and
- (6) liability of a trustee for an action or omission to act relating to the trust.

(e) A nonjudicial settlement agreement shall be in writing and executed by all interested persons described in paragraph (a) in the manner required by the laws of this state for the conveyance of real property.

(f) An agreement entered into in accordance with this section is final and binding on all beneficiaries, the trustee and all other persons identified in paragraph (a) as if ordered by a court with jurisdiction over the trust. The failure of a court to approve a nonjudicial settlement agreement as provided in paragraph (g) has no effect on the binding nature of the agreement.

(g) Notwithstanding paragraph (f), any interested person may petition the court to approve or disapprove a proposed or an executed a nonjudicial settlement agreement. Such petition may request a court to determine any issue regarding the agreement including whether the representation as provided in SCPA 315 is adequate, whether the agreement contains terms and conditions that violate the purposes of the trust or whether the agreement contains terms and conditions that the court could properly approve.

(h) A petition described in paragraph (g) must be filed no later than 60 days after the effective date of the agreement absent a showing of good cause why the petition was not timely filed. Process must issue to all other interested persons described in paragraph (a).

(i) An interested person may also commence a proceeding to interpret, apply or enforce a nonjudicial settlement agreement. Process must issue to all other interested persons described in paragraph (a).

(j) Cross-reference. See Section 7-A-4.11 (revocation or amendment of irrevocable trust initiated by consent).

#### PART 2 Judicial Proceedings

##### § 7-A-2.1 Role of court in administration of trust

The rules for court involvement in the administration of a trust are provided by numerous sections of the estates, powers and trusts law, the surrogate's court procedure act, and the civil practice law and rules.

##### § 7-A-2.2 Jurisdiction over trustee and beneficiary

The jurisdiction over trusts, trustees and beneficiaries is provided in article 2 of the SCPA.

#### PART 3 [Reserved]

#### PART 4 Creation, Validity, Amendment, Modification, and Termination of Trust

##### § 7-A-4.1 Methods of creating trust

(a) Subject to the requirements of sections 7-A-4.2, 7-4.2-A, and 7-A-4.4, a trust may be created by:

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

(2) a declaration by the owner of property that the owner holds identified property as trustee;

(3) the exercise of a power of appointment in favor of a trustee where the terms of such trust are created by the exercise of the power of appointment, including the exercise by a trustee of a discretionary power in favor of a trustee; or

(4) a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust.

(b) For purposes of subparagraph (a)(1), a transfer of property shall include a beneficiary designation as provided in section 13-3.3.

(c) Cross-reference. See section 3-3.7 (disposition in will to trustee).

##### § 7-A-4.2 General requirements for trust creation

(a) In addition to the requirements for creating a lifetime trust pursuant to section 7-A-4.2-A and the formality requirements to create a testamentary trust, and subject to section 7-A-4.4, a trust is created under section 7-A-4.1 only if:

(1) the settlor (or a person authorized to act for the settlor who acts for the settlor) has capacity to create a trust, as provided in sections 3-1.1, 4.2-A(e) and 6.1;

(2) the settlor (or a person properly acting on behalf of the settlor) indicates an intention to create the trust;

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

(A) a charitable trust;

(B) a trust for the care of an animal, as provided in section 7-A-4.8; or

(C) a trust for a noncharitable purpose, as provided in section 7-A-4.9;

(4) the trustee has duties to perform, see also section 7-A-4.2-B; and

(5) the same person is not the sole trustee and sole beneficiary. See also section 7-A-4.2-C.

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

§ 7-A-4.2-A Specific rules for creation of lifetime trusts

(a) Any person may by lifetime trust dispose of real and personal property. A natural person who creates a lifetime trust shall be eighteen years of age or older.

(b) Every estate in property may be disposed of by lifetime trust.

(c) Every lifetime trust shall be in writing, and shall be executed by the settlor or the person authorized to act on behalf of the settlor and unless such person is the sole trustee, by at least one other trustee thereof. The signature of the settlor (or the person authorized to act on behalf of the settlor) must be either (i) affixed to the document in the presence of two witnesses, who then affix their signatures to the document, or (ii) acknowledged by the settlor (or the person authorized to act on behalf of the settlor) in the manner required by the laws of this state for the conveyance of real property. If the signature of a trustee is required, the signature of the trustee must be either (i) affixed to the document in the presence of two witnesses, who then affix their signatures to the document, or (ii) acknowledged by the trustee in the manner required by the laws of this state for the conveyance of real property.

(d) A lifetime trust shall be valid as to any assets therein to the extent the assets have been transferred to the trustee. A transfer is not accomplished by recital of assignment, holding or receipt in the trust instrument. An asset will be deemed to have been transferred to a trustee on the delivery of the asset to the trustee except that when the settlor is the sole trustee, (a) in the case of assets capable of registration such as real estate, stocks, bonds, bank and brokerage accounts and the like, such assets are deemed transferred on the recording of the deed or the completion of registration of the asset in the name of the trust or trustee, and (b) in the case of other assets such assets are deemed transferred to the trustee (i) by a written assignment, either in the trust instrument or by a separate writing, describing the asset with particularity or (ii) by describing with particularity, either in the trust instrument or in a schedule attached to the trust instrument, the asset held in the trust or (iii) by affixing the asset to the trust instrument.

(e) A lifetime trust shall be irrevocable unless the terms of the trust expressly provide that it is revocable.

(f) The capacity to create an irrevocable trust is the same as that required to make a gift. The capacity needed to create a revocable trust is governed by section 7-A-6.1.

§ 7-A-4.2-B Trustee of passive trust not to take

Every disposition of property shall be made directly to the person in whom the right to possession and income is intended to be vested and not to another in trust for such person, and if made to any person in trust for another, no estate, legal or equitable, vests in the trustee. But neither this section nor section 7-A-4.2-C shall apply to trusts arising or resulting by implication of law.

§ 7-A-4.2-C When trust interests not to merge

A trust is not merged or invalid because a person, including but not limited to the settlor of the trust, is or may become the sole trustee and the sole holder of the present beneficial interest therein, provided that one or more other persons hold a beneficial interest therein, whether such interest be vested or contingent, present or future, and whether created by express provision of the instrument or as a result of reversion to the settlor's estate.

§ 7-A-4.3 Trusts created in jurisdictions outside of New York

(a) A lifetime trust created outside of New York is validly created if it is in writing and its creation complies with

(1) the law of the jurisdiction in which the trust instrument was executed,

or

(2) the law of the jurisdiction in which, at the time of creation:

(i) the settlor was domiciled, had a place of abode, or was a national; or

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

(iii) any trust property was situated.

(b) A testamentary trust is validly created if the will creating the trust may be admitted to probate in New York under section 3-5.1(c), provided, however, if the trust property includes real property, the trust must be validly created under the law of the jurisdiction in which the land is situated.

§ 7-A-4.4 Trust purposes

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

§ 7-A-4.4-A Supplemental needs trusts established for persons with severe and chronic or persistent disabilities

(a) Definitions: When used in this section, unless otherwise expressly stated or unless the context otherwise requires:

(1) "Developmental disability" means developmental disability as defined in subdivision twenty-two of section 1.03 of the mental hygiene law.

(2) "Government benefits or assistance" means any program of benefits or assistance which is intended to provide or pay for support, maintenance or health care and which is established or administered, in whole or in part, by any federal, state, county, city or other governmental entity.

(3) "Mental illness" means mental illness as defined in subdivision twenty of section 1.03 of the mental hygiene law.

(4) "Person with a severe and chronic or persistent disability" means a person (i) with mental illness, developmental disability, or other physical or mental impairment; (ii) whose disability is expected to, or does, give rise to a long-term need for specialized health, mental health, developmental disabilities, social or other related services; and (iii) who may need to rely on government benefits or assistance.

(5) "Supplemental needs trust" means a discretionary trust established for the benefit of a person with a severe and chronic or persistent disability (the "beneficiary") which conforms to all of the following criteria:

(i) The trust document clearly evidences the creator's intent to supplement, not supplant, impair or diminish, government benefits or assistance for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving, except as provided in clause (ii) of this subparagraph;

(ii) The trust document prohibits the trustee from expending or distributing trust assets in any way which may supplant, impair or diminish government benefits or assistance for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving; provided, however, that the trustee may be authorized to make such distributions to third parties to meet the beneficiary's needs for food, clothing, shelter or health care but only if the trustee determines (A) that the beneficiary's basic needs will be better met if such distribution is made, and (B) that it is in the beneficiary's best interests to suffer the consequent effect, if any, on the beneficiary's eligibility for or receipt of government benefits or assistance;

(iii) The beneficiary does not have the power to assign, encumber, direct, distribute or authorize distributions from the trust;

(iv) If an inter vivos trust, the creator of the trust is a person or entity other than the beneficiary or the beneficiary's spouse; and

(v) Notwithstanding subparagraph (iv) of this paragraph, the beneficiary of a supplemental needs trust may be the creator of the trust if such trust meets the requirements of subparagraph two of paragraph (b) of subdivision two of section three hundred sixty-six of the social services law and of the regulations implementing such clauses. Provided, however, that if the trust is

funded with the proceeds of retroactive payments made as a result of a court action and due the beneficiary under the federal supplemental security income program, as established under title XVI of the federal social security act, the creation of a supplemental needs trust by the beneficiary under this subparagraph shall not impair nor limit any right under applicable law of a representative payee to receive reimbursement out of such proceeds for expenses incurred on behalf of the beneficiary pending the determination of the beneficiary's eligibility for such federal supplemental security income program, nor any right under applicable law of any state or local governmental entity which provided the beneficiary with interim assistance pending the determination of the beneficiary's eligibility for such federal supplemental security income program to be repaid out of such proceeds for the amount of such interim assistance.

(6) A "beneficiary" means a person with a severe and chronic or persistent disability who is a beneficiary of a supplemental needs trust.

(b) A supplemental needs trust shall be construed in accordance with the following:

(1) It shall be presumed that the creator of the trust intended that neither principal nor income be used to pay for any expense which would otherwise be paid by government benefits or assistance for which the beneficiary might otherwise be eligible or which the beneficiary might be receiving, notwithstanding any authority the trustee may have to make distributions for food, clothing, shelter or health care as provided in clause (ii) of subparagraph five of paragraph (a) of this section;

(2) Section 7-A-4.4-A(b) shall not be applicable to the extent that the application or possible application of that section would reduce or eliminate the beneficiary's entitlement to government benefits or assistance;

(3) Neither principal nor income held in trust shall be deemed an available resource to the beneficiary under any program of government benefits or assistance; however, actual distributions from the trust may be considered to be income or resources of the beneficiary to the extent provided by the terms of any such program;

(4) The trustee of the trust shall not be deemed to be holding assets for the benefit of the beneficiary for purposes of section 43.03 of the mental hygiene law or section one hundred four of the social services law; and

(5) If the trust provides the trustee with the authority to make distributions for food, clothing, shelter or health care as provided in clause (ii) of subparagraph five of paragraph (a) of this section, and if the mere existence of that authority would, under the terms of any program of government benefits or assistance, result in the beneficiary's loss of government benefits or assistance, regardless of whether such authority were actually exercised, then:

(i) if the trust instrument expressly provides, such provision shall be null and void and the trustee's authority to make such distributions shall cease and shall be limited as otherwise provided; or

(ii) the trust shall no longer be treated as a supplemental needs trust under this section and the trust shall be construed, and the trust assets considered, without regard to the provisions of this section.

(c) (1) Paragraph (b) of this section shall not apply to the extent that the trust is funded, directly or indirectly, by the beneficiary, except as provided in clause (v) of subparagraph five of paragraph (a) of this section, by someone with a legal obligation of support to the beneficiary, or by someone with another financial obligation to the beneficiary to the extent of such obligation, at the time the beneficiary is receiving or applying to receive:

(i) Government benefits or assistance for which an income and resource calculation is made; or



(ii) Services, care or assistance for which payment or reimbursement is or may be sought under section 43.03 of the mental hygiene law or section one hundred four of the social services law.

(2) To the extent that said paragraph (b) does not apply, the trust shall not be treated as a supplemental needs trust under this section, and the trust shall be construed, and the trust assets considered, without regard to the provisions of this section.

(d) The provisions of paragraph (b) of this section shall not apply to bar claims by government against persons with an interest in or under the trust other than the beneficiary.

(e) (1) The following language may be used as part of a trust instrument, but is not required, to qualify a trust as a supplemental needs trust:

1. The property shall be held, IN TRUST, for the benefit of (hereinafter the "beneficiary") and shall be held, managed, invested and reinvested by the trustee, who shall collect the income therefrom and, after deducting all charges and expenses properly attributable thereto, shall, at any time and from time to time, apply for the benefit of the beneficiary, so much (even to the extent of the whole) of the net income and/or principal of this trust as the trustee shall deem advisable, in his or her sole and absolute discretion, subject to the limitations set forth below. The trustee shall add to the principal of such trust the balance of net income not so paid or applied.

2. It is the grantor's intent to create a supplemental needs trust which conforms to the provisions of section 7-A-4.4-A of the estates, powers and trust law. The grantor intends that the trust assets be used to supplement, not supplant, impair or diminish, any benefits or assistance of any federal, state, county, city, or other governmental entity for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving. Consistent with that intent, it is the grantor's desire that, before expending any amounts from the net income and/or principal of this trust, the trustee consider the availability of all benefits from government or private assistance programs for which the beneficiary may be eligible and that, where appropriate and to the extent possible, the trustee endeavor to maximize the collection of such benefits and to facilitate the distribution of such benefits for the benefit of the beneficiary.

3. None of the income or principal of this trust shall be applied in such a manner as to supplant, impair or diminish benefits or assistance of any federal, state, county, city, or other governmental entity for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving.

4. The beneficiary does not have the power to assign, encumber, direct, distribute or authorize distributions from this trust.

(2) (i) If the creator elects, the following additional language may be used:

5. Notwithstanding the provisions of paragraphs two and three above, the trustee may make distributions to meet the beneficiary's need for food, clothing, shelter or health care even if such distributions may result in an impairment or diminution of the beneficiary's receipt or eligibility for government benefits or assistance but only if the trustee determines that (i) the beneficiary's needs will be better met if such distribution is made, and (ii) it is in the beneficiary's best interests to suffer the consequent effect, if any, on the beneficiary's eligibility for or receipt of government benefits or assistance.

(ii) If the trustee is provided with the authority to make the distributions as described in subparagraph (2) (i), the creator may elect to add the following clause:

; provided, however, that if the mere existence of the trustee's authority to make distributions pursuant to this paragraph shall result in the beneficiary's loss of government benefits or assistance, regardless of whether such authority is actually exercised, this paragraph shall be null and void and

the trustee's authority to make such distributions shall cease and shall be limited as provided in paragraphs two and three above, without exception.

(f) Nothing in this section shall affect the establishment, interpretation or construction of trust instruments which do not conform with the provisions of this section, nor shall this section impair the state's authority to be paid from or seek reimbursement from any trust which does not conform with the provisions of this section or to deem the principal or income of such trust an available resource under any program of government benefits or assistance.

§ 7-A-4.5 Charitable purposes; enforcement

The rules for charitable purposes and enforcement are provided in article 8.

§ 7-A-4.6 Creation of trust induced by fraud, duress, or undue influence or the result of mistake

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

§ 7-A-4.7 Oral trusts not recognized

Other than a testamentary trust in a nuncupative will created pursuant to section 3-2.2, no oral trust can be created in New York.

§ 7-A-4.8 Trusts for pets

(a) A trust for the care of a designated domestic or pet animal is valid. Such trust shall terminate when the living animal beneficiary or beneficiaries of such trust are no longer alive.

(b) The intended use of the principal or income of a trust that is authorized pursuant to paragraph (a) may be enforced by a person designated for that purpose in the trust instrument. If no person is appointed to act or the person appointed is unable or unwilling to act, a court may appoint a person to act. A trustee or person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.

(c) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the benefit of all covered animals.

(d) Upon termination, the trustee shall transfer the unexpended trust property as directed in the trust instrument or, if there are no such directions in the trust instrument, the property shall pass to the settlor or to the settlor's successors in interest.

(e) A court may reduce the amount of the property transferred if it determines that amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property pursuant to paragraph (d) of this section.

(f) If no trustee is designated or no designated trustee is willing or able to serve, a court shall appoint a trustee and may make such other orders and determinations as are advisable to carry out the intent of the settlor and the purposes of this section.

§ 7-A-4.9 Noncharitable trust without ascertainable beneficiary

Except as otherwise provided in section 7-A-4.8 or by another statute, the following rules apply:

(1) A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. The trust may not be enforced for more than 21 years.

(2) A trust authorized by this section shall or may be enforced by a person appointed in the terms of the trust or if no person is appointed, or if the person so appointed is unwilling or unable to act, by a person appointed by the court.

(3) Property of a trust authorized by this section may be applied only for its intended purpose. Except as otherwise provided by the terms of the trust,

if the court determines that not all of the trust property is required for its intended purpose, the excess property must be distributed to the settlor or to the settlor's successors in interest.

§ 7-A-4.9-A Amendment of trust other than by trust contributor to a revocable trust

(a) A trust may be amended by a person other than the trust contributor to a revocable trust to the extent the trust terms provide.

(b) Any authorized trust amendment by a person other than the trust contributor to a revocable trust shall be in writing and executed by the person authorized to amend the trust, and except as otherwise provided in the governing instrument, shall be acknowledged or witnessed in the manner required by paragraph (c) of section 7-A.4.2-A, and shall take effect as of the date of such execution. Written notice of such amendment shall be delivered to at least one other trustee within a reasonable time if the person executing such amendment is not the sole trustee, but failure to give such notice shall not affect the validity of the amendment or the date upon which same shall take effect. No trustee shall be liable for any act reasonably taken in reliance on an existing trust instrument prior to actual receipt of notice of amendment thereof. Absent written consent, no trustee shall be liable for the failure to comply with an amendment that expands, restricts or otherwise modifies the trustee's duties, powers, obligations, or compensation for a period of 60 days after receipt of notice of amendment.

§ 7-A-4.10 Modification, termination, or reformation of trust; proceedings for approval or disapproval

(a) A trust terminates when and to the extent:

(1) The terms of the trust so provide, including by the valid exercise of a power to revoke pursuant to the terms of the trust;

(2) No purpose of the trust remains to be achieved;

(3) The purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve;

(4) All of the trust property has been distributed by the trustee in accordance with the terms of the trust;

(5) A trust is revoked pursuant to section 7-A-4.11; or

(6) A court orders a termination in a proceeding brought under sections 7-A-4.12 or 7-A-4.14.

(b) A proceeding to approve or disapprove a modification or termination under sections 7-A-4.12, 7-A-4.14 and 7-A-4.16, or a reformation under section 7-A-4.15 may be commenced solely by a trustee or beneficiary on notice to the parties interested in the proceeding. The parties interested in such a proceeding shall include the trustee and any person or persons upon whom service of process would be required in a proceeding for the judicial settlement of the account of the trustee, taking into account SCPA 315. In addition, the party commencing any proceeding described in the first sentence of this paragraph shall notify the settlor in writing that such proceeding has been commenced.

(c) Notwithstanding anything in sections 7-A-4-12, 7-A-4-14 and 7-A-4-16 to the contrary, a trust shall not be modified or terminated to the extent doing so would jeopardize (i) the deduction or exclusion originally claimed with respect to any contribution to the trust that qualified for the annual exclusion under section 2503(b) of the Internal Revenue Code, the marital deduction under section 2056(a) or 2523(a) of the Internal Revenue Code, or the charitable deduction under section 170(a), 642(c), 2055(a) or 2522(a) of the Internal Revenue Code, (ii) the qualification of a transfer as a direct skip under section 2642(c) of the Internal Revenue Code, or (iii) any other specific tax benefit for which a contribution originally qualified for income, gift, estate, or generation-skipping transfer tax purposes under the internal revenue code, or (iv) a beneficiary's eligibility for, or a beneficiary's receipt of, public benefits or both.

§ 7-A-4.11 Revocation or amendment of irrevocable lifetime trust initiated by consent

(a) Upon the written consent, acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property, of all the living persons beneficially interested in a trust of property, heretofore or hereafter created, the creator of such trust may revoke or amend the whole or any part thereof by an instrument in writing acknowledged or proved in like manner, and thereupon the estate of the trustees ceases with respect to any part of such trust property, the disposition of which has been revoked. If the conveyance or other instrument creating a trust of property was recorded in the office of the clerk or register of any county of this state, the instrument revoking or amending such trust, together with the consents thereto, shall be recorded in the same office of every county in which the conveyance or other instrument creating such trust was recorded. The creator's power to consent to a revocation or amendment may be exercised by an agent under a power of attorney only to the extent authorized by the power of attorney or under the terms of the trust.

(b) For the purposes of paragraph (a) (1), a disposition, contained in a trust created on or after September first, nineteen hundred fifty-one, in favor of a class of persons described only as the heirs, next of kin or distributees (or by any term of like import) of the creator of the trust does not create a beneficial interest in such persons.

(c) If not all of the beneficiaries consent to a revocation or amendment of the trust under paragraph (a) (1) and the creator so consents, the revocation or amendment may be approved by the court in a proceeding brought by the creator or a beneficiary if the court is satisfied that:

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

(2) the interests of a beneficiary who does not or cannot consent will be adequately protected; and

(3) the revocation or amendment will not jeopardize any tax benefit described in section 7-A-4.10(c) (i) - (iii).

(4) the revocation or amendment will not jeopardize a beneficiary's eligibility for, or a beneficiary's receipt of, public benefits or both.

(d) A trustee is not an interested person for purposes of paragraph (c).

(e) For purposes of this section, a trustee who exercises a power under section 7-A-8.19 is not a creator.

§ 7-A-4.12 Modification or termination because of unanticipated circumstances or inability to administer trust effectively

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

(b) The court may modify the dispositive terms of a trust (other than a wholly charitable trust or a supplemental needs trust that conforms to the provisions of section 7-A-4.4-A) or terminate such trust if, because of circumstances not anticipated by the settlor, including changes in law, modification or termination will further the purposes of the trust, provided, however, no modification allowing invasion of principal for an income beneficiary may be made if the trust terms expressly provide that the settlor does not intend an invasion of principal for an income beneficiary's health, education, maintenance or support. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

(c) Upon termination of a trust under this section, the trustee shall distribute the trust property in accordance with the terms of the trust or as the court may otherwise direct.

§ 7-A-4.13 Cy pres

The rules for cy pres are provided in section 8-1.1(c) (1).

§ 7-A-4.14 Modification or termination of uneconomical trust

(a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value less than \$100,000 may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration. Upon termination of a trust under this paragraph, the trustee shall distribute the trust property as the trustee determines will best effectuate the settlor's intention.

(b) The court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines under the circumstances that the value of the trust property is insufficient to justify the cost of administration. Upon termination of a trust under this paragraph, the trust property shall be distributed as the court determines will best effectuate the settlor's intention. Nothing in this paragraph shall be deemed to supersede the provisions of section 8-1.1(c) (4) governing a wholly charitable trust.

(c) Notwithstanding paragraphs (a) and (b), a trust may not be terminated if the express terms of the trust prohibit its early termination.

(d) This section does not apply to

1. an easement for conservation or preservation, or

2. a supplemental needs trust which conforms to the provisions of section 7-A-4.4-A, or

3. a wholly charitable trust. See section 8-1.1(c) (4).

§ 7-A-4.15 Reformation to correct mistakes

The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence what was the settlor's intention and that specific terms of the trust do not carry out that intention because the specific terms were affected by a mistake of fact or law, whether in expression or inducement.

§ 7-A-4.16 Modification to achieve settlor's tax or supplement needs trust objectives

(a) The court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention in order to (a) achieve the settlor's tax objectives or (b) to conform such trust to the requirements of section 7-A-4.4-A. The court may provide that the modification has retroactive effect.

(b) Cross-reference. See section 11-1.11 (limited power of trustee to amend trust for certain tax purposes.)

§ 7-A-4.17 Combination and division of trusts

(a) After notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts and distribute the trust property to the trustee of each separate trust if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trust, including any tax purposes.

(b) The court having jurisdiction of an express trust, upon the petition of the trustee or of any qualified beneficiary and upon notice to all qualified beneficiaries, may direct the combination of two or more trusts for any reason not directly contrary to the primary purpose of each trust, or may direct the establishment of two or more separate trusts for any reason not directly contrary to the primary purpose of the trust.

(c) Unless the court otherwise directs, the trusts established under this section by the division of an existing trust shall be deemed to have been created as of the date the divided trust was created; provided that the separate trusts created under paragraph (a) of this section may be deemed created, unless in violation of the limitations under sections 9-1.1, 10-8.1 and 10-8.2, upon the date or dates provided in the instrument or instruments required by paragraph (g) of this section.

(d) Unless the court otherwise directs, a trust established by the combination of two or more trusts under paragraph (a) of this section shall be deemed to be created on the date specified by the trustee.

(e) Unless the court otherwise directs, and except as provided in paragraph (f), the property distributed to the separate trust shall be fairly representative of appreciation or depreciation and shall be based upon the fair market value of the assets on the date or dates of the distributions of such assets to the separate trusts.

(f) Where separate trusts are to be created to segregate property transferred in trust by a creator (including but not limited to a transfer treated as made by a spouse by reason of section 2513 of the United States Internal Revenue Code) (i) from property transferred in trust by one of more different creators or (ii) from property transferred pursuant to a disposing instrument from property transferred by the same creator pursuant to another disposing instrument, paragraph (e) shall not apply if the original assets transferred remain or can be traced.

(g) Separate trusts or a trust resulting from the combination of existing trusts shall be established under paragraph (a) of this section by an instrument or instruments in writing, signed and acknowledged by the trustee. Such instruments shall be filed in the office of the clerk of the court having jurisdiction over the trust; except that where the divided trust was a lifetime trust or where all of the combined trusts were lifetime trusts and the divided trust or all of the combined trusts have not been the subject of a proceeding in surrogate's court, no filing is required. Whether or not filing is required, a copy of the instrument or instruments shall be served on all qualified beneficiaries of the trusts (or the guardian of the property, committee, conservator, adult guardian, or personal representative of such persons), by registered or certified mail, return receipt requested, or by personal delivery or upon application of the trustee in any other manner directed by the court.

(h) In any case where the Internal Revenue Code requires that an election or other action be made or taken by the executor or if no trustee of a trust under a will has qualified, the term "trustee" as used in this section shall mean the executor or administrator of an estate. In any such case, the trustee shall comply with any action taken by the executor or administrator under this section.

(i) For purposes of this section, a division of a trust into two or more separate trusts to permit one or more such trusts to be governed by article 11-A and another one or more such trusts to be governed by section 11-2.4 shall be deemed to be for a reason which is not directly contrary to the primary purpose of the trust unless such division is expressly prohibited by the terms of the disposing instrument.

(j) Unless the terms of the trust that is divided into separate trusts provide otherwise, the commissions allowed to a trustee as determined under article 23 of the SCPA, as amended from time to time, shall not be increased by reason of the establishment of separate trusts pursuant to this section unless the court otherwise permits an increase, provided, however, that such trustee shall be entitled to charge the trust for any additional reasonable and necessary expenses incurred in the administration of such separate trusts.

#### PART 4-A Bank Accounts in Trust Form

##### § 7-A-4-A.1 Definitions

(a) A "beneficiary" is a person who is described by a depositor as a person for whom a trust account is established or maintained.

(b) A "depositor" is a person in whose name a trust account subject to this part is established or maintained.

(c) A "financial institution" is a bank, trust company, national banking association, savings bank, industrial bank, private banker, foreign banking corporation, federal savings and loan association, a savings institution chartered and supervised as a savings and loan or similar institution under federal law or the laws of a state, a federal credit union, or a credit union chartered and supervised under the laws of a state.

(d) A "trust account" includes a savings, share, certificate or deposit account in a financial institution established by a depositor describing himself as trustee for another, other than a depositor describing himself as acting under a will, trust instrument or other instrument, court order or decree.

#### § 7-A-4-A.2 Terms of a trust account

The funds in a trust account, which shall include any dividends or interest thereon, shall be trust funds subject to the following terms:

(1) The trust can be revoked, terminated or modified by the depositor during his lifetime only by means of, and to the extent of, withdrawals from or charges against the trust account made or authorized by the depositor or by a writing which specifically names the beneficiary and the financial institution. The writing shall be acknowledged or proved in the manner required to entitle conveyances of real property to be recorded, and shall be filed with the financial institution wherein the account is maintained.

(2) A trust can be revoked, terminated or modified by the depositor's will only by means of, and to the extent of, an express direction concerning such trust account, which must be described in the will as being in trust for a named beneficiary in a named financial institution. Where the depositor has more than one trust account for a particular beneficiary in a particular financial institution, such a direction will affect all such accounts, unless the direction is limited to one or more accounts specifically identified by account number in addition to the foregoing requirements. A testamentary revocation, termination or modification under this paragraph can be effected by express words of revocation, termination or modification, or by a specific bequest of the trust account, or any part of it, to someone other than the beneficiary. A bequest or part of a trust account shall operate as a pro tanto revocation to the extent of the bequest.

(3) If the depositor survives the beneficiary, the trust shall terminate and title to the funds shall continue in the depositor free and clear of the trust.

(4) If the beneficiary survives the depositor, and the depositor's will contains no provision revoking, terminating or modifying the trust account under paragraph two, the trust shall terminate and title to the funds shall vest in the beneficiary free and clear of the trust, subject to the rules for cy pres in section 8-1.1(c)(1) if the beneficiary is a charitable organization that at the time of vesting or of payment of the funds is not in existence or is not carrying out charitable activities or if the circumstances otherwise support the application of cy pres, and further subject to the provisions of section 1002-a(c)(1) of the not-for-profit corporation law if the beneficiary is a dissolved or dissolving charitable corporation to which that section applies. The application of cy pres shall take precedence over the rule governing payment to multiple beneficiaries in section 7-A-4-A.7(b).

(5) If the beneficiary survives the depositor and the depositor's will contains language sufficient under paragraph two of this section, to revoke, terminate or modify the trust, in whole or in part, that part of the trust which is affected shall terminate and title to the funds shall be subject to disposition by the depositor's will, free and clear of the trust.

#### § 7-A-4-A.3 Payment to beneficiary

(a) If the beneficiary survives the depositor under the circumstances provided in paragraph four of section 7-A-4-A.2, the funds shall be paid to the

beneficiary upon his order, if, at the time of his demand for payment of all or part of the funds, he is eighteen or more years of age.

(b) If the beneficiary survives the depositor under the circumstances provided in paragraph four of section 7-A-4-A.2, and if the beneficiary is under eighteen years of age at the time demand for payment of any part or all of the funds is made, the funds may be paid to the order of the parent or parents of the beneficiary to be held for the use and benefit of such infant beneficiary or to the order of the duly appointed guardian of the property of the beneficiary, if the funds are equal to or are less than ten thousand dollars; but if the funds are more than ten thousand dollars, the funds may be paid only to the order of the duly appointed guardian of the property of the beneficiary.

#### § 7-A-4-A.4 Effect of payment

A financial institution which upon the death of a depositor and, prior to service upon it of a restraining order, injunction or other appropriate process from a court of competent jurisdiction prohibiting payment, makes payment to a beneficiary, or if the beneficiary is under eighteen years of age, to the guardian of the property or to the parent or parents of the infant pursuant to section 7-A-4-A.3, shall, to the extent of such payment, be released from liability to any person claiming a right to the funds and the receipt or acquittance of the person to whom payment is made shall be a valid and sufficient release and discharge of the financial institution.

#### § 7-A-4-A.5 Rights not affected

This part does not affect:

- (1) The rights of creditors of the depositor or his estate,
- (2) The rights of fiduciaries of the estate of the depositor, or
- (3) The rights of the surviving spouse of the depositor.

#### § 7-A-4-A.6 Joint depositors

If a trust account is established in the names of more than one depositor, in form to be paid or delivered to any, or the survivor of them, in trust for another, such account shall be subject to the terms of this part, except that the title to the funds on deposit, as between the depositors, shall be governed by article XIII-E of the banking law.

#### § 7-A-4-A.7 Multiple beneficiaries

(a) Whenever any proceeds of a trust account would pass pursuant to section 7-A-4-A.2 to two or more beneficiaries, such proceeds shall pass to such beneficiaries in equal proportions, unless the terms of the trust provide otherwise.

(b) Whenever any proceeds of a trust account would pass pursuant to section 7-A-4-A.2 to two or more beneficiaries, and one or more of the beneficiaries predeceases the depositor, such proceeds shall pass to the surviving beneficiary or beneficiaries in equal proportions, unless the terms of the trust provide otherwise or unless the rules of cy pres take precedence as provided in section 7-A-4-A.2(4).

#### § 7-A-4-A.8 Application

This part shall apply to all funds in trust accounts, as defined in paragraph (d) of section 7-A-4-A.1, which are in existence on its effective date, except that its provisions shall not impair or defeat any rights which have accrued prior to such date.

### PART 5 Rights of Beneficiaries and Creditors; Spendthrift and Discretionary Trusts

#### § 7-A-5.1 Rules regarding transfer of income in trust; rights of creditors

(a) A right of a beneficiary to receive income from property and apply it to the use of or pay it to any person may not be transferred by assignment or otherwise unless a power to transfer such right, or any part thereof, is



conferred upon such beneficiary by the instrument creating or declaring the trust. The preceding sentence shall not apply to (1) a beneficiary's income interest with respect to trust property attributable to that beneficiary; or (2) the proceeds of a life insurance policy governed by section 7-A-5.2-A.

(b) Notwithstanding paragraph (a):

(1) The beneficiary of a trust who has the right to receive income from property and apply it to the use of or pay it to any person may, unless otherwise provided in the instrument creating or declaring such trust, transfer any amount in excess of ten thousand dollars of the annual income to which the beneficiary is entitled from such trust to the spouse, issue, ancestors, brothers, sisters, uncles, aunts, nephews or nieces of the beneficiary, or to a trustee, guardian for property, committee, conservator, curator, custodian, or the donee of a power during minority for the benefit only of any such person bearing such relationship to the beneficiary, provided that such transfer is evidenced by a written instrument signed and acknowledged by the beneficiary and delivered to the trustee of the trust, together with an affidavit by the beneficiary that such transfer and any like transfer concurrently in effect are for all or part of the excess over ten thousand dollars of the annual income from such trust to which such beneficiary is entitled, and that the beneficiary has not received and is not to receive any consideration in money or money's worth for the transfer.

(2) Any such transfer shall be effective in any year only as to income from such trust in excess of ten thousand dollars to which such beneficiary is entitled, and for this purpose all previous like transfers applicable to a given year shall be taken into account. If two or more transfers are made in or for any year in a total amount exceeding the sum of ten thousand dollars, transferees shall be preferred in the order in which the instruments of transfer were delivered to the trustee.

(3) A trustee shall be exonerated and fully discharged for any payment made to a transferee in reliance on the affidavit of a beneficiary described in subparagraph (1).

(4) The provisions of this paragraph do not apply to sections 7-A-5.2-A and 7-A-5.4.

(c) A transferee of income may, if he has not received or is not to receive any consideration in money or money's worth therefor, make a further transfer of such income only to one or more of the permissible transferees referred to in subparagraph (b)(1), other than a prior transferor; provided, however, that upon the death of a transferee any income not so transferred by him shall be an asset of his estate, subject to his testamentary disposition or passing to his distributees under the statutes of descent and distribution.

(d) A beneficiary who has the right to receive the income from property and apply it to the use of or pay it to any person is not precluded by anything contained in this section from transferring by assignment or otherwise any part or all of such income to or for the benefit of persons whom the beneficiary is legally obligated to support.

(e) To the extent a trust beneficiary validly transfers an income interest during lifetime or at death if the interest has not terminated, the transferee becomes a beneficiary of the trust.

(f) A beneficiary's income interest is subject to the claims of creditors of the beneficiary to the extent provided by law, including article 52 of the civil practice law and rules and sections 7-A-5.3 and 7-A-5.5-A.

§ 7-A-5.2 Rules regarding transfer of principal interests in trust; rights of creditors

(a) Trusts created prior to the effective date of this article. The right of a beneficiary of a trust to receive principal may be transferred by assignment or otherwise unless such transfer is prohibited by the instrument creating or declaring the trust. Such a provision shall not apply to a beneficiary's

interest in principal with respect to property attributable to that trust beneficiary.

(b) Trusts created on or after the effective date of this article. The right of a beneficiary of a trust to receive principal may not be transferred by assignment or otherwise unless a power to transfer such right, or any part thereof, is conferred upon such beneficiary by the instrument creating or declaring the trust. The preceding sentence shall not apply to a beneficiary's interest in principal with respect to property attributable to that trust beneficiary, or to proceeds of a life insurance policy as provided in section 7-A-5.2-A.

(c) Whenever a trust is created,

(1) To the extent a trust beneficiary validly transfers an interest in principal during lifetime or at death if the interest has not terminated, the transferee becomes a beneficiary of the trust.

(2) A beneficiary's interest in principal is subject to the claims of creditors of the beneficiary to the extent provided by law, including article 52 of the civil practice law and rules, and sections 7-A-5.3 and 7-A-5.5-A.

§ 7-A-5.2-A When proceeds of life insurance policy inalienable

The proceeds of a life insurance policy which, under a trust or other agreement, are upon the death of the insured left with the insurance company may not be

(1) transferred,

(2) subject to commutation or encumbrance, or

(3) subject to legal process except in an action for necessities, if provisions to such effect were incorporated in such trust or other agreement.

§ 7-A-5.3 Special creditor exceptions to restraints on involuntary alienation

(a) An order of support directing the payment of alimony, maintenance, support or child support can be enforced against the income interest of a beneficiary that is subject to a spendthrift provision as provided in CPLR section 5241 and against a principal interest that is subject to a spendthrift provision.

(b) A spendthrift provision is unenforceable against:

(1) a judgment creditor who has provided goods or performed services suitable to the condition in life of the person to whom they are furnished or for whose benefit they are performed and which meet his or her actual needs at the time such goods are provided or services performed;

(2) a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust; and

(3) a claim of this State or the United States to the extent a statute of this State or federal law so provides.

(c) Nothing in this section shall be construed to limit the rights of creditors as otherwise provided by law.

§ 7-A-5.4 Discretionary trusts

(a) A beneficiary may not transfer his or her discretionary trust interest whether or not the interest is spendthrifted.

(b) A beneficiary's discretionary trust interest is subject to the claims of creditors of the beneficiary to the extent provided by law, including section 7-A-5.5-A and article 52 of the civil practice law and rules.

(c) A beneficiary of a discretionary trust interest has the right to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

§ 7-A-5.5 Creditor's claim against trust contributor to a revocable trust

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

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

(2) After the death of a trust contributor, and subject to the trust contributor's right to direct the source from which liabilities will be paid, the property of a trust over which immediately before the trust contributor's death the trust contributor has the power to revoke is subject to claims of the trust contributor's creditors, costs of administration of the trust contributor's estate, and the expenses of the trust contributor's funeral and disposal of the trust contributor's remains to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, and expenses.

(b) For purposes of paragraph (a), a trust created before the date of the enactment of this article is a revocable trust only if the creator reserved an unqualified power of revocation described in section 10-10.6.

(c) During the period the holder of a power of withdrawal may exercise the power, the property subject to the power is subject to the claims of the powerholder's creditors, the creditors of the powerholder's estate and the expense of administering the powerholder's estate to the extent provided by section 10-7.2.

§ 7-A-5.5-A Creditor claims to property contributed to a trust by a trust beneficiary

(a) To the extent that a beneficiary's trust interest is attributable to property contributed by a beneficiary, whether or not the beneficiary's interest is subject to a spendthrift provision, the interest is subject to the claims of the beneficiary's existing or subsequent creditors.

(b) For purposes of paragraph (a), upon the lapse, release, or waiver of a power of withdrawal, the holder of the power of withdrawal is treated as making a contribution of property to the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greatest amount specified at the time of the lapse, release, or waiver in section 2041(b)(2), 2503(b) or 2514(e) of the Internal Revenue Code.

(c) Paragraph (a) shall not apply to property contributed by a beneficiary to a trust for the beneficiary's spouse described in (i) section 2523(e) of the Internal Revenue Code or (ii) for which the election described in section 2523(f) of the Internal Revenue Code has been made and (iii) to a trust to the extent the assets of that trust are attributable to a trust described in (i) or (ii) after the death of the beneficiary's spouse.

(d) A provision in any trust, other than a testamentary trust or a trust which meets the requirements of subparagraph two of paragraph (b) of paragraph two of section three hundred sixty-six of the social services law and of the regulations implementing such clauses, which provides directly or indirectly for the suspension, termination or diversion of the principal, income or beneficial interest of either the creator or the creator's spouse in the event that the creator or creator's spouse should apply for medical assistance or require medical, hospital or nursing care or long term custodial, nursing or medical care shall be void as against the public policy of the state of New York, without regard to the irrevocability of the trust or the purpose for which the trust was created.

(e) Paragraph (a) shall not apply by reason of the trustee's authority to pay trust income or principal to the trust contributor pursuant to section 7-A-8.18. Nor shall paragraph (a) apply where the trustee, as defined in paragraph (b) of section 7-A-8.18, is authorized under the trust instrument or any other provision of law to pay or reimburse the trust contributor for any tax on trust income or trust principal that is payable by the trust contributor under the law imposing such tax or to pay any such tax directly to the taxing authorities. No creditor of a trust contributor shall be entitled to reach any trust property based on the discretionary powers described in this paragraph.

(f) Cross-reference. See CPLR 5205(c) (providing protections for a debtor's benefits under the terms of a specified retirement plan, savings plan, or individual retirement account).

§ 7-A-5.6 Overdue distribution

(a) In this section, "mandatory distribution" means a distribution of income or principal which the trustee is required to make to a beneficiary under the terms of the trust, including a distribution upon termination of the trust. The term does not include a distribution subject to the exercise of the trustee's discretion even if (1) the discretion is expressed in the form of a standard of distribution, or (2) the terms of the trust authorizing a distribution couple language of discretion with language of direction.

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

§ 7-A-5.7 Personal obligations of trustee

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

PART 6 Revocable Trusts

§ 7-A-6.1 Capacity of trust contributor of revocable trust

The trust contributor's capacity to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will. Notwithstanding the foregoing, the trust contributor's capacity required to irrevocably release a power to revoke or amend such a trust is the same as that required to make a gift.

§ 7-A-6.2 Revocation or amendment of revocable trust

(a) If a revocable trust has more than one trust contributor:

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

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

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

(b) The trust contributor may revoke or amend a revocable trust:

(1) by substantially complying with any method provided in the terms of the trust requiring a writing; or

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

(A) a later will that expressly refers to the trust or a particular provision thereof; or

(B) by executing an instrument that both expressly refers to the trust or a particular provision thereof and complies with the formalities for the creation of a lifetime trust as provided in section 7-A-4.2-A(c), and the revocation or amendment shall take effect as of the date of such execution.

(c) Upon the revocation of a revocable trust, the trustee shall deliver the trust property as the trust contributor directs.

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

(e) A guardian of the trust contributor may exercise a trust contributor's powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the guardianship.

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

(g) Written notice of such amendment or revocation by the trust contributor shall be delivered to at least one other trustee within a reasonable time if the trust contributor is not the sole trustee but failure to give such notice shall not affect the validity of the amendment or revocation or the date upon which the amendment or revocation shall take effect. No trustee shall be liable for any act reasonably taken in reliance on an existing trust instrument prior to actual receipt of notice of amendment or revocation thereof. Absent written consent, no trustee shall be liable for the failure to comply with an amendment that expands, restricts or otherwise modifies the trustee's duties, powers, obligations, or compensation for a period of 60 days after receipt of notice of amendment.

(h) Cross-reference. See section 7-A-4.2-A(e) (lifetime trust is irrevocable unless the terms of the trust expressly provide that the trust is revocable). § 7-A-6.3 Rights and duties in revocable trusts; power of withdrawal

(a) While a trust is revocable, the trustee shall follow a direction of the person having the unqualified power to revoke the trust that is contrary to the terms of the trust, unless the trustee has actual knowledge of the settlor's lack of capacity. The trustee shall not be liable for complying with the terms of the revocable trust or any revocation, amendment or direction by the settlor when the settlor lacks capacity unless the trustee has actual knowledge of the lack of capacity.

(b) While a trust is revocable and the person having the power to revoke the trust is the only present beneficiary, rights of all other beneficiaries are subject to the control of, the duties of the trustee are owed exclusively to, and the trustee is exclusively accountable to the person having the power to revoke.

(c) After the death of a person described in paragraph (b):

(1) the personal representative of that person has standing to petition the court for an order compelling the trustee to account for the period before the death of the person having the power to revoke and have standing to file objections on the grounds that the trustee violated the trustee's duties to the person having the power to revoke; and

(2) the beneficiaries of the trust have standing to petition the court for an order compelling the trustee to account for the period before the death of the person having the power to revoke and have standing to file objections on the grounds that the trustee violated the trustee's duties to the person having the power to revoke and consequently impaired the interests of the objectants in the trust.

(d) If the person having the power to revoke the trust loses the capacity to exercise the power to revoke and if by reason of that loss of capacity additional persons become present beneficiaries of the trust, the trustee's duties are owed to those persons as well so long as they are present beneficiaries of the trust.

(e) During the period the power may be exercised, the holder of a non-lapsing power of withdrawal shall be treated, for purposes of paragraph (a) and paragraph (b) of this section, as if the holder of the non-lapsing power of withdrawal were the person having a power to revoke the trust to the extent of the property subject to the power.

§ 7-A-6.4 Limitations on action contesting validity of revocable trust; distribution of trust property

(a) The following persons may commence a judicial proceeding after the settlor's death to contest the validity of a trust that was revocable at the settlor's death;

(1) the personal representative of the settlor;

(2) the trustee of a trust created under the will of the settlor duly admitted to probate by a court of competent jurisdiction;

(3) the trustee of a trust to which a disposition was validly made by the will of the settlor duly admitted to probate by a court of competent jurisdiction;

(4) an adversely-affected beneficiary of the will of the settlor admitted to probate by any court of competent jurisdiction or the guardian of or the agent duly authorized under a power of attorney granted by such beneficiary;

(5) the attorney general if an adversely-affected beneficiary of the will of the settlor admitted to probate by any court of competent jurisdiction is a charitable organization or an unnamed charitable beneficiary; or

(6) any adversely-affected distributee of the settlor.

A person who has been issued limited letters under SCPA 702(9) may also commence a proceeding under this paragraph (a).

(b) A petition to contest the validity of a revocable trust must be filed by the earlier of

(1) six years after the settlor's death in the case of trusts in existence on the effective date of this article and in all other cases three years after the settlor's death; or

(2) 120 days after the trustee sent the persons described in paragraph (a) (1)-(6) a copy of the trust instrument and a notice informing those persons of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding. Notice given to some but not all of the persons described in paragraph (a) (1)-(6) is effective only as to the persons or persons receiving such notice.

(c) Process must issue to the following persons if not petitioners:

(1) all trustees of the trust that was revocable at the settlor's death;

(2) all persons designated as beneficiaries in the trust that was revocable at the settlor's death;

(3) all distributees of the settlor, unless the court dispenses with such process;

(4) the administrator of the settlor's estate, if any;

(5) the executor or executors named in and the beneficiaries under the will of the settlor admitted to probate or offered for probate in any court of competent jurisdiction;

(6) the trustee of a trust to which a disposition was validly made by the will of the settlor duly admitted to probate or offered for probate in a court of competent jurisdiction;

(7) the attorney general if the trust that was revocable at the settlor's death is a charitable trust; and

(8) such other persons as the court in its discretion may determine.

(d) In any proceeding concerning the validity of a trust that was revocable at the settlor's death, the burden of proof on the issue of the settlor's capacity, due execution, the existence of undue influence, and the existence of fraud shall be on the person or persons seeking to challenge the validity of the trust instrument.

(e) Upon the death of the settlor of a trust that was revocable at the settlor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. The trustee is not subject to liability for doing so unless:

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

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

(f) A beneficiary of a trust that is determined to have been invalid is liable to return any distribution received.

(g) Where applicable, this section shall apply to a trust contributor who is not a settlor.

#### PART 7 Office of Trustee

##### § 7-A-7.1 Accepting or declining trusteeship of a lifetime trust

(a) Except as otherwise provided in paragraph (c), a person designated as trustee of a lifetime trust accepts the trusteeship:

(1) by complying with the execution requirements of section 7-A-4.2-A(c), or

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

(3) 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 of a lifetime trust who has not yet accepted the trusteeship may reject the trusteeship. A designated trustee of a lifetime trust who does not accept the trusteeship within a reasonable time after knowing of the designation and knowing of the occurrence of the event that makes the designation effective is deemed to have rejected the trusteeship.

(c) A person designated as trustee of a lifetime trust, 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.

##### § 7-A-7.2 Trustee's bond

(a) Except as provided in SCPA 710(2) and by paragraph (c), 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 trust company, as defined by Banking law section 2(2), any bank authorized to exercise fiduciary powers and any national bank having a principal, branch or trust office in this state and duly authorized to exercise fiduciary powers need not give a bond unless a bond is expressly required of the trust company or bank by the terms of the trust.

##### § 7-A-7.3 Co-trustees

(a) Co-trustees who are unable to reach a unanimous decision with respect to the exercise of a joint power may act by majority decision.

(b) If a vacancy occurs in a co-trusteeship, the remaining co-trustees may continue to act as trustees.

(c) A co-trustee must participate in carrying out the trustee's duties and in exercising joint powers unless the co-trustee is unavailable to do so because of absence, illness, disqualification under other law, or other temporary incapacity or the co-trustee has properly delegated the performance of the duty or exercise of the joint power to an agent or another trustee pursuant to section 8.7.

(d) If a co-trustee is either unwilling to perform duties or exercise joint powers or is unavailable to perform duties or exercise joint powers 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 co-trustee or a majority of the remaining co-trustees may act.

(e) The rules for delegation by a trustee to another trustee are provided in section 8.7(e).

(f) Except as otherwise provided in paragraph (h), a trustee who does not join in an action of another trustee is not liable for the action if the trustee is unavailable to join in the action due to absence, illness, disqualification under other law or other temporary incapacity, or if the trustee has properly delegated the performance of the action pursuant to section 8.7.

(g) Except as otherwise provided in paragraph (h), a dissenting trustee who joins in carrying out a decision of a majority of the trustees and who notified in writing any co-trustee of the dissent at or before the time of the carrying out the decision is not liable for the consequences of the majority decision.

(h) Subject to section 7-A-7.3-A, a trustee is not excused from liability for failing to exercise reasonable care to:

- (1) prevent a co-trustee from committing a breach of trust; and
- (2) compel a co-trustee to redress a breach of trust.

(i) For purposes of this section, a joint power includes a power in a trustee to invade trust principal under section 7-A-8.19 or under the terms of the dispositive instrument.

(j) Cross-reference. See section 7-A-3.3-A (excluded co-trustee) § 7-A-7.3-A Application to excluded co-trustee.

(a) Notwithstanding section 11-1.7, if the terms of the trust confer upon a co-trustee, to the exclusion of another co-trustee, the power to take certain actions with respect to the trust, including the power to direct or prevent certain actions of the trustees, the duties and liabilities of the excluded trustee are as follows:

(1) If the terms of the governing instrument confer upon the co-trustee the power to direct certain actions of the excluded trustee, the excluded trustee must act in accordance with the direction and shall have no duty to act in the absence of such direction and is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from compliance with the direction unless compliance with the direction constitutes willful misconduct on the part of the directed co-trustee;

(2) If the terms of the governing instrument confer upon the co-trustee exclusive authority to exercise any power, the excluded trustee is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from the action taken by the co-trustee in the exercise of the power; and

(3) The excluded trustee has no duty to monitor the conduct of the co-trustee, provide advice to the co-trustee or consult with or request directions from the co-trustee. The excluded trustee is not required to give notice to any beneficiary of any action taken or not taken by the co-trustee whether or not the excluded trustee agrees with the result. Administrative actions taken by the excluded trustee for the purpose of implementing directions of the co-trustee, including confirming that the directions of the co-trustee have been carried out, do not constitute monitoring of the co-trustee nor do they constitute participation in decisions within the scope of the co-trustee's authority.

(b) The co-trustee holding the power to take certain actions with respect to the trust shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustee were not in office and shall have the exclusive obligation to account to the beneficiaries and defend any action brought by the beneficiaries with respect to the exercise of the power.



§ 7-A-7.4 Vacancy in trusteeship; appointment of successor

(a) A vacancy in a trusteeship occurs if:

- (1) a person designated as trustee rejects the trusteeship;
- (2) a person designated as trustee cannot be identified or does not exist;
- (3) a trustee resigns;
- (4) a trustee is disqualified or removed;
- (5) a trustee dies; or
- (6) a guardian is appointed for an individual serving as trustee;
- (7) a trust instrument so provides.

(b) If one or more co-trustees 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. If for any reason the trust has no remaining trustee, the trust estate immediately vests in the supreme court or surrogate's court, as the case may be, unless the settlor provides otherwise.

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

- (1) by a person designated in the terms of the trust to act as successor trustee;
- (2) by a person selected by the charitable organizations expressly designated to receive distributions under the terms of the trust if the attorney general concurs in the selection; or
- (3) by a person appointed by the court.

(e) A vacancy in a trusteeship of a testamentary trust that is required to be filled shall be filled pursuant to SCPA 706 or 1502 by the court having jurisdiction of the decedent's estate.

(f) Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee as provided in SCPA 1502.

(g) Nothing in this section shall be construed to limit the application of SCPA 706 and any other application of SCPA 1502.

§ 7-A-7.4-A Suspension of powers of trustee in war service

(a) Whenever a trustee of an express trust is engaged in war service, as defined in this section, such trustee or any other person interested in the trust estate may present a petition to the supreme court or the surrogate's court, as the case may be, to suspend the powers of such trustee while he is so engaged and until the further order of the court, and if the suspension of such trustee will leave no person acting as trustee or leave a beneficiary of such trust as the only acting trustee thereof, the petition must pray for the appointment of a successor trustee, unless a successor has been named in the trust instrument and is not engaged in war service or is not for any other reason unable or unwilling to act as such trustee.

(b) For the purposes of this section, a trustee is engaged in war service in any of the following cases:

- (1) If the trustee is a member of the armed forces of the United States or of any of its allies, or if the trustee has been accepted for such service and is awaiting induction.
- (2) If the trustee is engaged in any work abroad in connection with a governmental agency of the United States or with the American Red Cross Society or any other body with similar objectives.

(3) If the trustee is interned in any enemy country or is in a foreign country or a possession or dependency of the United States and is unable to return to this state.

(4) If the trustee is a member of the Merchant Marine or similar service.

(c) Where the application is made by a trustee engaged in war service, notice shall be given to such persons and in such manner as the court may direct. Where the application is made by any other person interested in the trust estate and the trustee is in the armed forces of the United States, notice shall be given to such trustee in such manner as the court may direct. In every other case, where the application is made by a person other than the trustee, notice thereof shall be given to such persons and in such manner as the court may direct.

(d) Upon the filing of the petition and proof of service of notice prescribed in paragraph (c), the court may, notwithstanding any other provision of law, suspend the trustee engaged in war service from the exercise of all of the trustee's powers and duties while engaged in such service and until the further order of the court. The order may further provide that the remaining trustee or, if there is none, the successor named in the trust instrument or appointed by the court may exercise all of the powers and be subject to all of the duties of the original trustee.

(e) The successor trustee shall be limited to commissions as computed under SCPA 2308 or 2309, whichever is applicable, upon income received and disbursed and upon principal disbursed. Commissions may also be allowed under 2308 or 2309 upon rents if the trustee is authorized or required to collect the rents of and manage real property. In case of the resignation or removal of the suspended trustee, or in the event of such trustee's death, the foregoing basis for computing the commissions shall not apply and the trustee's commissions shall be computed in the same manner as those of any other trustee.

(f) When the suspended trustee ceases to be engaged in war service the trustee may, upon application to the court and upon such notice as the court may direct, be reinstated as trustee if any of the duties of such office remain unexecuted. If the suspended trustee is reinstated the court shall thereupon remove the trustee's successor and make such other order as justice requires, but such removal shall not bar the successor from subsequently qualifying as a trustee if for any reason it thereafter becomes necessary to appoint a trustee.

#### § 7-A-7.5 Resignation of trustee

(a) A trustee may resign:

(1) upon at least 30 days' notice to (i) the trust contributor and all co-trustees in the case of a revocable trust or (ii) the qualified beneficiaries and all co-trustees, in the case of any other trust; 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.

(d) The resignation of a trustee of a testamentary trust shall not be effective until the trustee provides written notice of such resignation to the court that has taken jurisdiction over the trust.

#### § 7-A-7.6 Removal of trustee

(a) In addition to any provision for removal in the trust instrument, the settlor, a co-trustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.

(b) The court may remove a trustee if:

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

(2) lack of cooperation among co-trustees 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, provided that the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with the purposes of the trust, and a suitable co-trustee or successor trustee is available. A corporate reorganization is presumptively not a substantial change of circumstances.

(c) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under section 7-A-10.1(b) as may be necessary to protect the trust property or the interests of the beneficiaries.

(d) For purposes of this section, "court" shall refer to the supreme court and the surrogate's court.

(e) Nothing in this section shall be construed to limit the application of SCPA 711, 712, 713 and 719.

#### § 7-A-7.7 Delivery of property by former trustee

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

(b) A trustee who has resigned or been removed shall proceed expeditiously to deliver the trust property within the trustee's possession (subject to a reasonable reserve for the expenses of such trustee's accounting) to the co-trustee, successor trustee, or other person entitled to it.

#### § 7-A-7.8 Compensation of trustee

The rules for compensating a trustee are provided in SCPA 2308 through 2313.

#### § 7-A-7.9 Reimbursement of expenses

(a) A trustee is entitled to be reimbursed out of the trust property, with interest, if appropriate, at a reasonable rate, 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 property, expenses that were not properly incurred in the administration of the trust.

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

(c) Cross-reference. See SCPA 2308(1), 2309(1) and 2312(7) (court required to allow reasonable and necessary expenses actually paid by the trustee).

#### § 7-A-7.10 Accounting by trustee in supreme court

Any proceeding for an accounting or other relief brought by a trustee or by a substituted or successor trustee may be commenced by such notice to the beneficiaries of the trust as the supreme court may direct.

### PART 8 Duties and Powers of Trustee

#### § 7-A-8.1 Duty to administer trust

(a) The trustee shall administer the trust in good faith, in accordance with its terms and purposes, and in accordance with this article and other applicable law.

(b) Cross-reference. See section 8.14(a) (requiring trustee's actions to be made in good faith).

#### § 7-A-8.2 Duty of loyalty

(a) As between a trustee and the beneficiaries, the duty of loyalty requires that a trustee shall administer the trust solely in the interests of the beneficiaries.

(b) Subject to the rights of persons dealing with or assisting the trustee as provided in section 7-A-10.11, 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 a breach of the duty of loyalty and voidable by a qualified beneficiary unless:

(1) the transaction was authorized by the terms of the trust;

(2) the transaction was approved by the court;

(3) the qualified beneficiary did not commence a judicial proceeding within the time allowed by section 7-A-10.5;

(4) the qualified beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with section 7-A-10.8;  
or

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

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

(1) the trustee's spouse;

(2) the trustee's issue, 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 described in subparagraph (1), (2) or (3), 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 qualified beneficiary that does not concern trust property but that occurs during the existence of the trust, and which is outside the ordinary course of the trustee's business or on terms and conditions substantially less favorable than those the trustee generally offers customers similarly situated, is voidable by the qualified 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 is affected by a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust. Such transaction is a breach of the duty of loyalty and is voidable by a qualified beneficiary, subject to the exceptions in paragraphs (b) (1) - (5).

(f) 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.

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

(4) a deposit of trust money in a bank, banking department or insured depository institution operated by the trustee or an affiliate; or

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

(h) 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.

(i) Cross-reference. See section 7-A-10.1 (providing other remedies for a breach of trust) and section 7-A-10.2(b)(2) (trustee's liability may require restoration of trust property).

§ 7-A-8.3 Duty of impartiality

If a trust has two or more beneficiaries, the trustee has the duty to act impartially in investing, managing, distributing and otherwise administering the trust property, giving due regard to the beneficiaries' respective interests.

§ 7-A-8.4 Duty of prudent administration

(a) A trustee has the duty to 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.

(b) Cross-reference. See sections 7.3(h), 8.5, 8.9, 8.11, 8.12, 10.6 and 10.7 (requiring reasonable care by trustee) and 11-2.3 (duties under prudent investor act).

§ 7-A-8.5 Duty regarding costs of administration

In administering a trust, the trustee has a duty to incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee taking into account sections 7-A-8.7 to the extent those sections apply.

§ 7-A-8.6 Duty to exercise trustee's special skills and expertise

A trustee who has represented to the settlor that such trustee has special skills (other than special investment skills) or expertise, shall use those special skills or expertise, subject to the rules governing trustees with special investment skills provided in section 11-2.3(b)(6).

§ 7-A-8.7 Powers and duties regarding delegation by trustee to agent or another trustee

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

(1) selecting an agent suitable to exercise the delegated function, taking into account the nature and value of the assets subject to such delegation and the expertise of the agent;

(2) establishing the scope and terms of the delegation, consistent with the purposes of the governing instrument;

(3) periodically reviewing the agent's exercise of the delegated function and compliance with the scope and terms of the delegation.

(4) taking any appropriate action based on the trustee's review; and

(5) controlling the overall cost by reason of the delegation.

(b) In performing a delegated function, an agent owes a duty to the trustee and the beneficiaries to comply with the scope and terms of the delegation and to exercise the delegated function with reasonable care, skill and caution. An attempted exoneration of the agent from liability for failure to meet such duty is contrary to public policy and void.

(c) A trustee who complies with paragraph (a) is not liable for an action of the agent to whom the function was delegated.

(d) By accepting a delegation of duties or powers 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 New York.

(e) A trustee may delegate duties and powers to a co-trustee that a prudent trustee could properly delegate under the circumstances.

(1) In making a delegation under this paragraph, the trustee shall exercise reasonable care, skill, and caution in:

(A) selecting a trustee suitable to exercise the delegated function;

(B) establishing the scope and terms of the delegation consistent with the purposes of the governing instrument; and

(C) periodically reviewing the trustee's exercise of the delegated function and compliance with the scope and terms of the delegation.

(2) A trustee who complies with paragraph (e) (1) is not liable for an action of the trustee to whom the function was delegated.

(3) Unless a delegation was irrevocable, a trustee may revoke a delegation previously made under this paragraph (e).

§ 7-A-8.9 Duty to control and protect trust property

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

§ 7-A-8.10 Duty regarding recordkeeping and identification of trust property

(a) A trustee has the duty to keep adequate records of the administration of the trust.

(b) A trustee has the duty to keep trust property separate from the trustee's own property.

(c) Except as otherwise provided in paragraph (d) or elsewhere in this article, a trustee has the duty to cause the trust property to be designated as held in the trustee's capacity as trustee so that the interest of the trustee, to the extent capable of registration, appears in records maintained by a party other than a trustee or beneficiary.

(d) If the trustee may invest as a whole the property in which the trustee has interests under two or more trust instruments, the trustee has the duty to maintain records clearly indicating the respective interests of the trustee under each trust instrument.

(e) Notwithstanding anything in this section to the contrary, this section shall not be construed to abridge in any way any duties imposed, or any powers conferred, upon a trustee under any other provision of this chapter, including without limitation under section 11-1.6.

§ 7-A-8.11 Duty to enforce and defend claims

A trustee has the duty to take reasonable steps to enforce claims of the trustee in the trustee's capacity as such and to defend claims against the trustee in such capacity.

§ 7-A-8.12 Duty to collect trust property

(a) 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.

(b) Cross-reference. See SCPA 1506(non-liability of trustee under certain circumstances).

§ 7-A-8.13 Duty to inform and report

(a) Unless unreasonable under the circumstances, a trustee has the duty to promptly respond to a beneficiary's request for information related to the administration of a specifically identified trust in which the beneficiary has an interest, including a report containing the information referred to in paragraph (c).

(b) A trustee:

(1) upon request of a beneficiary, has the duty to promptly furnish to the beneficiary a copy of the terms of the trust that describe or affect the beneficiary's interest;

(2) within 60 days after accepting a trusteeship or if later, 60 days after the effective date of enactment of this article, has the duty to notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number;

(3) within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, or if later, 60 days after the effective date of enactment of this article, the trustee has the duty to notify the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee's report as provided in paragraph (c); and

(4) shall notify the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation.

(c) A trustee has the duty to send to current recipients or permissible recipients of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values. Upon a vacancy in a trusteeship, unless a co-trustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative or guardian may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.

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

(e) Paragraphs (b)(2) and (3) do not apply to a trustee who accepted a trusteeship or was issued letters of trusteeship before the effective date of this article, to an irrevocable trust created before the effective date of this article, or to a revocable trust that becomes irrevocable before the effective date of this article.

(f) Nothing in this section shall be construed to limit the application of SCPA 2102(1), 2309(4) and 2312(6).

(g) Cross-reference. See §7-A-6.3 (Rights and duties in revocable trusts).

#### § 7-A-8.14 Duty regarding discretionary powers

(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 has the duty to exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust.

(b) The trustee shall not be compelled to exercise the trustee's discretion under paragraph (a) in such a way that would jeopardize a beneficiary's eligibility for, or receipt of, public benefits or both.

(c) The rules that address the exercise of discretionary powers by a trustee-beneficiary are set forth in section 10-10.1.

#### § 7-A-8.15 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, court order or decree or other applicable law:

(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 article.

(b) The court having jurisdiction of the trust may authorize the trustee to exercise any power which in the judgment of the court is necessary for the proper administration of the trust.

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

§ 7-A-8.16 Specific powers of trustee

Without limiting the authority conferred, or the restrictions imposed, by section 7-A-8.15, 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 trust property at public or private sale, and on such terms as in the opinion of the trustee will be most advantageous to those interested therein;

(3) exchange, partition, or otherwise change the character of trust property;

(4) deposit trust money in an account in a bank or other insured depository 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 (and subject to SCPA 2108), 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 held as a trustee, 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) employ a financial institution as custodian of any such stock or other securities as in the same manner as authorized for a fiduciary in section 11-1.1(b)(9);

(C) cause any such stock or other securities to be registered and held in the name of a nominee in the same manner as authorized for a fiduciary in section 11-1.1(b)(10);

(D) cause any such stock or other securities to be deposited in the same manner as authorized for a fiduciary in sections 11-1.8 and 11-1.9;

(E) employ a broker-dealer as a custodian of any such stock or other securities and to register such securities in the name of the such broker-dealer in the same manner as authorized for a fiduciary in section 11-1.10;

(F) pay calls, assessments, and other sums chargeable or accruing against the securities, in the same manner as authorized for a fiduciary in section 11-1.1(b)(15); and

(G) sell or exercise stock subscription or conversion rights, participate in foreclosures, reorganizations, consolidations, mergers or liquidations, and consent to corporate sales, leases and encumbrances in the same manner as authorized for a fiduciary in section 11-1.1(b)(16).

(8) with respect to repairs and other actions;

(A) for 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;

(B) for an interest in tangible personal property, make repairs to, conserve or improve such property.

(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) effect and keep in force fire, rent, title, liability casualty or other insurance to protect the property of the trust and to protect the trustee;

(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, including the reasonable expense of obtaining and continuing the trustee's bond and any reasonable counsel fees the trustee may necessarily incur;

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

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

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

(19) pledge trust property to guarantee loans made by others to the beneficiary;

(20) appoint a trustee to act in another jurisdiction with respect to real or tangible or personal 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 by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by:

(A) paying it to the beneficiary's guardian;

(B) paying it to the beneficiary's custodian under New York's Uniform Transfers to Minors Act and, for that purpose, creating a custodianship pursuant to sections 7-6.5 and 7-6.6;

(C) if the amount is not in excess of \$10,000 paying the amount 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;

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

(E) if the sum payable to a patient in an institution in the state department of mental hygiene is not in excess of the amount which the director of the

institution is authorized to receive under section 29.23 of the mental hygiene law, paying such sum to such director for use as provided in that section.

(22) on distribution of trust property or the division or termination of a trust, make distributions in cash, in kind valued at the fair market value of the property at the date of distribution, or partly in each, and make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation;

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

(24) contest, compromise or otherwise settle any claim in favor of the trust or trustee or in favor of third persons and against the trust or trustee;

(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;

(27) acquire the remaining undivided interest in the property of a trust in which the trustee, in the trustee's capacity, holds an undivided interest;

(28) invest and reinvest property of the trust under the provisions of the will, deed or other instrument or as otherwise provided by law;

(29) take possession of, collect the rents from and manage any property or any estate therein owned by the trustee;

(30) with respect to any mortgage on property owned by the trustee (A) continue the same upon and after the maturity, with or without renewal or extension, upon such terms as the trustee deems advisable; (B) foreclose, as an incident to collection of any bond or note, any mortgage securing such bond or note, and to purchase the mortgaged property or acquire the property by deed from the mortgagor in lieu of foreclosure;

(31) in the case of a successor or substitute trustee, succeed to all of the powers, duties and discretion of the original trustee with respect to the trust, as were given to the original trustee unless the exercise of such powers, duties or discretion of the original fiduciary are expressly prohibited by the will, deed or other instrument to any successor or substituted fiduciary;

(32) hold the property of two or more trusts or parts of such trusts created by the same instrument as an undivided whole without separation as between such trusts or parts, provided that such separate trusts or parts shall have undivided interests and provided further that not such holding shall defer the vesting of any estate in possession or otherwise;

(33) invest as a whole the property in which the trustee has interests under two or more trusts instruments;

(34) employ and compensate persons deemed by the trustee needful to advise or assist in the proper administration of any trust including, but not limited to: agents, accountants, brokers, attorneys-at-law, attorneys-in-fact, real estate managers, rental agents, realtors, appraisers, and investment counsel, custodians and other professional advisors as reasonably may be required or desired in managing, protecting and investing any trust; and

(35) in addition to those expenses specifically provided for in this sub paragraph, to pay all other reasonable and proper expenses of administration from the property of the trust, including the reasonable expense of obtaining and continuing the trustee's bond his bond and any reasonable counsel fees the trustee may necessarily incur.

§ 7-A-8.17 Duties and powers regarding distribution upon termination

(a) Upon termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. Subject to the provisions of paragraph (c) hereof, the right of any beneficiary to object to the proposed

distribution terminates if the beneficiary does not notify the trustee of an objection within 30 days after the proposal was sent but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection.

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

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

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

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

§ 7-A-8.18 Power of trustee to pay income or principal to trust contributor as reimbursement for income taxes

(a) Notwithstanding any contrary provision of law, the trustee, unless otherwise provided in the disposing instrument, may, from time to time pay to, or apply on behalf of, a trust contributor of such trust an amount equal to any income taxes on any portion of the trust income or trust principal of which such trust contributor is treated as the owner under Part 1 of Subchapter J of Subtitle 1 of the Internal Revenue Code. If the income tax is based on amounts allocated to trust income payment shall be made from trust income. If the income tax is based on amounts allocated to trust principal payment shall be made from trust principal.

(b) For purposes of paragraph (a), a trustee does not include a trust contributor unless the trust contributor has a power of revocation with respect to the trust.

(c) Paragraph (a) shall not apply if the application or the possibility of the application of paragraph (a) to any trust would reduce or eliminate a charitable deduction otherwise available to any person under any provision of the Internal Revenue Code.

(d) Paragraph (a) shall not apply if the application or the possibility of the application of paragraph (a) to any trust would reduce or eliminate for any person a gift tax marital deduction or a gift tax annual exclusion under the Internal Revenue Code.

(e) Paragraph (a) shall not apply if its application or possible application would reduce or eliminate a public benefit otherwise available to the trust contributor or to the trust contributor's spouse.

§ 7-A-8.19 Powers and duties regarding decanting

(a) An authorized trustee with unlimited discretion to invade trust principal may appoint part or all of such principal to a trustee of an appointed trust for, and only for the benefit of, one, more than one or all of the current beneficiaries of the invaded trust (to the exclusion of any one or more of such current beneficiaries). The successor and remainder beneficiaries of such appointed trust may be one, more than one or all of the successor and remainder beneficiaries of such invaded trust (to the exclusion of any one, more than one or all of such successor and remainder beneficiaries).

(1) An authorized trustee exercising the power under this paragraph may grant a discretionary power of appointment as defined in paragraph (b) of section 10-3.4 (including a presently exercisable power of appointment) in the appointed trust to one or more of the current beneficiaries of the invaded trust, provided that the beneficiary granted a power to appoint could receive the principal outright under the terms of the invaded trust.

(2) If the authorized trustee grants a power of appointment under subparagraph (1) of this paragraph, except as otherwise provided in subparagraph (3) of this paragraph, the granted power may only exclude as permissible appointees one or more of the beneficiary, the creator, or the creator's spouse,

or any of the estates, creditors, or creditors of the estates of the beneficiary, the creator or the creator's spouse.

(3) If the authorized trustee exercises the power under this paragraph, the appointed trust may grant any power of appointment included in the invaded trust provided such power has the same class of permissible appointees as the power of appointment in the invaded trust and is exercisable in the same fashion as the power of appointment in the invaded trust.

(4) If the beneficiary or beneficiaries of the invaded trust are described by a class, the beneficiary or beneficiaries of the appointed trust may include present or future members of such class.

(b) An authorized trustee with the power to invade trust principal but without unlimited discretion may appoint part or all of the principal of the trust to a trustee of an appointed trust, provided that the current beneficiaries of the appointed trust shall be the same as the current beneficiaries of the invaded trust and the successor and remainder beneficiaries of the appointed trust shall be the same as the successor and remainder beneficiaries of the invaded trust.

(1) If the authorized trustee exercises the power under this paragraph, the appointed trust shall include the same language authorizing the trustee to distribute the income or invade the principal of the appointed trust as in the invaded trust.

(2) If the authorized trustee exercises the power under this paragraph to extend the term of the appointed trust beyond the term of the invaded trust, for any period after the invaded trust would have otherwise terminated under the provisions of the invaded trust, the appointed trust, in addition to the language required to be included in the appointed trust pursuant to subparagraph (1) of this paragraph, may also include language providing the trustees with unlimited discretion to invade the principal of the appointed trust during such extended term.

(3) If the beneficiary or beneficiaries of the invaded trust are described by a class, the beneficiary or beneficiaries of the appointed trust shall include present or future members of such class.

(4) If the authorized trustee exercises the power under this paragraph and if the invaded trust grants a power of appointment to a beneficiary of the trust, the appointed trust shall grant such power of appointment in the appointed trust and the class of permissible appointees shall be the same as in the invaded trust.

(c) An exercise of the power to invade trust principal under paragraphs (a) and (b) of this section shall be considered the exercise of a special power of appointment as defined in section 10-3.2.

(d) The appointed trust to which an authorized trustee appoints the assets of the invaded trust may have a term that is longer than the term set forth in the invaded trust, including, but not limited to, a term measured by the lifetime of a current beneficiary.

(e) If an authorized trustee has unlimited discretion to invade the principal of a trust and the same trustee or another trustee has the power to invade principal under the trust instrument which power is not subject to unlimited discretion, such authorized trustee having unlimited discretion may exercise the power of appointment under paragraph (a) of this section.

(f) An authorized trustee may exercise the power to appoint in favor of an appointed trust under paragraphs (a) and (b) of this section whether or not there is a current need to invade principal under the terms of the invaded trust.

(g) An authorized trustee exercising the power under this section has a fiduciary duty to exercise the power in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under the prevailing circumstances. The authorized trustee may not

exercise the power under this section if there is substantial evidence of a contrary intent of the creator and it cannot be established that the creator would be likely to have changed such intention under the circumstances existing at the time of the exercise of the power. The provisions of the invaded trust alone are not to be viewed as substantial evidence of a contrary intent of the creator unless the invaded trust expressly prohibits the exercise of the power in the manner intended by the authorized trustee.

(b) Unless the authorized trustee provides otherwise:

(1) The appointment of all of the assets comprising the principal of the invaded trust to an appointed trust shall include subsequently discovered assets of the invaded trust and undistributed principal of the invaded trust acquired after the appointment to the appointed trust; and

(2) The appointment of part but not all of the assets comprising the principal of the invaded trust to an appointed trust shall not include subsequently discovered assets belonging to the invaded trust and principal paid to or acquired by the invaded trust after the appointment to the appointed trust; such assets shall remain the assets of the invaded trust.

(i) The exercise of the power to appoint to an appointed trust under paragraph (a) or (b) of this section shall be evidenced by an instrument in writing, signed, dated and acknowledged by the authorized trustee. The exercise of the power shall be effective thirty days after the date of service of the instrument as specified in subparagraph (2) of this paragraph, unless the persons entitled to notice consent in writing to a sooner effective date.

(1) An authorized trustee may exercise the power authorized by paragraphs (a) and (b) of this section without the consent of the creator, or of the persons interested in the invaded trust, and without court approval, provided that the authorized trustee may seek court approval for the exercise with notice to all persons interested in the invaded trust.

(2) A copy of the instrument exercising the power and a copy of each of the invaded trust and the appointed trust shall be delivered (A) to the creator, if living, of the invaded trust, (B) to any person having the right, pursuant to the terms of the invaded trust, to remove or replace the authorized trustee exercising the power under paragraph (b) or (c) of this section, and (C) to any persons interested in the invaded trust and the appointed trust (or, in the case of any persons interested in the trust, to any guardian of the property, conservator or personal representative of any such person or the parent or person with whom any such minor person resides), by registered or certified mail, return receipt requested, or by personal delivery or in any other manner directed by the court having jurisdiction over the invaded trust.

(3) The instrument exercising the power shall state whether the appointment is of all the assets comprising the principal of the invaded trust or a part but not all the assets comprising the principal of the invaded trust and if a part, the approximate percentage of the value of the principal of the invaded trust that is the subject of the appointment.

(4) A person interested in the invaded trust may object to the trustee's exercise of the power under this section by serving a written notice of objection upon the trustee prior to the effective date of the exercise of the power. The failure to object shall not constitute a consent.

(5) The receipt of a copy of the instrument exercising the power shall not affect the right of any person interested in the invaded trust to compel the authorized trustee who exercised the power under paragraph (a) or (b) of this section to account for such exercise and shall not foreclose any such interested person from objecting to an account or compelling a trustee to account. Whether the exercise of a power under paragraph (a) or (b) of this section begins the running of the statute of limitations on an action to compel a trustee to account shall be based on all the facts and circumstances of the situation.

(6) A copy of the instrument exercising the power shall be kept with the records of the invaded trust and the original shall be filed in the court having jurisdiction over the invaded trust. Where a trustee of an inter vivos trust exercises the power and the trust has not been the subject of a proceeding in the surrogate's court, no filing is required. The instrument shall state that in certain circumstances the appointment will begin the running of the statute of limitations that will preclude persons interested in the invaded trust from compelling an accounting by the trustees after the expiration of a given time.

(7) Prior to the effective date as provided herein, a trustee may revoke the exercise of the power to invade to a new trust. Where a trustee has served notice of the exercise of the power pursuant to subparagraph (2) of this paragraph, the trustee shall serve notice of the revocation of the exercise of the power to persons interested in the invaded trust and the appointed trust by registered or certified mail, return receipt requested, or by personal delivery or in any other manner directed by the court having jurisdiction over the invaded trust. Where the notice of the exercise of the power was filed with the court, the trustee shall file the notice of revocation of the exercise of the power with such court.

(j) This section shall not be construed to abridge the right of any trustee to appoint property in further trust that arises under the terms of the governing instrument of a trust or under any other provision of law or under common law, or as directed by any court having jurisdiction over the trust.

(k) Nothing in this section is intended to create or imply a duty to exercise a power to invade principal, and no inference of impropriety shall be made as a result of an authorized trustee not exercising the power conferred under paragraph (a) or (b) of this section.

(l) A power authorized by paragraph (a) or (b) of this section may be exercised, subject to the provisions of paragraph (g) of this section, unless expressly prohibited by the terms of the governing instrument, but a general prohibition of the amendment or revocation of the invaded trust or a provision that constitutes a spendthrift provision shall not preclude the exercise of a power under paragraph (a) or (b) of this section.

(m) An authorized trustee may not exercise a power authorized by paragraph (a) or (b) of this section to effect any of the following:

(1) To reduce, limit or modify any beneficiary's current right to a mandatory distribution of income or principal, a mandatory annuity or unitrust interest, a right to withdraw a percentage of the value of the trust or a right to withdraw a specified dollar amount, provided that such mandatory right has come into effect with respect to the beneficiary. Notwithstanding the foregoing, but subject to the other limitations in this section, an authorized trustee may exercise a power authorized by paragraph (a) or (b) of this section to appoint to an appointed trust that is a supplemental needs trust that conforms to the provisions of section 7-A-4.4-A;

(2) To decrease or indemnify against a trustee's liability or exonerate a trustee from liability for failure to exercise reasonable care, diligence and prudence;

(3) To eliminate a provision granting another person the right to remove or replace the authorized trustee exercising the power under paragraph (a) or (b) of this section unless a court having jurisdiction over the trust specifies otherwise;

(4) To make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise; or

(5) To jeopardize (A) the deduction or exclusion originally claimed with respect to any contribution to the invaded trust that qualified for the annual exclusion under section 2503(b) of the Internal Revenue Code, the marital deduction under section 2056(a) or 2523(a) of the internal revenue code, or the charitable deduction under section 170(a), 642(c), 2055(a) or 2522(a) of the

Internal Revenue Code, (B) the qualification of a transfer as a direct skip under section 2642(c) of the Internal Revenue Code, or (C) any other specific tax benefit for which a contribution originally qualified for income, gift, estate, or generation-skipping transfer tax purposes under the internal revenue code.

(n) An authorized trustee shall consider the tax implications of the exercise of the power under paragraph (a) or (b) of this section.

(o) An authorized trustee may not exercise a power described in paragraph (a) or (b) of this section in violation of the limitations under sections 9-1.1, 10-8.1 and 10-8.2, and any such exercise shall void the entire exercise of such power.

(p) (1) Unless a court otherwise directs, an authorized trustee may not exercise a power authorized by paragraph (a) or (b) of this section to change the provisions regarding the determination of the compensation of any trustee, the commissions or other compensation payable to the trustees of the invaded trust may continue to be paid to the trustees of the appointed trust during the term of the appointed trust and shall be determined in the same manner as in the invaded trust.

(2) No trustee shall receive any paying commission or other compensation for appointing of property from the invaded trust to an appointed trust pursuant to paragraph (a) or (b) of this section.

(q) Unless the invaded trust expressly provides otherwise, this section applies to:

(1) Any trust governed by the laws of this state, including a trust whose governing law has been changed to the laws of this state; and

(2) Any trust that has a trustee who is an individual domiciled in this state or a trustee which is an entity having an office in this state, provided that a majority of the trustees select this state as the location for the primary administration of the trust by an instrument in writing, signed and acknowledged by a majority of the trustees. The instrument exercising this selection shall be kept with the records of the invaded trust.

(r) For purposes of this section:

(1) The term "appointed trust" means an irrevocable trust which receives principal from an invaded trust under paragraph (a) or (b) of this section including a new trust created by the creator of the invaded trust or by the trustees, in that capacity, of the invaded trust.

(2) The term "authorized trustee" means, as to an invaded trust, any trustee or trustees with authority to pay trust principal to or for one or more current beneficiaries other than (i) the creator, or (ii) a beneficiary to whom income or principal must be paid currently or in the future, or who is or will become eligible to receive a distribution of income or principal in the discretion of the trustee (other than by the exercise of a power of appointment held in a non-fiduciary capacity).

(3) The term "current beneficiary or beneficiaries" means the person or persons (or as to a class, any person or persons who are or will become members of such class) to whom the trustees may distribute principal at the time of the exercise of the power, provided however that the interest of a beneficiary to whom income, but not principal, may be distributed in the discretion of the trustee of the invaded trust may be continued in the appointed trust.

(4) The term "invade" shall mean the power to pay directly to the beneficiary of a trust or make application for the benefit of the beneficiary.

(5) The term "invaded trust" means any existing irrevocable inter vivos or testamentary trust whose principal is appointed under paragraph (a) or (b) of this section.

(6) The term "person or persons interested in the invaded trust" shall mean any person or persons upon whom service of process would be required in a

proceeding for the judicial settlement of the account of the trustee, taking into account SCPA 315.

(7) The term "principal" shall include the income of the trust at the time of the exercise of the power that is not currently required to be distributed, including accrued and accumulated income.

(8) The term "unlimited discretion" means the unlimited right to distribute principal that is not modified in any manner. A power to pay principal that includes words such as best interests, welfare, comfort, or happiness shall not be considered a limitation or modification of the right to distribute principal.

(9) A trust contributor shall not be considered to be a beneficiary of an invaded or appointed trust by reason of the trustee's authority to pay trust income or principal to the creator pursuant to section 7-A-8.18 or by reason of the trustee's authority under the trust instrument or any other provision of law to pay or reimburse the trust contributor for any tax on trust income or trust principal that is payable by the trust contributor under the law imposing such tax or to pay any such tax directly to the taxing authorities.

(s) Cross-reference. For the exercise of the power under paragraph (a) or (b) of this section where there are multiple trustees, see sections 10-6.7 and 10-10.7.

§ 7-A-8.20 Duty when a resulting trust arises

Subject to section 7-A-8.17, the trustee has the duty to distribute trust property to the settlor or the settlor's successors in interest when a resulting trust arises.

#### PART 9 New York Uniform Directed Trust Act

§ 7-A-9.1 Short title. This part may be cited as the New York uniform directed trust act.

§ 7-A-9.2 Definitions. In this part:

(1) "Directed trust" means a trust for which the terms of the trust grant a power of direction.

(2) "Directed trustee" means a trustee that is subject to a trust director's power of direction.

(3) "Power of direction" means a power over a trust granted to a person by the terms of the trust to the extent the power is exercisable while the person is not then serving as a trustee. The term includes a power over the investment, management, or distribution of trust property or other matters of trust administration. The term excludes the powers described in section 7-A-9.4 (b).

(4) "Trust director" means a trust director as defined by section 7-A-1.3(28).

(5) "Willful misconduct" means willful misconduct as defined by section 7-A-1.3(31).

§ 7-A-9.3 Application; principal place of administration.

(a) This part applies to a trust, whenever created, that has its principal place of administration in this state, subject to the following rules:

(1) If the trust was created before the effective date of this article, this part applies only to a decision or action occurring on or after the effective date of this article.

(2) If the principal place of administration of the trust is changed to this state on or after the effective date of this article, this part applies only to a decision or action occurring on or after the date of the change.

(b) Without precluding other means to establish a sufficient connection with the designated jurisdiction in a directed trust, terms of the trust which designate the principal place of administration of the trust are valid and controlling if those terms satisfy the requirements of section 7-A-1.8(a).

(c) Cross-reference. See section 7-A-1.8(b) and (c) (providing default rules to determine principal place of administration).



§ 7-A-9.4 Exclusions.

(a) In this section, "power of appointment" means a power of appointment as defined by section 10-3.1(a).

(b) This part does not apply to a person who has a:

(1) power of appointment;

(2) power to appoint or remove a trustee or trust director;

(3) power of a trust contributor over a trust to the extent the trust contributor has a power to revoke the trust;

(4) power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects the beneficial interest of:

(A) the beneficiary; or

(B) another beneficiary represented by the beneficiary under SCPA 315 with respect to the exercise or nonexercise of the power; or

(5) power over a trust if:

(A) the terms of the trust provide that the power is held in a nonfiduciary capacity; and

(B) the power must be held in a nonfiduciary capacity to achieve the trust contributor's tax objectives under the Internal Revenue Code and regulations issued thereunder, as amended.

(c) A power granted to a person by the terms of the trust that would otherwise be a power of appointment is a power of direction if the terms of the trust impose fiduciary duties on that person's exercise of the power.

§ 7-A-9.5 Powers of trust director.

(a) The terms of a trust may grant to a trust director one or more powers of direction. Such powers, the listing of which is not exclusive but illustrative, may include a power to:

(1) direct investments;

(2) adjust between principal and income or convert to a unitrust;

(3) modify, reform, terminate, or decant a trust;

(4) direct a trustee's or another trust director's delegation of a trustee's or other trust director's powers;

(5) change the principal place of administration, situs, or governing law of the trust;

(6) ascertain the happening of an event that affects the administration of the trust;

(7) determine the capacity of a trustee, settlor, trust director, or beneficiary of the trust;

(8) determine the compensation to be paid to a trustee or trust director;

(9) prosecute, defend, or join an action, claim, or judicial proceeding relating to the trust;

(10) grant or withhold permission before a trustee or another trust director may exercise a power of the trustee or other trust director;

(11) release a trustee or another trust director from liability for an action proposed or previously taken by the trustee or other trust director;

(12) authorize loans to trust beneficiaries;

(13) guarantee loans made by trust beneficiaries;

(14) enforce a trust for pets pursuant to section 7-A-4.8; or

(15) enforce a non-charitable trust without an ascertainable beneficiary pursuant to section 7-A-4.9.

(b) For purposes of paragraph (a)(1), unless the terms of the trust provide otherwise, the power to direct investments means with respect to all of the trust's investments (or, if applicable, to investments specified in the governing instrument), the power to direct the retention, purchase, sale, exchange, tender or other transaction or decision affecting the ownership thereof or rights therein (including the powers to borrow and lend for investment purposes), to direct the exercise of all management, control and voting powers related directly or indirectly to such investments (including,

without limitation, nonpublicly traded investments), to direct the selection of custodians or subcustodians other than the trustee, the selection and compensation of, and delegation to, investments advisers, managers or other investment providers, and with respect to nonpublicly traded investments, the valuation thereof.

(c) Unless the terms of a trust provide otherwise, a trust director may exercise any further power appropriate to the exercise or nonexercise of a power of direction granted to the trust director under paragraph (a). Such further powers, the listing of which is not exclusive but illustrative, may include a power to:

- (1) incur reasonable costs and direct indemnification for those costs;
- (2) make a report or accounting to a beneficiary or other interested party;
- (3) direct a trustee to issue a certification of trust under section 7-A-10.13 of this chapter;
- (4) prosecute, defend, or join an action, claim, or judicial proceeding relating to a trust; or
- (5) employ a professional to assist or advise the trust director in the exercise or non-exercise of the trust director's powers;
- (6) delegate the trust director's power to an agent without liability for the actions of the agent provided the trust director exercises the reasonable care, skill, and caution that is required of a trustee in making a delegation under section 7-A-8.7(a); or
- (7) prosecute, defend, or join an action, claim, or judicial proceeding pertaining to the trust where appropriate under the circumstances to the trust director's exercise or non-exercise of the trust director's power of direction.

(d) Unless the terms of a trust provide otherwise, trust directors with joint powers must act by majority decision.

#### § 7-A-9.6 Limitations on powers of trust director.

A trust director having the power either to direct the trustee to make a discretionary distribution of principal or income to the trust director as a beneficiary or to consent to such a distribution is subject to the provisions of section 10-10.1 (other than the last sentence thereof) as if for purposes of that section the trust director were a trustee having the power to make a discretionary distribution to the trustee as beneficiary.

#### § 7-A-9.7 General duties and liabilities of trust director.

(a) Subject to paragraph (b),

(1) the trust director is a fiduciary and has the same duties as a trustee under part 8 of this article 7-A, and the same liabilities of a trustee under part 10 of this article 7-A, that a trustee would have if the power of direction authorized under the terms of the trust or any further power under section 7-A-9.5(c) was held by a trustee. If the power is held jointly with a trustee or another trust director, the rules applicable to co-trustees under section 7-A-7.3 shall also apply to the trust director; and

(2) the terms of the trust may vary the trust director's duties to the same extent the terms of the trust could vary the duties of a trustee.

(b) Unless the terms of a trust provide otherwise, if a trust director is licensed, certified, or otherwise authorized or permitted by law other than this part to provide health care in the ordinary course of the trust director's business or practice of a profession, to the extent the trust director acts in that capacity, the trust director has no duty or liability under this part and section 7-A-9.15 shall not apply.

(c) The terms of a trust may impose a duty or liability on a trust director in addition to the duties and liabilities under this section.

(d) Cross-reference. See section 7-A-9.8(b) (additional duties of trust director).

#### § 7-A-9.8 Duties and liabilities of directed trustee with respect to power of direction.

(a) Subject to paragraph (b), a directed trustee must take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction or a further power under section 7-A-9.5(c) and notwithstanding sections 7-A-8.19(m)(2) and 11-1.7 the directed trustee is not liable for any loss resulting directly or indirectly from any action taken pursuant to such exercise of a power of direction or any action not taken pursuant to the nonexercise of a power of direction.

(b) A directed trustee must not comply with a trust director's exercise or nonexercise of a power of direction or further power under section 7-A-9.5(c) to the extent that by complying the trustee would engage in willful misconduct.

(c) A directed trustee that has reasonable doubt about its duty not to engage in willful misconduct may timely petition the court for instructions or present the issue in a pending proceeding.

(d) The terms of a trust may impose a duty or liability on a directed trustee in addition to the duties and liabilities under this section.

(e) Cross-reference. See section 7-A-9.9(a) (additional duties of directed trustee)

§ 7-A-9.9 Duty to provide information to trust director or trustee.

(a) Subject to section 7-A-9.10(a), a trustee shall provide information to a trust director to the extent the information is reasonably related both to:

- (1) the powers or duties of the trustee; and
- (2) the powers or duties of the trust director.

(b) Subject to section 7-A-9.10(b), a trust director shall provide information to a trustee or another trust director to the extent the information is reasonably related both to:

- (1) the powers or duties of the trust director; and
- (2) the powers or duties of the trustee or other trust director.

(c) Notwithstanding section 11-1.7, a trustee that acts in reliance on information provided by a trust director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trustee engages in willful misconduct.

(d) Notwithstanding section 11-1.7, a trust director that acts in reliance on information provided by a trustee or another trust director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trust director engages in willful misconduct.

§ 7-A-9.10 No duty to monitor, inform, or advise.

(a) A trustee does not have a duty to:

- (1) monitor a trust director; or
- (2) inform or give advice to a settlor, trust contributor (other than a settlor), beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the trust director; and
- (3) by taking an action described in paragraph (a), a trustee does not assume the duty excluded by paragraph (a).

(b) A trust director does not have a duty to:

- (1) monitor a trustee or another trust director; or
- (2) inform or give advice to a settlor, trust contributor (other than a settlor), beneficiary, trustee, or another trust director concerning an instance in which the trust director might have acted differently than a trustee or another trust director; and
- (3) by taking an action described in paragraph (b), a trust director does not assume the duty excluded by paragraph (b).

(c) by taking an action described in paragraph (b), a trust director does not assume the duty excluded by paragraph (b).

§ 7-A-9.11 Limitation of action against trust director.

An action against a trust director for breach of trust must be commenced within the same limitation period as an action for breach of trust against a trustee under section 7-A-10.5.

§ 7-A-9.12 Defenses in action against trust director.

In an action against a trust director for breach of trust, the trust director may assert the same defenses as a trustee could assert in an action for breach of trust against the trustee.

§ 7-A-9.13 Jurisdiction over trust director.

(a) By accepting appointment as a trust director of a trust subject to this part, the trust director submits to the personal jurisdiction of the courts of this state regarding any matter related to a power or duty of the trust director.

(b) This section does not preclude other methods of obtaining jurisdiction over a trust director.

§ 7-A-9.14 Accepting or declining the position of trust director.

(a) A person designated as trust director accepts the position of trust director:

(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 exercising powers or performing duties as trust director, or otherwise indicating acceptance of the position of trust director.

(b) A person designated as trust director who has not yet accepted the directorship may reject the position of trust director. A designated trust director of a lifetime trust who does not accept the position of trust director within a reasonable time after knowing of the designation and knowing of the occurrence of the event that makes the designation effective is deemed to have rejected the position of trust director.

§ 7-A-9.15 Compensation of trust directors and directed trustees.

(a) If the terms of the trust make provision for specific rates or amounts of commissions (other than a general reference to commissions allowed by law or words of like import) for a trust director or a directed trustee, or, if a corporate directed trustee has agreed to accept specific rates or amounts of commissions, a trust director or a directed trustee shall be entitled to be compensated in accordance with such provisions or agreement, as the case may be.

(b) If the terms of the trust do not so provide, a trust director, other than one described in section 7-A-9.6(b), and a directed trustee shall be entitled to such compensation as may be reasonable, and the court, upon application of a person interested in the trust, may review the reasonableness of such compensation.

(c) If the terms of the trust do not provide for the allocation of payment of commissions to income and principal, commissions shall be payable as provided in SCPA 2312(5) or, in the case of a charitable trust, as provided in SCPA 2319(5).

(d) Notwithstanding the provisions of paragraphs (a) and (b), in the case of a charitable trust, the compensation of any trust director or directed trustee, other than a corporate trust director or corporate directed trustee, shall not exceed the amount provided in SCPA 2319(5) and the compensation of all trust directors and trustees (including directed trustees) of such trust shall be limited as provided in SCPA 2313.

§ 7-A-9.16 Trust director's bond.

(a) Except as provided by paragraph (c), a trust director shall give bond to secure performance of the trust director'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 trust company, as defined by banking law section 2(2), any bank authorized to exercise fiduciary powers and any national bank having a principal, branch or trust office in this state and duly authorized to exercise

fiduciary powers need not give a bond unless a bond is expressly required of the trust company or bank by the terms of the trust.

§ 7-A-9.17 Vacancy in the position of trust director; appointment of successor.

(a) A vacancy in the position of trust director occurs if:

(1) a person designated as trust director rejects the position of trust director;

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

(3) a trust director resigns;

(4) a trust director is disqualified or removed;

(5) a trust director dies;

(6) a guardian is appointed for an individual serving as trust director; or

(7) a trust instrument so provides.

(b) A vacancy in the position of trust director shall be filled only if expressly required by the terms of the trust, or if the terms of the trust expressly provide that trustees, other trust directors, or other persons may fill the vacancy in their discretion. If the terms of the trust do not expressly require that a vacancy be filled, and there is no other trust director then serving that is authorized to exercise the same power of direction as that held by the trust director that is no longer serving, the trustee or co-trustee is authorized to exercise the power or powers authorized by that power of direction.

(c) A vacancy in the position of trust director 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 trust director;

(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 the position of trust director 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 trust director;

(2) by a person selected by the charitable organizations expressly designated to receive distributions under the terms of the trust if the attorney general concurs in the selection; or

(3) by a person appointed by the court.

§ 7-A-9.18 Resignation of trust director.

(a) A trust director may resign:

(1) upon at least 30 days' notice, as provided in section 7-A-1.9, to (i) the trust contributor, all co-trustees and all other trust directors in the case of a revocable trust or (ii) the qualified beneficiaries, all co-trustees and all other trust directors, in the case of any other trust; 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 trust director and of any sureties on the trust director's bond for acts or omissions of the trust director are not discharged or affected by the trust director's resignation.

§ 7-A-9.19 Removal of trust director.

(a) In addition to any provision for removal in the trust instrument, the settlor, a co-trustee, co-trust director or a beneficiary may request the court to remove a trust director or a trust director may be removed by the court on its own initiative.

(b) The court may remove a trust director if:

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

(2) lack of cooperation among co-trust directors substantially impairs the administration of the trust;

(3) because of unfitness, unwillingness, or persistent failure of the trust director to effectively exercise the power of direction held by the trust director the court determines that removal of the trust director 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, provided that the court finds that removal of the trust director best serves the interests of all of the beneficiaries and is not inconsistent with the purposes of the trust, and a suitable co-trust director or successor trust director is available.

(c) Pending a final decision on a request to remove a trust director, or in lieu of or in addition to removing a trust director the court may order such appropriate relief under section 7-A-10.1(b) as may be necessary to protect the trust property or the interests of the beneficiaries.

§ 7-A-9.20 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.

§ 7-A-9.21 Severability clause.

If any provision of this part or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this part which can be given effect without the invalid provision or application, and to this end the provisions of this part are severable.

§ 7-A-9.22 Application of part

This part applies to trusts created on or after the effective date of this article as provided in section 7-A-11.4.

#### PART 10 Liability of Trustees and Rights of Persons Dealing with Trustee

##### § 7-A-10.1 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, by restoring property, and by other means;

(4) order a trustee to account;

(5) appoint a successor trustee or co-trustee to take possession of the trust property and administer the trust as provided in SCPA section 1502;

(6) suspend the trustee;

(7) remove the trustee as provided in section 7-A-7.6;

(8) reduce or deny compensation to the trustee;

(9) subject to section 7-A-10.11, 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.

(c) Nothing in this section shall be construed to limit the court's application of remedial provisions that are provided in the surrogate's court procedure act.

##### § 7-A-10.2 Liability for breach of trust

(a) Unless section 7-A-10.9 applies, and except as otherwise provided in this section, a trustee who commits a breach of trust is chargeable with the value of the capital lost by reason of the breach plus prejudgment interest as determined by the court.

(b) Unless section 7-A-10.9 applies, a trustee who commits a breach of trust (other than breaching the duty of loyalty) by conduct constituting gross negligence, recklessness or bad faith is chargeable with the greater of:

(1) the value of the capital lost by reason of the breach plus prejudgment interest as determined by the court; or

(2) the amount at the time of the decree required to restore the values of the trust property to what they would have been if the portion of the trust affected by the breach had been properly administered.

(c) Unless section 7-A-10.9 applies, a trustee who commits a breach of trust by breaching the duty of loyalty is chargeable with

(1) the greater of:

(A) the value of the capital lost by reason of the breach plus prejudgment interest as determined by the court; or

(B) the amount required to restore the values of the trust property to what they would have been if the portion of the trust affected by the breach had been properly administered; and

(2) the amount of any benefit to the trustee personally as a result of the breach to the extent that such amount is not included in the amount determined under subparagraph (1) (A) or (1) (B).

(d) In addition to charging the trustee as provided in paragraphs (b) and (c), a trustee may be additionally chargeable as the court deems appropriate to fashion complete equitable relief.

(e) Except as otherwise provided in this paragraph, if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee may be entitled to contribution from the other trustee or trustees in accordance with applicable law. A trustee is not entitled to contribution 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.

(f) Cross-reference. See section 7-A-8.2 (allowing qualified beneficiaries to void a transaction if a trustee breaches the duty of loyalty).

#### § 7-A-10.3 Damages in absence of breach

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

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

#### § 7-A-10.4 Compensation of attorney's fees, costs and allowances

(a) In a judicial proceeding involving the administration of a trust a court is authorized to

(1) fix and determine the compensation of an attorney as provided in SCPA 2110, and

(2) award costs and allowances as provided in article 23 of the SCPA.

(b) Cross-reference. Section 7-A-8.16 (b) (34) (trustee's payment of reasonable counsel fees).

#### § 7-A-10.5 Limitation of action against trustee

(a) A beneficiary may not commence a proceeding against a trustee for breach of trust more than two years after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.

(b) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.

(c) If paragraph (a) does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within six 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;
- (3) the termination of the trust; or.
- (4) the open repudiation of the trust by the trustee.

(d) Paragraph (a) does not apply to the attorney general acting under the authority given under article 8 of this chapter or under any other provision of law.

§ 7-A-10.6 Reliance on trust instrument

To the extent section 11-2.3 does not apply, 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.

§ 7-A-10.7 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.

§ 7-A-10.8 Exculpation of trustee and trust director

The rules for the exculpation of a trustee and a trust director are provided in section 11-1.7.

§ 7-A-10.9 Beneficiary's consent, release, or ratification

(a) A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented in writing to the conduct constituting the breach, executed a written release of the trustee from liability for the breach, or ratified in writing 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.

(b) A consent, release, or ratification under paragraph (a) that is made by a beneficiary upon whom service of process would be required in a proceeding to settle the trustee's account is binding upon all persons upon whom service of process would not be required under SCPA 315 because process was served upon the beneficiary.

§ 7-A-10.10 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 disclosed the fiduciary capacity in the contract.

(b) A trustee is personally liable for torts committed in the course of administering a trust, or for obligations arising from ownership or control of trust property, including liability for violation of environmental law, only if the trustee failed to exercise reasonable care, diligence, and prudence.

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

(d) In any case where liability is found against the trustee as the result of an action or proceeding brought under paragraph (c), issues of liability as between the trustee in the trustee's fiduciary capacity and the trustee in the



trustee's individual capacity shall, if necessary, be determined in an accounting proceeding brought pursuant to SCPA 2205.

§ 7-A-10.11 Interest as general partner

(a) 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 trustee's acquisition of the interest if the fiduciary capacity was disclosed in the contract or in a statement previously filed pursuant to the partnership law.

(b) A trustee who holds an interest as a general partner is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault.

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

§ 7-A-10.12 Protection of person dealing with trustee

(a) Except in the case of a breach pursuant to section 7-A-8.2, a person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers, is protected from liability as if the trustee properly exercised the power.

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

(c) A person who in good faith transfers money or property to a trustee is not responsible for the proper application of such money or property; and any right or title derived by him from the trustee in consideration of such transfer is not affected by the trustee's misapplication of such money or property.

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

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

(f) Paragraphs (a) through (e) of this section apply only to transactions that occur after the effective date of this article.

(g) With respect to transactions between a trustee or trustees and any person occurring before the effective date of this article:

(1) If the trust is expressed in the instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee, in contravention of the trust, except as authorized in this article and by any other provision of law, is void.

(2) An express trust not declared in the disposition to the trustee or an implied or resulting trust does not defeat the title of a purchaser from the trustee for value and without notice of the trust, or the rights of a creditor who extended credit to the trustee in reliance upon his apparent ownership of the trust property.

§ 7-A-10.13 Certification of trust

(a) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing so much of the following information as is requested by such person:

- (1) that the trust exists and the date the trust instrument was executed;
- (2) the identity of the settlor;
- (3) the identity and address of the currently acting trustee;

- (4) the powers of the trustee;
- (5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
- (6) the authority of co-trustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee;
- (7) the manner of taking title to trust property.
- (b) A certification of trust may be signed or otherwise authenticated by any trustee.
- (c) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.
- (d) A certification of trust need not contain the dispositive terms of a trust.
- (e) A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments which designate the trustee and confer upon the trustee the power to act in the pending transaction.
- (f) A person who acts in reliance upon a certification of trust without knowledge that the representations contained therein are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the certification.
- (g) A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.
- (h) A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.
- (i) This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

#### PART 11 Miscellaneous Provisions

§ 7-A-11.1 {Reserved}

§ 7-A-11.2 Relation to Electronic Signatures in Global and National Commerce Act

This article modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. section 7001 et seq., but does not modify, limit, or supersede section 101(c) of such act, 15 U.S.C. section 7001(c), or authorize electronic delivery of any of the notices described in section 103(b) of such act, 15 U.S.C. section 7003(b).

§ 7-A-11.3 Severability clause

If any provision of this article or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

§ 7-A-11.4 Effective date

This article takes effect 180 days after enactment.

§ 7-A-11.5 {Reserved}

§ 7-A-11.6 Application to existing relationships

(a) Except as otherwise provided in this article, on the effective date of this article:

(1) this article applies to all trusts created before, on, or after its effective date;

(2) this article applies to all judicial proceedings concerning trusts commenced on or after its effective date;

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

(4) any rule of construction or presumption provided in this article applies to trust instruments executed before the effective date of the article unless there is a clear indication of a contrary intent in the terms of the trust; and

(5) an act done before the effective date of the article is not affected by this article.

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

(c) The provisions of this article shall not impair or defeat any rights which have accrued under dispositions or appointments in effect prior to its effective date.

§ 2. Section 1-2.4 of the Estates, Powers and Trusts Law, is amended to read as follows:

§ 1-2.4 Disposition

(a) A disposition is a transfer of property by a person during his lifetime or by will.

(b) Cross-reference. See section 8-1.1(c)(2) (providing for cy pres application where charitable organization is designated as a beneficiary or payee upon the person making the disposition in certain nonprobate transfers).

§ 3. Section 1-2.12 of the Estates, Powers and Trusts Law, is amended to read as follows:

§ 1-2.12 Person

The term "person" includes [a natural person, an association, board, any corporation, whether municipal, stock or non-stock, court, governmental agency, authority or subdivision, partnership or other firm and the state] an individual, corporation, business trust, estate, partnership, limited liability company, association, or joint venture; government; government subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

§ 4. Section 1-2.21 of the Estates, Powers and Trusts Law is added to read as follows:

§ 1-2.21 Charitable organization

"Charitable organization" means an "institution" as defined in section 551(d) of the not-for-profit corporation law.

§ 5. Section 3-3.10 of the Estates, Powers and Trusts Law is added to read as follows:

§ 3-3.10 Reformation of wills to correct mistakes

The court may reform the terms of a will, even if unambiguous, to conform the terms to the testator's intention if it is proved by clear and convincing evidence what was the testator's intention and that specific terms of the will

do not carry out that intention because the specific terms were affected by a mistake of fact or law, whether in expression or inducement.

§ 6. The article heading of article 7 of the Estates, Powers and Trusts Law is amended to read as follows:

ARTICLE 7

[TRUSTS]NON-GRATUITOUS TRUSTS, TRANSFERS TO MINORS AND CHILD PERFORMER TRUST ACCOUNTS

§ 7. The Summary of article 7 is amended to read as follows:

SUMMARY OF ARTICLE

[Part 1. Rules Governing Trusts

~~Section 7-1.1 When trust interests not to merge.~~  
~~7-1.2 Trustee of passive trust not to take~~  
~~7-1.3 Purchase money resulting trust abolished~~  
~~7-1.4 Purposes for which trust may be created~~  
~~7-1.5 When trust interest inalienable; exception~~  
~~7-1.6 Application of principal to income beneficiary~~  
~~7-1.7 Interest remaining in creator of trust~~  
~~7-1.8 Duration of trust for benefit of creditors~~  
~~7-1.9 Revocation of trusts~~  
~~7-1.10 Provision by non-domiciliary creator as to law to govern trust~~  
~~7-1.11 Application of principal to creator of trust as reimbursement for taxes~~  
~~7-1.12 Supplemental needs trusts established for persons with severe and chronic or persistent disabilities~~  
~~7-1.13 Division of trusts and establishment of separate trusts~~  
~~7-1.14 Who may make a lifetime trust~~  
~~7-1.15 What property may be disposed of by lifetime trust~~  
~~7-1.16 Revocation of lifetime trust by will~~  
~~7-1.17 Execution, amendment and revocation of lifetime trusts~~  
~~7-1.18 Funding of lifetime trust]~~

Part 1-A. Rules Governing Non-gratuitous Trusts

~~Section 7-1.1-A Scope of part 1-A~~  
~~7-1.2-A Purposes for which trust may be created.~~  
~~7-1.3-A Duration of trust for benefit of creditors~~  
~~7-1.4-A Provision by non-domiciliary creator as to law to govern trust~~  
~~7-1.5-A Extent of trustee's estate~~  
~~7-1.6-A Trust estate not to descend on death of trustee; appointment, duties and rights of successor trustee~~  
~~7-1.7-A Suspension of powers of trustee in war service~~  
~~7-1.8-A Resignation, suspension or removal of trustee~~  
~~7-1.9-A Accounting by trustee in supreme court~~  
~~7-1.10-A Commissions of trust to sell real property for benefit of creditors~~  
~~7-1.11-A Common Law and principles of equity~~

[Part 2. Rules Governing Trustees

~~Section 7-2.1 Extent of trustee's estate~~  
~~7-2.2 When estate of trustee ceases~~  
~~7-2.3 Trust estate not to descend on death of trustee; appointment, duties and rights of successor trustee~~  
~~7-2.4 Act of trustee in contravention of trust~~  
~~7-2.5 Suspension of powers of trustee in war service~~  
~~7-2.6 Resignation, suspension or removal of trustee~~

- ~~7-2.7 Accounting by trustee in supreme court~~
- ~~7-2.8 Commissions of trustee to sell real property for benefit of creditors~~

~~Part 3. Rights of Purchasers, Creditors and Other Persons~~

- ~~Section 7-3.1 Disposition in trust for creator void as against creditors~~
- ~~7-3.2 Bona fide purchasers and creditors protected~~
  - ~~7-3.3 Person paying money to the trustee protected~~
  - ~~7-3.4 Excess income from trust property subject to creditors' claims~~
  - ~~7-3.5 Rights of creditors to obtain information concerning beneficiaries~~

~~PART 4. [Repealed]~~

~~Part 5. Bank Accounts in Trust Form~~

- ~~Section 7-5.1 Definitions~~
- ~~7-5.2 Terms of a trust account~~
  - ~~7-5.3 Payment to beneficiary~~
  - ~~7-5.4 Effect of payment~~
  - ~~7-5.5 Rights not affected~~
  - ~~7-5.6 Joint depositors~~
  - ~~7-5.7 Multiple beneficiaries~~
  - ~~7-5.8 Application]~~

~~Part 6. Uniform Transfers to Minors Act~~

- ~~Section 7-6.1 Definitions~~
- ~~7-6.2 Scope and jurisdiction~~
  - ~~7-6.3 Nomination of custodian~~
  - ~~7-6.4 Transfer by gift or exercise of power of appointment~~
  - ~~7-6.5 Transfer authorized by will or trust~~
  - ~~7-6.6 Other transfer by fiduciary~~
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  - ~~7-6.8 Receipt for custodial property~~
  - ~~7-6.9 Manner of creating custodial property and effecting transfer; designation of initial custodian; control~~
  - ~~7-6.10 Single custodianship~~
  - ~~7-6.11 Validity and effect of transfer~~
  - ~~7-6.12 Care of custodial property~~
  - ~~7-6.13 Powers of custodian~~
  - ~~7-6.14 Use of custodial property~~
  - ~~7-6.15 Custodian's expenses, compensation, and bond~~
  - ~~7-6.16 Exemption of third person from liability~~
  - ~~7-6.17 Liability to third persons~~
  - ~~7-6.18 Renunciation, resignation, death, or removal of custodian; designation of successor custodian~~
  - ~~7-6.19 Accounting by and determination of liability of custodian~~
  - ~~7-6.20 Termination of custodianship~~
  - ~~7-6.21 Age eighteen election~~
  - ~~7-6.22 Effect on existing custodianships~~
  - ~~7-6.23 Applicability~~
  - ~~7-6.24 Uniformity of application and construction~~
  - ~~7-6.25 Short title~~
  - ~~7-6.26 Severability~~

~~Part 7. Child Performer Trust Account~~

- ~~Section 7-7.1. Child performer trust account~~

[PART 8. Honorary Trusts for Pets]

Section 7-8.1 Trusts for pets]

§ 8. Part 1 of article 7 of the Estates, Powers and Trusts Law is REPEALED.

§ 9. Part 1-A of article 7 of the Estates, Powers and Trusts Law is added to read as follows:

PART 1-A Rules Governing Non-gratuitous Trusts

§ 7-1.1-A Scope of part 1-A

(a) This Part 1-A provides rules for non-gratuitous trusts. Non-gratuitous trusts are trusts not governed by article 7-A.

(b) Cross-reference. See §7-A-1.2(a) (trusts governed by article 7-A).

§ 7-1.2-A Purposes for which trust may be created

A non-gratuitous trust may be created for any lawful purpose.

§ 7-1.3-A Duration of trust for benefit of creditors

(a) Where an estate in real property has heretofore vested or shall hereafter vest in an assignee or other trustee for the benefit of creditors, it shall cease at the expiration of ten years from the time the trust was created, except where a different limitation is contained in the instrument creating the trust or is otherwise prescribed by law. Such estate shall thereupon revert to the assignor.

(b) This section does not apply to a trust of personal property or to a trust of real property created in connection with the salvaging of mortgage participation certificates. Nor does this section affect any rights to the proceeds of a sale of real property made by the assignee or other trustee for the benefit of creditors.

§ 7-1.4-A Provision by non-domiciliary creator as to law to govern trust

Whenever a person, not domiciled in this state, creates a non-gratuitous trust which provides that it shall be governed by the laws of this state, such provision shall be given effect in determining the validity, effect and interpretation of the disposition in such trust of:

(1) Any trust property situated in this state at the time the trust is created.

(2) Personal property, wherever situated, if the trustee of the trust is a person residing, incorporated or authorized to do business in this state or a national bank having an office in this state.

§ 7-1.5-A Extent of trustee's estate

A trust as described in sections 9-1.5, 9-1.6 and 9-1.7, including a business trust as defined in subdivision two of section two of the general associations law, may acquire property in the name of the trust as such name is designated in the instrument creating said trust. Any property, so acquired can be conveyed, encumbered or otherwise disposed of only in such name by a conveyance, encumbrance or other instrument executed by:

(1) the person or persons authorized by the instrument creating said trust;

or

(2) the person or persons authorized by a resolution duly adopted by the trustees; or

(3) a majority of the trustees unless the instrument creating said trust otherwise provides.

Any instrument of conveyance, encumbrance or disposition delivered prior to the effective date of this section to or by a trust to which this section applies, in its trust name is hereby validated provided that no action or proceeding to cancel or disaffirm it shall be instituted within one year from the effective date hereof, but nothing herein contained shall affect any such pending action or proceeding.

§ 7-1.6-A Trust estate not to descend on death of trustee; appointment, duties and rights of successor trustee

(a) On the death of the sole surviving trustee of a non-gratuitous trust, the trust estate does not vest in his personal representative or pass to his

distributees or devisees, but, in the absence of a contrary direction by the creator, if the trust has not been executed, the trust estate vests in the supreme court or the surrogate's court, as the case may be, and the trust shall be executed by a person appointed by the court.

(b) Upon such notice to the beneficiaries of the trust as the court may direct of an application for the appointment of a successor trustee, unless the creator has directed otherwise, the court may appoint a successor trustee, even though the trust has terminated, whenever in the opinion of the court such appointment is necessary for the effective administration and distribution of the trust estate, subject to the following:

(1) A successor trustee shall give security in such amount as the court may direct.

(2) A successor trustee shall be subject to the same duties, as to accounting and trust administration, as are imposed by law on trustees and, in addition to the reasonable expenses incurred in the course of trust administration, shall be entitled to such commissions as may be fixed by any court having jurisdiction to pass upon such trustee's final account, which shall in no case exceed the commissions allowable by law to trustees.

§ 7-1.7-A Suspension of powers of trustee in war service

(a) Whenever a trustee of a non-gratuitous trust not governed by article 1-a is engaged in war service, as defined in this section, such trustee or any other person interested in the trust estate may present a petition to the supreme court or the surrogate's court, as the case may be, to suspend the powers of such trustee while the trustee is so engaged and until the further order of the court, and if the suspension of such trustee will leave no person acting as trustee or leave a beneficiary of such trust as the only acting trustee thereof, the petition must pray for the appointment of a successor trustee, unless a successor has been named in the trust instrument and is not engaged in war service or is not for any other reason unable or unwilling to act as such trustee.

(b) For the purposes of this section, a trustee is engaged in war service in any of the following cases:

(1) If the trustee is a member of the armed forces of the United States or of any of its allies, or if he has been accepted for such service and is awaiting induction.

(2) If the trustee is engaged in any work abroad in connection with a governmental agency of the United States or with the American Red Cross Society or any other body with similar objectives.

(3) If the trustee is interned in any enemy country or is in a foreign country or a possession or dependency of the United States and is unable to return to this state.

(4) If the trustee is a member of the Merchant Marine or similar service.

(c) Where the application is made by a trustee engaged in war service, notice shall be given to such persons and in such manner as the court may direct. Where the application is made by any other person interested in the trust estate and the trustee is in the armed forces of the United States, notice shall be given to such trustee in such manner as the court may direct. In every other case, where the application is made by a person other than the trustee, notice thereof shall be given to such persons and in such manner as the court may direct.

(d) Upon the filing of the petition and proof of service of notice prescribed in paragraph (c), the court may, notwithstanding any other provision of law, suspend the trustee engaged in war service from the exercise of all of the trustee's powers and duties while engaged in such service and until the further order of the court. The order may further provide that the remaining trustee or, if there is none, the successor named in the trust instrument or appointed by the court may exercise all of the powers and be subject to all of the duties of the original trustee.

(e) The successor trustee shall be limited to commissions as computed under SCPA 2308 or 2309, whichever is applicable, upon income received and disbursed and upon principal disbursed. Commissions may also be allowed under 2308 or 2309 upon rents if the trustee is authorized or required to collect the rents of and manage real property. In case of the resignation or removal of the suspended trustee, or in the event of such trustee's death, the foregoing basis for computing the commissions shall not apply and the trustee's commissions shall be computed in the same manner as those of any other trustee.

(f) When the suspended trustee ceases to be engaged in war service the trustee may, upon application to the court and upon such notice as the court may direct, be reinstated as trustee if any of the duties of such office remain unexecuted. If the suspended trustee is reinstated the court shall thereupon remove the trustee's successor and make such other order as justice requires, but such removal shall not bar the successor from subsequently qualifying as a trustee if for any reason it thereafter becomes necessary to appoint a trustee.

§ 7-1.1.8-A Resignation, suspension or removal of trustee

(a) Subject to the relevant provisions of the civil practice law and rules, the supreme court has power:

(1) On the application of a trustee of a non-gratuitous trust, to accept the trustee's resignation and to discharge the trustee on such terms as it deems proper.

(2) On the application of any person interested in the trust estate, to suspend or remove a trustee who has violated or threatens to violate his trust, who is insolvent or whose insolvency is imminent or apprehended or who for any reason is a person unsuitable to execute the trust.

(3) In the case of the resignation or removal of a trustee, to appoint a successor trustee and, if there is no acting trustee, to cause the trust to be executed by a receiver or other officer under its direction. This section does not apply to a trust arising or resulting by implication of law, nor where other provision is made by law for the resignation, suspension or removal of a trustee or the appointment of a successor trustee.

§ 7-1.9-A Accounting by trustee in supreme court

(a) With respect to a non-gratuitous trust, any proceeding for an accounting or other relief brought by a trustee or by a substituted or successor trustee may be commenced by such notice to the beneficiaries of the trust as the supreme court may direct.

(b) In case of the resignation, suspension or removal, pursuant to this part, of any trustee of a trust which includes real property and mortgage participation certificates held by more than one person and secured by a mortgage on real property or any estate therein, payment of which certificates is not guaranteed by the trustee or by any title or mortgage guaranty or investment company, the court in its discretion may dispense with a formal accounting by such trustee; but the trustee shall file with the court a statement of the condition of the trust and of the security underlying such certificates as of the date of his resignation, suspension or removal and shall assign, transfer or convey all of the assets of the trust to the successor trustee or the receiver or other officer appointed by the court, as the case may be.

§ 7-1.10-A Commissions of trust to sell real property for benefit of creditors

A trustee of a trust to sell real property for the benefit of creditors is entitled to the same commissions as an assignee for the benefit of creditors.

§ 7-1.11-A Common law and principles of equity

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

§ 10. Part 2 of article 7 of the Estates, Powers and Trusts Law is REPEALED.

§ 11. Part 3 of article 7 of the Estates, Powers and Trusts Law is REPEALED.

§ 12. Part 5 of article 7 of the Estates, Powers and Trusts Law is REPEALED.

§ 13. Part 8 of article 7 of the Estates, Powers and Trusts Law is REPEALED.



§ 14. Paragraph (c) of section 8-1.1 of the Estates, Powers and Trusts Law is amended to read as follows:

(c) (1) ~~[The supreme court and, where the disposition is made by will, the surrogate's court in which such will is probated have]~~ Subject to subparagraph (c) (3), whenever it appears to the court having jurisdiction over the dispositions referred to and authorized by paragraphs (a) and (b), that circumstances have so changed since the execution of an instrument making a disposition for religious, charitable, educational or benevolent purposes as to render impracticable or impossible a literal compliance with the terms of such disposition, ~~[the]such court may, on application of the donor, [trustee or of]~~ a charitable beneficiary named in the disposition, the attorney general, the fiduciary, or the person having custody of the property subject to the disposition on notice to the attorney general and to the donor if the donor available and on such additional notice as the court may direct, make an order or decree directing that such disposition be administered and applied, in whole or in part, in ~~[such manner as in the judgment of the court will most effectively accomplish its general purposes]~~ a manner consistent with the donor's intent (which intent shall be presumed to be generally charitable subject to rebuttal), free from any specific restriction, limitation or direction contained therein. ~~[-; provided, however, that any such order or decree is effective only with the consent of the creator of the disposition if he is living]~~

For the purposes of this subparagraph, "donor" means the creator of the disposition, including a settlor as defined in section 7-A-1.3(21). A donor is "available" if the donor (i) is living or, if the donor is not a natural person, is in existence and conducting activities, and (ii) can be identified and located with reasonable efforts.

(c) (2) For the purposes of subparagraph (c) (1), the designation of a charitable organization as a beneficiary or payee upon the death of the person making the designation with respect to (i) a trust account as defined in section 7-A-4-A.1(d), (ii) a pension, retirement, death benefit, stock bonus or profit-sharing plan, system or trust or an annuity or supplemental insurance contract within the meaning of section 13-3.2 or (iii) a security registered in beneficiary form within the meaning of section 13-4.4 constitutes a disposition for religious, charitable, educational or benevolent purposes, effective at the time ownership passes or the funds or assets become payable to such beneficiary or payee (or would have passed or become payable to such beneficiary or payee but for the applicability of cy pres) but does not change the legal character of such designation for any other purpose.

(c) (3) A provision in the terms of a charitable disposition that would result in distribution of the subject property to a noncharitable beneficiary or a different charitable beneficiary prevails over the power of the court to apply its powers under subparagraph (c) (1) to modify or terminate the disposition.

(c) (4) ~~[(2)-(4)]~~ The attorney general or any trustee or beneficiary of a testamentary or lifetime trust wholly benefitting one or more charitable beneficiaries may petition a court of competent jurisdiction, on notice to the attorney general and all parties interested in the trust, seeking a termination of such trust when the trust is comprised of assets, the market value of which is one hundred thousand dollars or less and the expense of administering the trust is uneconomical when considered relative to income. When the court finds upon such application that continuation of the trust is economically impracticable or is not in the best interests of the beneficiaries, the court shall make an order or decree terminating the trust and directing the distribution of the trust assets to accomplish its charitable purposes, provided, however, that if the trust is one for the benefit of a particular charitable beneficiary or beneficiaries named therein, the court shall direct the distribution of the trust assets to such named charitable beneficiary or

beneficiaries, and provided further that no such proceeding may be instituted without the consent of the creator of the disposition if he is living.

~~[ (ii) ]~~ For purposes of this subparagraph, the term "charitable beneficiary" shall mean the beneficiary of a disposition for a religious, charitable, educational or benevolent purpose.

§ 15. Subparagraph (b) of section 10-6.6 of the Estates, Powers and Trusts Law is amended to read as follows:

~~(b) [An authorized trustee with unlimited discretion to invade trust principal may appoint part or all of such principal to a trustee of an appointed trust for, and only for the benefit of, one, more than one or all of the current beneficiaries of the invaded trust (to the exclusion of any one or more of such current beneficiaries). The successor and remainder beneficiaries of such appointed trust may be one, more than one or all of the successor and remainder beneficiaries of such invaded trust (to the exclusion of any one, more than one or all of such successor and remainder beneficiaries).] Cross reference. See section 7-A-8.19 (powers and duties regarding decanting).~~

~~(1) An authorized trustee exercising the power under this paragraph may grant a discretionary power of appointment as defined in paragraph (c) of section 10-3.4 of this article (including a presently exercisable power of appointment) in the appointed trust to one or more of the current beneficiaries of the invaded trust, provided that the beneficiary granted a power to appoint could receive the principal outright under the terms of the invaded trust.~~

~~(2) If the authorized trustee grants a power of appointment under subparagraph (1)<sup>a</sup> of this paragraph, except as otherwise provided in subparagraph (3) of this paragraph, the granted power may only exclude as permissible appointees one or more of the beneficiary, the creator, or the creator's spouse, or any of the estates, creditors, or creditors of the estates of the beneficiary, the creator or the creator's spouse.~~

~~(3) If the authorized trustee exercises the power under this paragraph, the appointed trust may grant any power of appointment included in the invaded trust provided such power has the same class of permissible appointees as the power of appointment in the invaded trust and is exercisable in the same fashion as the power of appointment in the invaded trust.~~

~~(4) If the beneficiary or beneficiaries of the invaded trust are described by a class, the beneficiary or beneficiaries of the appointed trust may include present or future members of such class.~~

~~(c) An authorized trustee with the power to invade trust principal but without unlimited discretion may appoint part or all of the principal of the trust to a trustee of an appointed trust, provided that the current beneficiaries of the appointed trust shall be the same as the current beneficiaries of the invaded trust and the successor and remainder beneficiaries of the appointed trust shall be the same as the successor and remainder beneficiaries of the invaded trust.~~

~~(1) If the authorized trustee exercises the power under this paragraph, the appointed trust shall include the same language authorizing the trustee to distribute the income or invade the principal of the appointed trust as in the invaded trust.~~

~~(2) If the authorized trustee exercises the power under this paragraph to extend the term of the appointed trust beyond the term of the invaded trust, for any period after the invaded trust would have otherwise terminated under the provisions of the invaded trust, the appointed trust, in addition to the language required to be included in the appointed trust pursuant to subparagraph (1) of this paragraph, may also include language providing the trustees with unlimited discretion to invade the principal of the appointed trust during such extended term.~~

~~(3) If the beneficiary or beneficiaries of the invaded trust are described by a class, the beneficiary or beneficiaries of the appointed trust shall include present or future members of such class.~~

~~(4) If the authorized trustee exercises the power under this paragraph and if the invaded trust grants a power of appointment to a beneficiary of the trust, the appointed trust shall grant such power of appointment in the appointed trust and the class of permissible appointees shall be the same as in the invaded trust.~~

~~(d) An exercise of the power to invade trust principal under paragraphs (b) and (c) of this section shall be considered the exercise of a special power of appointment as defined in section 10-3.2 of this article.~~

~~(e) The appointed trust to which an authorized trustee appoints the assets of the invaded trust may have a term that is longer than the term set forth in the invaded trust, including, but not limited to, a term measured by the lifetime of a current beneficiary.~~

~~(f) If an authorized trustee has unlimited discretion to invade the principal of a trust and the same trustee or another trustee has the power to invade principal under the trust instrument which power is not subject to unlimited discretion, such authorized trustee having unlimited discretion may exercise the power of appointment under paragraph (b) of this section.~~

~~(g) An authorized trustee may exercise the power to appoint in favor of an appointed trust under paragraphs (b) and (c) of this section whether or not there is a current need to invade principal under the terms of the invaded trust.~~

~~(h) An authorized trustee exercising the power under this section has a fiduciary duty to exercise the power in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under the prevailing circumstances. The authorized trustee may not exercise the power under this section if there is substantial evidence of a contrary intent of the creator and it cannot be established that the creator would be likely to have changed such intention under the circumstances existing at the time of the exercise of the power. The provisions of the invaded trust alone are not to be viewed as substantial evidence of a contrary intent of the creator unless the invaded trust expressly prohibits the exercise of the power in the manner intended by the authorized trustee.~~

~~(i) Unless the authorized trustee provides otherwise:~~

~~(1) The appointment of all of the assets comprising the principal of the invaded trust to an appointed trust shall include subsequently discovered assets of the invaded trust and undistributed principal of the invaded trust acquired after the appointment to the appointed trust; and~~

~~(2) The appointment of part but not all of the assets comprising the principal of the invaded trust to an appointed trust shall not include subsequently discovered assets belonging to the invaded trust and principal paid to or acquired by the invaded trust after the appointment to the appointed trust; such assets shall remain the assets of the invaded trust.~~

~~(j) The exercise of the power to appoint to an appointed trust under paragraph (b) or (c) of this section shall be evidenced by an instrument in writing, signed, dated and acknowledged by the authorized trustee. The exercise of the power shall be effective thirty days after the date of service of the instrument as specified in subparagraph (2) of this paragraph, unless the persons entitled to notice consent in writing to a sooner effective date. The exercise of the power is irrevocable on such effective date, either thirty days following service of the notice or the effective date as set forth in the written consent.~~

~~(1) An authorized trustee may exercise the power authorized by paragraphs (b) and (c) of this section without the consent of the creator, or of the persons interested in the invaded trust, and without court approval, provided~~

~~that the authorized trustee may seek court approval for the exercise with notice to all persons interested in the invaded trust.~~

~~(2) A copy of the instrument exercising the power and a copy of each of the invaded trust and the appointed trust shall be delivered (A) to the creator, if living, of the invaded trust, (B) to any person having the right, pursuant to the terms of the invaded trust, to remove or replace the authorized trustee exercising the power under paragraph (b) or (c) of this section, and (C) to any persons interested in the invaded trust and the appointed trust (or, in the case of any persons interested in the trust, to any guardian of the property, conservator or personal representative of any such person or the parent or person with whom any such minor person resides), by registered or certified mail, return receipt requested, or by personal delivery or in any other manner directed by the court having jurisdiction over the invaded trust.~~

~~(3) The instrument exercising the power shall state whether the appointment is of all the assets comprising the principal of the invaded trust or a part but not all the assets comprising the principal of the invaded trust and if a part, the approximate percentage of the value of the principal of the invaded trust that is the subject of the appointment.~~

~~(4) A person interested in the invaded trust may object to the trustee's exercise of the power under this section by serving a written notice of objection upon the trustee prior to the effective date of the exercise of the power. The failure to object shall not constitute a consent.~~

~~(5) The receipt of a copy of the instrument exercising the power shall not affect the right of any person interested in the invaded trust to compel the authorized trustee who exercised the power under paragraph (b) or (c) of this section to account for such exercise and shall not foreclose any such interested person from objecting to an account or compelling a trustee to account. Whether the exercise of a power under paragraph (b) or (c) of this section begins the running of the statute of limitations on an action to compel a trustee to account shall be based on all the facts and circumstances of the situation.~~

~~(6) A copy of the instrument exercising the power shall be kept with the records of the invaded trust and, within twenty days of the effective date, the original shall be filed in the court having jurisdiction over the invaded trust. Where a trustee of an inter vivos trust exercises the power and the trust has not been the subject of a proceeding in the surrogate's court, no filing is required. The instrument shall state that in certain circumstances the appointment will begin the running of the statute of limitations that will preclude persons interested in the invaded trust from compelling an accounting by the trustees after the expiration of a given time.~~

~~(7) Prior to the effective date as provided herein, a trustee may revoke the exercise of the power to invade to a new trust. Where a trustee has served notice of the exercise of the power pursuant to subparagraph (2) of this paragraph, the trustee shall serve notice of the revocation of the exercise of the power to persons interested in the invaded trust and the appointed trust by registered or certified mail, return receipt requested, or by personal delivery or in any other manner directed by the court having jurisdiction over the invaded trust. Where the notice of the exercise of the power was filed with the court, the trustee shall file the notice of revocation of the exercise of the power with such court.~~

~~(k) This section shall not be construed to abridge the right of any trustee to appoint property in further trust that arises under the terms of the governing instrument of a trust or under any other provision of law or under common law, or as directed by any court having jurisdiction over the trust.~~

~~(l) Nothing in this section is intended to create or imply a duty to exercise a power to invade principal, and no inference of impropriety shall be made as a result of an authorized trustee not exercising the power conferred under paragraph (b) or (c) of this section.~~

~~(m) A power authorized by paragraph (b) or (c) of this section may be exercised, subject to the provisions of paragraph (h) of this section, unless expressly prohibited by the terms of the governing instrument, but a general prohibition of the amendment or revocation of the invaded trust or a provision that constitutes a spendthrift clause shall not preclude the exercise of a power under paragraph (b) or (c) of this section.~~

~~(n) An authorized trustee may not exercise a power authorized by paragraph (b) or (c) of this section to effect any of the following:~~

~~(1) To reduce, limit or modify any beneficiary's current right to a mandatory distribution of income or principal, a mandatory annuity or unitrust interest, a right to withdraw a percentage of the value of the trust or a right to withdraw a specified dollar amount, provided that such mandatory right has come into effect with respect to the beneficiary. Notwithstanding the foregoing, but subject to the other limitations in this section, an authorized trustee may exercise a power authorized by paragraph (b) or (c) of this section to appoint to an appointed trust that is a supplemental needs trust that conforms to the provisions of section 7-1.12 of this chapter;~~

~~(2) To decrease or indemnify against a trustee's liability or exonerate a trustee from liability for failure to exercise reasonable care, diligence and prudence;~~

~~(3) To eliminate a provision granting another person the right to remove or replace the authorized trustee exercising the power under paragraph (b) or (c) of this section unless a court having jurisdiction over the trust specifies otherwise;~~

~~(4) To make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise; or~~

~~(5) To jeopardize (A) the deduction or exclusion originally claimed with respect to any contribution to the invaded trust that qualified for the annual exclusion under section 2503(b) of the internal revenue code, the marital deduction under section 2056(a) or 2522(a) of the internal revenue code, or the charitable deduction under section 170(a), 642(c), 2055(a) or 2522(a) of the internal revenue code, (B) the qualification of a transfer as a direct skip under section 2642(c) of the internal revenue code, or (C) any other specific tax benefit for which a contribution originally qualified for income, gift, estate, or generation skipping transfer tax purposes under the internal revenue code.~~

~~(c) An authorized trustee shall consider the tax implications of the exercise of the power under paragraph (b) or (c) of this section.~~

~~(p) An authorized trustee may not exercise a power described in paragraph (b) or (c) of this section in violation of the limitations under sections 9-1.1, 10-8.1 and 10-8.2 of this chapter, and any such exercise shall void the entire exercise of such power.~~

~~(q) (1) Unless a court otherwise directs, an authorized trustee may not exercise a power authorized by paragraph (b) or (c) of this section to change the provisions regarding the determination of the compensation of any trustee, the commissions or other compensation payable to the trustees of the invaded trust may continue to be paid to the trustees of the appointed trust during the term of the appointed trust and shall be determined in the same manner as in the invaded trust.~~

~~(2) No trustee shall receive any paying commission or other compensation for appointing of property from the invaded trust to an appointed trust pursuant to paragraph (b) or (c) of this section.~~

~~(r) Unless the invaded trust expressly provides otherwise, this section applies to:~~

~~(1) Any trust governed by the laws of this state, including a trust whose governing law has been changed to the laws of this state; and~~

~~(2) Any trust that has a trustee who is an individual domiciled in this state or a trustee which is an entity having an office in this state, provided that a majority of the trustees select this state as the location for the primary administration of the trust by an instrument in writing, signed and acknowledged by a majority of the trustees. The instrument exercising this selection shall be kept with the records of the invaded trust.~~

~~(s) For purposes of this section:~~

~~(1) The term "appointed trust" means an irrevocable trust which receives principal from an invaded trust under paragraph (b) or (c) of this section including a new trust created by the creator of the invaded trust or by the trustees, in that capacity, of the invaded trust. For purposes of creating the new trust, the requirement of section 7-1.17 of this chapter that the instrument be executed and acknowledged by the person establishing such trust shall be deemed satisfied by the execution and acknowledgment of the trustee of the appointed trust.~~

~~(2) The term "authorized trustee" means, as to an invaded trust, any trustee or trustees with authority to pay trust principal to or for one or more current beneficiaries other than (i) the creator, or (ii) a beneficiary to whom income or principal must be paid currently or in the future, or who is or will become eligible to receive a distribution of income or principal in the discretion of the trustee (other than by the exercise of a power of appointment held in a non-fiduciary capacity).~~

~~(3) References to sections of the "internal revenue code" refer to the United States internal revenue code of 1986, as amended from time to time, or to corresponding provisions of subsequent internal revenue laws, and also refer to corresponding provisions of state law.~~

~~(4) The term "current beneficiary or beneficiaries" means the person or persons (or as to a class, any person or persons who are or will become members of such class) to whom the trustees may distribute principal at the time of the exercise of the power, provided however that the interest of a beneficiary to whom income, but not principal, may be distributed in the discretion of the trustee of the invaded trust may be continued in the appointed trust.~~

~~(5) The term "invade" shall mean the power to pay directly to the beneficiary of a trust or make application for the benefit of the beneficiary.~~

~~(6) The term "invaded trust" means any existing irrevocable inter vivos or testamentary trust whose principal is appointed under paragraph (b) or (c) of this section.~~

~~(7) The term "person or persons interested in the invaded trust" shall mean any person or persons upon whom service of process would be required in a proceeding for the judicial settlement of the account of the trustee, taking into account section three hundred fifteen of the surrogate's court procedure act.~~

~~(8) The term "principal" shall include the income of the trust at the time of the exercise of the power that is not currently required to be distributed, including accrued and accumulated income.~~

~~(9) The term "unlimited discretion" means the unlimited right to distribute principal that is not modified in any manner. A power to pay principal that includes words such as best interests, welfare, comfort, or happiness shall not be considered a limitation or modification of the right to distribute principal.~~

~~(10) The creator shall not be considered to be a beneficiary of an invaded or appointed trust by reason of the trustee's authority to pay trust principal to the creator pursuant to section 7-1.11 of this chapter or by reason of the trustee's authority under the trust instrument or any other provision of law to pay or reimburse the creator for any tax on trust income or trust principal that is payable by the creator under the law imposing such tax or to pay any such tax directly to the taxing authorities.~~

~~(t) Cross-reference. For the exercise of the power under paragraph (b) or (c) of this section where there are multiple trustees, see sections 10-6.7 and 10-10.7 of this article.]~~

§ 16. Section 10-10.1 of the Estates, Powers and Trusts Law is amended to read as follows:

§ 10-10.1 Power to distribute principal or allocate income; restriction on exercise

A power held by a person as trustee of an express trust to make a discretionary distribution of either principal or income to such person as a beneficiary, or to make a discretionary ~~[allocations in such person's favor of receipts or expenses as between]~~ distribution of either principal ~~[and] or~~ income in discharge of the trustee's personal obligation of support, cannot be exercised by such person unless (1) such person is the grantor of the trust and the trust is revocable by such person during such person's lifetime, or (2) the power is a power to provide for such person's health, education, maintenance or support within the meaning of sections 2041 and 2514 of the Internal Revenue Code, or (3) the trust instrument, by express reference to this section, provides otherwise. If the power is conferred on two or more trustees, it may be exercised by the trustee or trustees who are not so disqualified. If there is no trustee qualified to exercise the power, its exercise devolves on the supreme court or the surrogate's court, except that if the power is created by will, its exercise devolves on the surrogate's court having jurisdiction of the estate of the donor of the power.

§ 17. Section 10-10.6 of the Estates, Powers and Trusts Law is amended to read as follows:

§ 10-10.6 Effect of reserved unqualified power to revoke

Where a creator reserves an unqualified power of revocation, he remains the absolute owner of the property disposed of so far as the rights of his creditors or purchasers are concerned. This section does not apply to the trust contributor of an express trust created after the effective date of section 7-A-5.5.

§ 18. Section 10-10.7 of the Estates, Powers and Trusts Law is amended to read as follows:

§ 10-10.7 Exercise of powers by multiple fiduciaries; joint and several powers

Unless contrary to the express provisions of an instrument affecting the disposition of property, a joint power other than a power of appointment ~~[but including a power in a trustee to invade trust principal under section 10-6.6 of this article or under the terms of the dispositive instrument]~~, conferred upon three or more fiduciaries, as that term is defined in 11-1.1, by the terms of such instrument, or by statute, or arising by operation of law, may be exercised by a majority of such fiduciaries, or by a majority of survivor fiduciaries, or by the survivor fiduciary. Such a power conferred upon or surviving to two such fiduciaries may be exercised jointly by both such fiduciaries or by the survivor fiduciary, unless contrary to the express terms of the instrument creating the power. A fiduciary who fails to act through absence or disability, or a dissenting fiduciary who joins in carrying out the decision of a majority of the fiduciaries if his or her dissent is expressed promptly in writing to his or her co-fiduciaries, shall not be liable for the consequences of any majority decision, provided that liability for failure to join in administering the estate ~~[or trust or to prevent a breach of the trust]~~ may not thus be avoided. A power vested in one or more persons under a trust of real property created in connection with the salvaging of mortgage participation certificates may be executed by one or more of such persons as provided in such trust. This section shall not affect the right of any one of two or more personal representatives of a decedent to exercise a several power.

§ 19. Section 11-1.1 of the Estates, Powers and Trusts Law is amended to read as follows:

Fiduciaries' powers. (a) As used in this section, unless the context or subject matter otherwise requires, (1) the term "estate" means the estate of a decedent; (2) the term "trust" means any express trust of property, created by a will, deed or other instrument, whereby there is imposed upon a trustee the duty to administer property for the benefit of a named or otherwise described income or principal beneficiary, or both. A trust shall not include trusts for the benefit of creditors, resulting or constructive trusts, business trusts where certificates of beneficial interest are issued to the beneficiary, investment trusts, voting trusts, security instruments such as deeds of trust and mortgages, trusts created by the judgment or decree of a court, liquidation or reorganization trusts, trusts for the sole purpose of paying dividends, interest, interest coupons, salaries, wages, pensions or profits, instruments wherein persons are mere nominees for others, or trusts created in deposits in any banking institution or savings and loan institution; (3) the term "fiduciary" means administrators, executors, preliminary executors, administrators d.b.n., administrators c.t.a.d.b.n., administrators c.t.a., ancillary executors, ancillary administrators, ancillary administrators c.t.a. [~~and trustees of express trusts~~], including a corporate as well as a natural person acting as fiduciary, and a successor or substitute fiduciary, whether designated in a trust instrument or otherwise.

(b) In the absence of contrary or limiting provisions in the court order or decree appointing a fiduciary, or in a subsequent order or decree, or in the will, deed or other instrument, every fiduciary is authorized:

(1) To accept additions to any estate [~~or trust~~] from sources other than the estate of the decedent [~~or the settlor of a trust~~].

(2) To acquire the remaining undivided interest in the property of an estate [~~or trust~~] in which the fiduciary, in his fiduciary capacity, holds an undivided interest.

(3) To invest and reinvest property of the estate [~~or trust~~] under the provisions of the will, deed or other instrument or as otherwise provided by law.

(4) To effect and keep in force fire, rent, title, liability, casualty or other insurance to protect the property of the estate [~~or trust~~] and to protect the fiduciary.

(5) With respect to any property or any estate therein owned by an estate [~~or trust~~], except where such property or any estate therein is specifically disposed of:

(A) To take possession of, collect the rents from and manage the same.

(B) To sell the same at public or private sale, and on such terms as in the opinion of the fiduciary will be most advantageous to those interested therein.

(C) With respect to fiduciaries [~~other than a trustee~~], to lease the same for a term not exceeding three years [~~and, in the case of a trustee, to lease the same for a term not exceeding ten years although such term extends beyond the duration of the trust and, in either of such cases~~], including the right to explore for and remove mineral or other natural resources, and in connection with mineral leases to enter into pooling and unitization agreements.

(D) To mortgage the same.

(E) Any power to take possession of, collect the rent from, manage, sell, lease or mortgage, granted by this subparagraph (5), which is prohibited by the terms of the will, deed or other instrument or by the provisions of this subparagraph (5), nonetheless exists, upon the approval of the surrogate, where such power is necessary for the purposes set forth in SCPA 1902.

(F) A fiduciary acting under a will may exercise all of the powers granted by this subparagraph (5) notwithstanding the effect upon such will of the birth of a child after its execution or of any election by a surviving spouse.

(6) To make ordinary repairs to the property of the estate [~~or trust~~].



(7) To grant options for the sale of property for a period not exceeding six months.

(8) With respect to any mortgage held by the estate~~(or trust)~~ (A) to continue the same upon and after maturity, with or without renewal or extension, upon such terms as the fiduciary deems advisable; (B) to foreclose, as an incident to collection of any bond or note, any mortgage securing such bond or note, and to purchase the mortgaged property or acquire the property by deed from the mortgagor in lieu of foreclosure.

(9) To employ any bank or trust company incorporated in this state, any national bank located in this state or any private banker duly authorized by the superintendent of financial services of this state to engage in business here (who, as private banker, maintains a permanent capital of not less than one million dollars) as custodian of any stock or other securities held as a fiduciary, and the cost thereof, except in the case of a corporate fiduciary, shall be a charge upon the estate or trust. The records of such bank, trust company or private banker shall at all times show the ownership of such stock or other securities. Such stock or other securities shall at all times be kept separate from the assets of such bank, trust company or private banker and may be kept by such bank, trust company or private banker

(A) in a manner such that all certificates representing the securities from time to time constituting the assets of a particular estate, trust or other fiduciary account are held separate from those of all other estates, trusts or accounts; or

(B) in a manner such that, without certification as to ownership attached, certificates representing securities of the same class of the same issuer and from time to time constituting assets of particular estates, trusts or other fiduciary accounts are held in bulk, including, to the extent feasible, the merging of certificates of small denomination into one or more certificates of large denomination, provided that a bank, trust company or private banker, when operating under the method of safekeeping security certificates described in this subparagraph (B), shall be subject to such rules and regulations as, in the case of state chartered institutions, the state superintendent of financial services and, in the case of national banking associations, the comptroller of the currency may from time to time issue. Such bank, trust company or private banker shall, on demand by the fiduciary, certify in writing the securities held by it for such estate, trust or fiduciary account.

(10) To cause any stock or other securities (hereinafter referred to as "securities") held by any bank or trust company, when acting as fiduciary, whether alone or jointly with an individual, with the consent of the individual fiduciary, if any (who is hereby authorized to give such consent), to be registered and held in the name of a nominee of such bank or trust company without disclosure of the fiduciary relationship; and, in the case of an individual acting as fiduciary, to direct any bank or trust company incorporated under the laws of this state, any national bank located in this state or any private banker duly authorized by the superintendent of financial services of this state to engage in business here (who, as private banker, maintains a permanent capital of not less than one million dollars) to register and hold any securities deposited with such bank, trust company or private banker (hereinafter referred to as "bank") in the name of a nominee of such bank. The bank shall not redeliver such securities to the individual fiduciary, who authorized their registration in the name of a nominee of the bank, without first registering the securities in the name of the individual fiduciary, as such. But, any sale of such securities by the bank at the direction of the individual fiduciary shall not be treated as a redelivery. The bank may make any disposition of such securities which is authorized or directed by an order or decree of the court having jurisdiction of the estate or trust. Any such

bank shall be absolutely liable for any loss occasioned by the acts of its nominee with respect to the securities so registered. The records of the bank shall at all times show the ownership of any such securities and of those held in bearer form. Such securities and those held in bearer form shall at all times be kept separate from the assets of the bank and may be kept by such bank

(A) in a manner such that all certificates representing the securities from time to time constituting the assets of a particular estate, trust or other fiduciary account are held separate from those of all other estates, trusts or accounts; or

(B) in a manner such that, without certification as to ownership attached, certificates representing securities of the same class of the same issuer and from time to time constituting assets of particular estates, trusts or other fiduciary accounts are held in bulk, including, to the extent feasible, the merging of certificates of small denomination into one or more certificates of large denomination, provided that a bank, when operating under the method of safekeeping security certificates described in this subparagraph (B), shall be subject to such rules and regulations as, in the case of state chartered institutions, the state superintendent of financial services and, in the case of national banking associations, the comptroller of the currency may from time to time issue. Such bank or trust company shall, on demand by any party to an accounting by such bank or trust company as fiduciary or on demand by the attorney for such party, certify in writing the securities held by such bank or trust company as such fiduciary.

(11) In the case of the survivor of two or more fiduciaries, to continue to administer the property of the estate~~[or trust]~~ without the appointment of a successor to the fiduciary who has ceased to act and to exercise or perform all of the powers given to the original fiduciaries unless contrary to the express provision of the will, deed or other instrument.

(12) As successor or substitute fiduciary, to succeed to all of the powers, duties and discretion of the original fiduciary, with respect to the estate~~[or trust]~~, as were given to the original fiduciary, unless the exercise of such powers, duties or discretion of the original fiduciary are expressly prohibited by the will, deed or other instrument to any successor or substituted fiduciary.

(13) To contest, compromise or otherwise settle any claim in favor of the estate~~[, trust]~~ or fiduciary or in favor of third persons and against the estate~~[, trust]~~ or fiduciary.

(14) To vote in person or by proxy, discretionary or otherwise, shares of stock or other securities held by him as fiduciary.

(15) To pay calls, assessments and any other sums chargeable or accruing against or on account of shares of stock, bonds, debentures or other corporate securities held by a fiduciary, whenever such payments may be legally enforceable against the fiduciary or any property of the estate or~~[trust or]~~ the fiduciary deems payment expedient and for the best interests of the estate~~[or trust]~~.

(16) To sell or exercise stock subscription or conversion rights, participate in foreclosures, reorganizations, consolidations, mergers or liquidations, and to consent to corporate sales, leases and encumbrances. In the exercise of such powers the fiduciary is authorized to deposit stocks, bonds or other securities with any protective or other similar committee under such terms and conditions respecting the deposit thereof as the fiduciary may approve.

(17) To execute and deliver agreements, assignments, bills of sale, contracts, deeds, notes, receipts and any other instrument necessary or appropriate for the administration of the estate~~[or trust]~~.

~~[(18) In the case of a trustee, to hold the property of two or more trusts or parts of such trusts created by the same instrument as an undivided whole without separation as between such trusts or parts, provided that such separate~~

~~trusts or parts shall have undivided interests and provided further that no such holding shall defer the vesting of any estate in possession or otherwise.~~

~~(19)~~ (18) When a legacy, a distributive share, the proceeds of any action brought as prescribed by 5-4.1, or the proceeds of a settlement of an action brought in behalf of an infant for personal injuries are payable to an infant, incompetent, conservatee or person under disability and the sum does not exceed ten thousand dollars, to make payment thereof to the father or mother or to some competent adult person with whom the infant, incompetent, conservatee or person under disability resides or who has some interest in his welfare for the use and benefit of such infant, incompetent, conservatee or person under disability. If the sum payable to a patient in an institution in the state department of mental hygiene is not in excess of the amount which the director of the institution is authorized to receive under section 29.23 of the mental hygiene law, to make payment of such sum to such director for use as provided in that section.

~~(20)~~ (19) To make distribution in cash, in kind valued at the fair market value of the property at the date of distribution, or partly in each, without being required to make pro rata distributions of specific property.

~~(21)~~ (20) To join with the surviving spouse or the executor of his will or the administrator of his estate in the execution and filing of a joint income tax return for any period prior to the death of a decedent for which he has not filed a return or a gift tax return on gifts made by the decedent's surviving spouse, and to consent to treat such gifts as being made one-half by the decedent, for any period prior to a decedent's death, and to pay such taxes thereon as are chargeable to the decedent.

~~(22)~~ (21) In addition to those expenses specifically provided for in this paragraph, to pay all other reasonable and proper expenses of administration from the property of the estate or trust, including the reasonable expense of obtaining and continuing his bond and any reasonable counsel fees he may necessarily incur.

(c) The court having jurisdiction of the estate ~~(or trust)~~ may authorize the fiduciary to exercise any other power which in the judgment of the court is necessary for the proper administration of the estate ~~(or trust)~~.

(d) The powers set forth in this section shall apply to all estates ~~(and trusts)~~ now in existence or which may hereafter come into existence and are in addition to the powers granted by law or by the will, deed or other instrument.

§ 20. Section 11-1.7 of the Estates, Powers and Trusts Law is amended to read as follows:

§ 11-1.7 Limitations on powers and immunities of executors, ~~and testamentary trustees and trust directors~~

(a) The attempted grant to an executor, testamentary trustee, ~~or~~ inter vivos trustee, or trust director, his or her successor, of any of the following enumerated powers or immunities is contrary to public policy:

(1) The exoneration of such fiduciary from liability for failure to exercise reasonable care, diligence and prudence.

(2) The power to make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise.

(b) The attempted grant in any will or trust of any power or immunity in contravention of the terms of this section shall be void but shall not be

deemed to render such will or trust invalid as a whole, and the remaining terms of the instrument shall, so far as possible, remain effective.

(c) Any person interested in an estate or trust may contest the validity of any purported grant of any power or immunity within the purview of this section without diminishing or affecting adversely his or her interest in the estate or trust any provision in any will or trust to the contrary notwithstanding.

§ 21. Paragraph (c) of section 11-2.3 of the Estates, Powers and Trusts Law is amended to read as follows:

(c) Delegation of investment or management functions.

(1) ~~[Delegation]~~ Except as provided in subparagraph 4, delegation of an investment or management function requires a trustee to exercise care, skill and caution in:

(A) selecting a delegee suitable to exercise the delegated function, taking into account the nature and value of the assets subject to such delegation and the expertise of the delegee;

(B) establishing the scope and terms of the delegation consistent with the purposes of the governing instrument;

(C) periodically reviewing the delegee's exercise of the delegated function and compliance with the scope and terms of the delegation; and

(D) controlling the overall cost by reason of the delegation.

(2) The delegee has a duty to the trustee and to the trust to comply with the scope and terms of the delegation and to exercise the delegated function with reasonable care, skill and caution. An attempted exoneration of the delegee from liability for failure to meet such duty is contrary to public policy and void.

(3) By accepting the delegation of a trustee's function from the trustee of a trust that is subject to the law of New York, the delegee submits to the jurisdiction of the courts of New York even if a delegation agreement provides otherwise, and the delegee may be made a party to any proceeding in such courts that places in issue the decisions or actions of the delegee.

(4) A trustee, as defined in this article, shall be authorized to delegate in its investment or management functions as set forth in section 7-A-8.7.

§ 22. Section 13-3.2 of the Estates, Powers and Trusts Law is amended to read as follows:

§ 13-3.2. Rights of beneficiaries of pension, retirement, death benefit, stock bonus and profit-sharing plans, systems or trusts and of beneficiaries of annuities and supplemental insurance contracts

(a) If a person is entitled to receive (1) payment in money, securities or other property under a pension, retirement, death benefit, stock bonus or profit-sharing plan, system or trust or (2) money payable by an insurance company or a savings bank authorized to conduct the business of life insurance under an annuity or pure endowment contract or a policy of life, group life, industrial life or accident and health insurance, or if a contract made by such an insurer relating to the payment of proceeds or avails of such insurance designates a payee or beneficiary to receive such payment upon the death of the person making the designation or another, the rights of persons so entitled or designated and the ownership of money, securities or other property thereby received shall not be impaired or defeated by any statute or rule of law governing the transfer of property by will, gift or intestacy, except as provided in subparagraph (d) (3).

(b) This section does not limit article 10 of the debtor and creditor law, articles 10-C and 26 of the tax law, or sections 2-1.8, 5-1.1-A or 13-3.6.

(c) Paragraph (a) applies although a designation is revocable or subject to change by the person who makes it, and although the money, securities or other property receivable thereunder are not yet payable at the time the designation is made or are subject to withdrawal, collection or assignment by the person making the designation.

(d) A person entitled to receive payment includes:

(1) An employee or participant in a pension, retirement, death benefit, stock bonus or profit-sharing plan, system or trust.

(2) The owner or person purchasing an annuity, the person insured or the person effecting insurance, the person effecting a contract relating to payment of the proceeds or avails of a policy of insurance or an annuity or pure endowment contract.

(3) Any person entitled to receive payment by reason of a payee or beneficiary designation described in this section; provided, however, that the rules for cy pres in section 8-1.1(c)(1) shall apply if at the time of payment such person is a charitable organization that is not in existence or is not carrying out charitable activities or if the circumstances otherwise support the application of cy pres, and provided further that the provisions of section 1002-a(c)(1) of the not-for-profit corporation law shall apply if at the time of payment such person is a dissolved or dissolving charitable corporation to which that section applies.

(e) A designation of a beneficiary or payee to receive payment upon death of the person making the designation or another must be made in writing and signed by the person making the designation and be:

(1) Agreed to by the employer or made in accordance with the rules prescribed for the pension, retirement, death benefit, stock bonus or profit-sharing plan, system or trust.

(2) Agreed to by the insurance company or the savings bank authorized to conduct the business of life insurance, as the case may be.

(f) This section applies to designations heretofore or hereafter made by persons who die on or after the date this section takes effect. This section does not invalidate any contract or designation which is valid without regard to this section.

§ 23. Section 13-4.7 of the Estates, Powers and Trusts Law is amended to read as follows:

§ 13-4.7 Ownership on death of owner

On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners; provided, however, that if any beneficiary is a charitable organization, the rules for cy pres in section 8 1.1(c)(1) shall apply if at the time ownership passes to the beneficiary, or at any time prior to payment or distribution to the beneficiary, the beneficiary is not in existence or is not carrying out charitable activities or if the circumstances otherwise support the application of cy pres, and provided further that the

provisions of section 1002-a(c)(1) of the not-for-profit corporation law shall apply if at such time the beneficiary is a dissolved or dissolving charitable corporation to which that section applies. On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survived the death of all owners. Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interests as tenants in common. If no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners.

§ 24. Subdivision 5 of section 100-a of the Banking Law is amended to read as follows:

5. Bonds. No bond or other security, except as hereinafter provided, shall be required from any trust company [~~for or in respect to any trust, nor~~] when appointed executor, administrator, guardian[~~, trustee~~], receiver, committee or depository or in any other fiduciary capacity nor when receiving commissions under the provisions of SCPA 2310 or 2311. The settlor of a trust governed by EPTL Article 7-A may expressly require that a trust company furnish a bond. The court, or officer making such appointment may, upon proper application, require any trust company, which shall have been so appointed to give such security as to the court or officer shall seem proper, or upon failure of such trust company to give security as required, may remove such trust company from and revoke such appointment.

§ 25. Subdivision (c) of section 5205 of the Civil Practice Law and Rules is amended to read as follows:

(c) Trust exemption. 1. Except as provided in paragraphs four, five, and [~~five~~]six of this subdivision, all property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor, is exempt from application to the satisfaction of a money judgment.

2. For purposes of this subdivision, all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either any trust or plan, which is qualified as an individual retirement account under section four hundred eight or section four hundred eight A of the United States Internal Revenue Code of 1986, as amended, a Keogh (HR-10), retirement or other plan established by a corporation, which is qualified under section 401 of the United States Internal Revenue Code of 1986, as amended, or created as a result of rollovers from such plans pursuant to sections 402 (a) (5), 403 (a) (4), 408 (d) (3) or 408A of the Internal Revenue Code of 1986, as amended, or a plan that satisfies the requirements of section 457 of the Internal Revenue Code of 1986, as amended, shall be considered a trust which has been created by or which has proceeded from a person other than the judgment debtor, even though such judgment debtor is (i) in the case of an individual retirement account plan, an individual who is the settlor of and depositor to such account plan, or (ii) a self-employed individual, or (iii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iv) a shareholder of the corporation sponsoring the retirement or other plan or (v) a participant in a section 457 plan.

3. All trusts, custodial accounts, annuities, insurance contracts, monies, assets, or interests described in paragraph two of this subdivision shall be conclusively presumed to be spendthrift trusts under this section and the common law of the state of New York for all purposes, including, but not limited to, all cases arising under or related to a case arising under sections one hundred one to thirteen hundred thirty of title eleven of the United States Bankruptcy Code, as amended.

4. This subdivision shall not impair any rights an individual has under a qualified domestic relations order as that term is defined in section 414(p) of the United States Internal Revenue Code of 1986, as amended or under any order of support, alimony or maintenance of any court of competent jurisdiction to enforce arrears/past due support whether or not such arrears/past due support have been reduced to a money judgment.

5. Additions to an asset described in paragraph two of this subdivision shall not be exempt from application to the satisfaction of a money judgment if (i) made after the date that is ninety days before the interposition of the claim on which such judgment was entered, or (ii) deemed to be voidable transfers ~~fraudulent conveyances~~, under article ten of the debtor and creditor law.

6. For purposes of this subdivision, a trust shall be considered a trust which has been created by or which has proceeded from the judgment debtor on the lapse, release, or waiver of a power held by the judgment debtor to withdraw property from the trust only to the extent that the value of the property affected by the release, waiver, or lapse exceeds the greatest amount specified at the time of the lapse, release, or waiver in sections 2041(b)(2), 2503(b), or 2514(e) of the Internal Revenue Code of 1986, as amended.

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§ 26. Subdivision 2 of section 706 of the Surrogate's Court Procedure Act is amended to read as follows:

2. When all the persons to whom letters have been issued die or where letters issued to all of them have been revoked by a decree of the surrogate's court, or, in the case of a lifetime trust, when all persons serving as trustee die or are removed, without any successor trustee having been effectively appointed pursuant to the terms of the lifetime trust instrument, or if a trustee is appointed pursuant to EPTL 7-A-7.4(c)(2) or 7-A-7.4(d)(2), that court has, except in a case where it is otherwise specially prescribed by law, the same power to appoint a successor to the person or persons whose powers have ceased as if the letters had not been issued or as if no appointment had been made. The successor may complete the administration of the estate committed to his predecessor, he may continue in his own name a civil action or proceeding pending in favor of his predecessor and he may enforce a judgment, order or decree in favor of the latter.

§ 27. Section 715 of the Surrogate's Court Procedure Act is amended to read as follows:

§ 715. Application by fiduciary for permission to resign. A fiduciary may present to the court at any time a petition praying that he or she be permitted to resign, that his or her letters be revoked and that he or she be permitted to settle his or her account judicially or informally as such fiduciary, and that notice of the application be given to the persons and in the manner directed by the court. Notwithstanding the prior sentence, a testamentary trustee may resign as provided in EPTL 7-A-7.5. The petition shall show the facts upon which the application is founded.

§ 28. Section 806 of the Surrogate's Court Procedure Act is amended to read as follows:

§ 806. Bond of ~~[a testamentary trustee or]~~ an executor acting as trustee. Whenever ~~[a testamentary trustee is appointed by will or order of the court or]~~ an executor is appointed who is required to hold, manage or invest real or personal property for the benefit of another, he shall unless the will provides otherwise, execute and file a bond.

§ 29. Subdivision 2 of section 1502 of the Surrogate's Court Procedure Act is amended to read as follows:

2. The court shall not appoint a trustee, successor or co-trustee if the appointment would contravene the express terms of the will or lifetime trust instrument or if a trustee may be or has been named in the will or lifetime trust instrument as successor, substitute or co-trustee and is not disqualified

to act, or if a trustee is appointed pursuant to EPTL 7-A-7.4(c)(2) or 7-A-7.4(d)(2).

§ 30. Sections 2-29 are effective 180 days after enactment and apply to all trusts as provided in § 7-A-11.6.



NEW YORK STATE ASSEMBLY  
MEMORANDUM IN SUPPORT OF LEGISLATION  
Submitted in accordance with [Assembly Rule III, Sec 1(f)]

BILL NUMBER: [•]

SPONSOR: [•]

TITLE OF BILL: New York Trust Code

PURPOSE OR GENERAL IDEA OF BILL: The purpose for this legislation is to create a stand-alone Article 7-A of the Estates, Powers and Trusts Law which sets forth the substantive rules (as well as procedural rules not governed by the Surrogate's Court Procedure Act) for gratuitous trusts, including directed trusts. In order to implement enactment of new Article 7-A, the legislation makes appropriate conforming changes to various sections in the Estates, Powers and Trusts Law and to various sections in other New York Codes.

SUMMARY OF SPECIFIC PROVISIONS:

Section 1 of the bill adds a new Article 7-A to the Estates, Powers and Trusts Law ("NEW YORK TRUST CODE"), which consists of the following:

Summary of Article 7-A,

Part 1 of Article 7-A of the Estates, Powers and Trusts Law is entitled "In General".

Section 7-A-1.1 of the Estates, Powers and Trusts Law establishes the short title of Article 7-A as the New York Trust Code.

Section 7-A-1.2 of the Estates, Powers and Trusts Law clarifies that Article 7-A applies to express trusts that are gratuitous in nature, resulting trusts, and (where expressly made applicable) to bank accounts in trust form. This section also makes clear that this article will not apply to constructive trusts.

Section 7-A-1.2 of the Estates, Powers and Trusts Law replaces EPTL section 7-1.3, and includes the same language abolishing purchase money resulting trusts.

Section 7-A-1.3 of the Estates, Powers and Trusts Law adds new definitions for implementing the provisions of Article 7-A. Notable definitions include the following:

**Express Trust:** This definition is based on the traditional definition for an express trust, but has been amplified to reflect the recognition of pet trusts and purpose trusts. The definition also includes trusts that are created by other statutes and courts that will be administered as express trusts. In addition, the definition limits express trusts to gratuitous trusts.

**Qualified Beneficiary:** This is an important definition used throughout Article 7-A. Generally, qualified beneficiaries are beneficiaries who would be entitled to notice for proceedings involving the trust under the principles of virtual representation as they currently exist in the law of New York. Only qualified beneficiaries are entitled to notice of some actions by the trustee or to demand information from the trustee. All other

beneficiaries are non-qualified beneficiaries. Settlor: This definition is critical because it is employed throughout Article 7-A. It is intended to be precise enough to reflect the many nuances of trust law. For example, a person who exercises a special power of appointment in favor of a trustee effectively creates a trust, and should therefore be treated as a settlor. By including the donee of a special power of appointment, the uncertain general application of the relation back doctrine would be discarded. Similarly, the trustee who decants all or part of trust property is the settlor of the appointed trust because the exercise of a decanting power is considered to be the exercise of a special power of appointment. See EPTL section 7-A-8-19(c).

Trust Contributor: A separate definition is provided for "trust contributor" because that concept, which includes many settlors (but not persons who exercise special powers of appointment), has significance, especially in the area of creditors' rights and for certain revocable trust issues. Excluded from the definition of "trust contributor" are persons who contribute property to a trust revocable by another person and persons who contribute property if another person has a non-lapsing power of withdrawal over the contributed property.

Section 7-A-1.4 of the Estates, Powers and Trusts Law defines when an organization has notice or knowledge of a fact involving a trust.

Section 7-A-1.5 of the Estates, Powers and Trusts Law provides that most rules set forth in EPTL Article 7-A are default rules subject to modification by the terms of a trust, court order or decree or other applicable law. See section 7-A-1.5(a). Some of those rules, however, embody public policies that are too important to be overridden by the terms of the trust. These mandatory trust rules are listed in section 7-A-1.5(b) by reference to the numbers of the sections that set out the rules. Most of these rules set forth the fiduciary duties at the heart of trust law. Some involve the authority of the court to act with regard to a trust at the trustee's or beneficiaries' request—such as modifying, terminating, combining or dividing trusts and the principles for the computation of damages—as provided in the Code. Others are even more fundamental such as the rules governing the determination of the governing law and principal place of administration of the trust. The Code allows a trust to be "quiet" for only a limited period of time by requiring that the trustee inform, and furnish requested information about an irrevocable trust to, qualified beneficiaries over the age of 25 after the later death of the settlor or the settlor's spouse (and if the settlor was not an individual for a maximum of 21 years).

Section 7-A-1.6 of the Estates, Powers and Trusts Law makes clear that the common law of trusts and principles of equity supplement Article 7-A unless these are otherwise modified by Article 7-A or another statute.

Section 7-A-1.7 of the Estates, Powers and Trusts Law Section 7-A-1.7 principally provides comprehensive conflict of laws rules for lifetime trusts (as contrasted with the limited provision of repealed EPTL 7-1.10) that for the most part follow the conflict of laws rules governing testamentary trusts in EPTL 3-5.1. The most important difference between the two provisions allows the settlor of a lifetime trust to designate the law of any jurisdiction to govern the trust or some aspects of the trust so long as the law of the designated jurisdiction does not conflict with a mandatory trust provision or violate some strong public policy of the jurisdiction having the most significant relationship to the matter of issue, such as the rule against perpetuities. The section also provides flexible conflict of laws rules.

Section 7-A-1.8 of the Estates, Powers and Trusts Law provides ways that a settlor can designate the principal place of administration of the trust as well as default rules for determining principal place of administration, including where there are multiple trustees and where corporate trustees are involved. The section also provides that the trustee may change the principal place of administration of a testamentary trust with court approval, and may change the principal place of administration of a lifetime trust with court approval or if the qualified beneficiaries do not object to the change.

Section 7-A-1.9 of the Estates, Powers and Trusts Law makes clear what constitutes notice to a person under this Article.

Section 7-A-1.10 of the Estates, Powers and Trusts Law addresses situations in which other persons or entities would be treated as "qualified beneficiaries" as defined in EPTL section 7-A-1.3, including charitable organizations, persons appointed to enforce trusts for the care of animals or other noncharitable purposes, and the Attorney General.

Section 7-A-1.11 of the Estates, Powers and Trusts Law expands current New York law in order to allow for nonjudicial settlement of various trust matters by interested persons besides nonjudicial settlements of accounts by fiduciaries, which are governed by SCPA 315, subsection 8. Matters which may be resolved under section 7-A-1.11 include, but are not limited to, the interpretation or construction of trust terms, the approval of a trustee's report or accounting; the ability to direct a trustee to refrain from performing a particular act or to grant a trustee any necessary or desirable power; the resignation or appointment of a trustee and the determination of trustee compensation; the transfer of the principal place of administration of a lifetime trust; and the liability of a trustee for an act or failure to act in relation to a trust.

Section 7-A-1.12 of the Estates, Powers and Trusts Law is a reserved section for possible future use.

Part 2 of Article 7-A of the Estates, Powers and Trusts Law is entitled "Judicial Proceedings".

Section 7-A-2.1 of the Estates, Powers and Trusts Law makes clear that there are existing rules for court involvement in the administration of a trust which are provided in the EPTL, SCPA and the CPLR.

Section 7-A-2.2 of the Estates, Powers and Trusts Law makes clear that jurisdiction over trustees and beneficiaries is covered by Article 2 of the SCPA.

Part 3 of Article 7-A of the Estates, Powers and Trusts Law is Reserved for possible future use.

Part 4 of Article 7-A of the Estates, Powers and Trusts Law is entitled "Creation, Validity, Amendment, Modification, and Termination of Trust".

Section 7-A-4.1 of the Estates, Powers and Trusts Law codifies the methods for creating a trust which are currently part of the New York common law.

Section 7-A-4.2 of the Estates, Powers and Trusts Law consolidates into a single section the formal requirement for trust creation currently found in various statutory sections.

Section 7-A-4.2-A of the Estates, Powers and Trusts Law replaces EPTL sections 7-1.14, 7-1.15, 7-1.16 (first sentence), and 7-1.17(a), and expands EPTL section 7-1.18, in order to consolidate the rules for the creation of lifetime trusts into a single statutory section. It also provides that the capacity to create an irrevocable trust is the same as that required to make a gift.

Section 7-A-4.2-B of the Estates, Powers and Trusts Law replaces EPTL section 7-1.2, which addresses trustees of passive trusts, without changing its provisions.

Section 7-A-4.2-C of the Estates, Powers and Trusts Law replaces EPTL section 7-1.1, which addresses when trust interests do not merge, without substantively changing its provisions.

Section 7-A-4.3 of the Estates, Powers and Trusts Law addresses the validity of lifetime trusts created in other jurisdictions. The validity of testamentary trusts is addressed in EPTL section 3-5.1.

Section 7-A-4.4 of the Estates, Powers and Trusts Law, which replaces EPTL section 7-1.4, is makes clear that a trust may be created only to the extent that its purposes are lawful and not contrary to public policy. Current EPTL section 7-1.4 addresses only the lawfulness requirement; the public policy requirement is currently a common law doctrine.

Section 7-A-4.4-A of the Estates, Powers and Trusts Law replaces EPTL section 7-1.12, which addresses the establishment of supplemental needs trusts, without substantively changing its provisions.

Section 7-A-4.5 of the Estates, Powers and Trusts Law makes clear that the rules for charitable purposes and enforcement are to be found in Article 8.

Section 7-A-4.6 of the Estates, Powers and Trusts Law codifies the rule that a trust is voidable if created through fraud, duress, undue influence or mistake. This concept is currently governed by New York common law.

Section 7-A-4.7 of the Estates, Powers and Trusts Law supplements EPTL section 7-1.17(a) by providing that oral trusts may not be created, except for a testamentary trust in a nuncupative will created pursuant to EPTL section 3-2.2.

Section 7-A-4.8 of the Estates, Powers and Trusts Law replaces New York's present pet trust statute (EPTL section 7-8.1). While generally consistent with EPTL section 7-8.1, this section modifies that statute to (i) set out, in a separate paragraph, provisions for enforcing the intended use of the trust, (ii) clarify that any person, not just an individual, may be appointed as an enforcer of the trust's intended use and (iii) provide that unexpended property passes to the settlor or the settlor's successors in interest, rather than to the successor's estate.

Section 7-A-4.9 of the Estates, Powers and Trusts Law codifies current New York common law in order to explicitly provide for the creation of trusts for noncharitable purposes (so-called "honorary trusts"). The term of any such trust is to be limited to 21 years, consistent with current law. This section also supplements current law by giving the court the authority to appoint an enforcer if an appointed enforcer is unable or unwilling to act, and by providing that

trust property not required for its intended purpose be distributed to the settlor or the settlor's successors in interest.

Section 7-A-4.9-A of the Estates, Powers and Trusts Law replaces and supplements current EPTL section 7-1.17(b). It maintains that section's current authority for trust amendments to be made, as well as the formality requirements for making such amendments. Section 7-A-4.9-A supplements current law by shielding a trustee from liability for failure to comply with an amendment that modifies the trustee's powers, obligations or compensation for a period of 60 days after being notified of the amendment.

Section 7-A-4.10 of the Estates, Powers and Trusts Law codifies current New York common law by setting forth all of the circumstances under which a trust may terminate. This section supplements current New York law by providing procedural rules for modifying or terminating a trust, and provides limitations for when a trust can be modified or terminated.

Section 7-A-4.11 of the Estates, Powers and Trusts Law replaces in substance, and adds to, EPTL section 7-1.9, by allowing irrevocable trusts to be terminated or modified with the consent of the creator and all living beneficiaries, clarifying, based on a Court of Appeals holding, that the consent of only living beneficiaries is required. Further, this section clarifies that a court can act in certain circumstances if the creator and only some beneficiaries consent; it also clarifies that a trustee who exercises a special power of appointment is not a creator.

Section 7-A-4.12 of the Estates, Powers and Trusts Law codifies current law to allow the court to modify the administrative terms of a trust due to changed circumstances. This section also supplements current law to allow the court to modify the dispositive terms of a trust or terminate a trust due to changed circumstances (and, in the case of an administrative modification, when the court finds another compelling reason for the modification).

Section 7-A-4.13 of the Estates, Powers and Trusts Law clarifies that the current rules are provided for in EPTL section 8-1.1(c)(1).

Section 7-A-4.14 of the Estates, Powers and Trusts Law replaces EPTL section 7-1.19, which permits judicial termination of certain lifetime or testamentary trusts when the expense of administering such a trust is uneconomical. This section modifies EPTL section 7-1.19 by giving authority, except in certain situations, to (1) trustees to terminate trusts of \$100,000 or less without a court proceeding and (2) the court to terminate any uneconomical trust if the value of the trust property is insufficient to justify the cost of administration. This section also provides that on termination the trust property is distributed as the trustee or court, as the case may be, determines will best effectuate the settlor's intention.

Section 7-A-4.15 of the Estates, Powers and Trusts Law modifies current New York law by allowing the court to reform even unambiguous terms of a trust that fails to carry out the settlor's intent because of a mistake.

Section 7-A-4.16 of the Estates, Powers and Trusts Law allows courts to modify a trust, possibly with retroactive effect, to accomplish the settlor's tax objectives or the settlor's supplemental needs trust objectives.

Section 7-A-4.17 of the Estates, Powers and Trusts Law restates, modifies and liberalizes EPTL section 7-1.13, which governs the division of existing trusts.

This section modifies EPTL section 7-1.13 by generally permitting a trustee to combine or divide an existing trust for any purpose without obtaining beneficiary consent or court approval, provided that "qualified beneficiaries" are notified. This section continues to allow a trustee or "qualified beneficiary" to seek a court order authorizing the combination or division of an existing trust. This section then sets forth the rules governing the combination or division of existing trusts.

Part 4-A of Article 7-A of the Estates, Powers and Trusts Law replaces EPTL Part 5 of EPTL Article 7 (Bank Accounts in Trust Form).

Section 7-A-4-A-1 replaces EPTL 7-5.1, which sets forth applicable definitions, without changing its provisions.

Section 7-A-4-A.2 of the Estates, Powers and Trusts Law replaces EPTL section 7-5.2, which sets forth the terms to which a trust account is subject, without changing its provisions.

Section 7-A-4-A.3 of the Estates, Powers and Trusts Law replaces EPTL section 7-5.3, which addresses when payments are to be made to the beneficiary of the trust account that survives the depositor under certain circumstances, without changing its provisions.

Section 7-A-4-A.4 of the Estates, Powers and Trusts Law replaces EPTL section 7-5.4, which releases from liability a financial institution that makes payments to a beneficiary or guardian upon the death of a depositor in certain circumstances without changing its provisions.

Section 7-A-4-A.5 of the Estates, Powers and Trusts Law replaces EPTL section 7-5.5, which clarifies the parties not affected by EPTL Part 4-A, without changing its provisions.

Section 7-A-4-A.6 of the Estates, Powers and Trusts Law replaces EPTL section 7-5.6, which addresses the application of EPTL Part 4-A to trust accounts established in the name of more than one depositor, without changing its provisions.

Section 7-A-4-A.7 of the Estates, Powers and Trusts Law replaces EPTL section 7-5.7, which addresses how payments of proceeds of a trust account with multiple beneficiaries are to be made, without changing its provisions.

Section 7-A-4-A.8 of the Estates, Powers and Trusts Law replaces EPTL section 7-5.8, which addresses the application of EPTL Part 4-A to funds in trust accounts, without changing its provisions.

Part 5 of Article 7-A of the Estates, Powers and Trusts Law is entitled "Rights of Beneficiaries and Creditors; Spendthrift and Discretionary Trusts".

Section 7-A-5.1 of the Estates, Powers and Trusts Law replaces, with minor alterations, EPTL section 7-1.5 as it applies to a beneficiary's income interest. This section provides that unless the trust instrument provides otherwise, the income interest of a trust beneficiary is not transferrable, subject to specific exceptions described in this section. The rule as it applies to (1) self-settled trusts is described in EPTL section 7-A-5.5-A and (2) life insurance proceeds trusts is described in EPTL section 7-A-5.2-A. This section also clarifies that the transferee of a valid transfer becomes a beneficiary,

and that a beneficiary's income interest remains subject to the claims of creditors to the extent provided by law.

Section 7-A-5.2 of the Estates, Powers and Trusts Law replaces and modifies EPTL section 7-1.5(a) as it applies to a beneficiary's principal interest. Section 7-A-5.2 provides that unless the trust instrument provides otherwise, the principal interest of a trust beneficiary is not transferrable for trusts created on or after the effective date of Article 7-A. Section 7-A-5.2 also clarifies that the transferee of a valid transfer becomes a beneficiary, and that a beneficiary's principal interest remains subject to the claims of creditors to the extent provided by law.

Section 7-A-5.2-A of the Estates, Powers and Trusts Law replaces EPTL section 7-1.5(a)(2), which generally prohibits the alienation of the proceeds of a life insurance policy left with the insurance company upon the death of the insured, without changing its provisions.

Section 7-A-5.3 of the Estates, Powers and Trusts Law codifies current New York law by listing special creditors against whom a spendthrift provision in a trust is unenforceable.

Section 7-A-5.4 of the Estates, Powers and Trusts Law prohibits a beneficiary from transferring his discretionary trust interest irrespective of any spendthrift clause, although this interest remains subject to the claims of creditors to the extent provided by law. This section also allows the beneficiary to sue a trustee for abusing trustee discretion or for failing to comply with a standard for distribution.

Section 7-A-5.5 of the Estates, Powers and Trusts Law allows the creditors of a trust contributor to reach property in a revocable trust during the contributor's lifetime unless revocation requires the consent of an adverse person. This property would also be reachable after the contributor's death to cover claims and certain expenses.

Section 7-A-5.5-A of the Estates, Powers and Trusts Law replaces and modifies certain provisions of EPTL 7-3.1, allowing a creditor to reach property contributed by a beneficiary of a trust (i.e., a self-settled trust). Section 7-A-5.5-A clarifies the extent to which the lapse, release or waiver of a power of withdrawal is treated as a contribution, and clarifies that the settlor is not treated as a contributing beneficiary of certain marital deduction trusts.

Section 7-A-5.6 of the Estates, Powers and Trusts Law gives a creditor the power to compel the trustee to distribute an overdue distribution to the beneficiary. Once the beneficiary receives the property, creditors will then be able to reach the property.

Section 7-A-5.7 of the Estates, Powers and Trusts Law makes explicit the basic implication of New York trust law that the trustee takes an estate in the trust property only to the extent necessary to carry out the duties imposed by the trust's terms.

Part 6 of Article 7-A of the Estates, Powers and Trusts Law is entitled "Revocable Trusts".

Section 7-A-6.1 of the Estates, Powers and Trusts Law makes explicit that the capacity required by a trust contributor to create, revoke, or amend a trust is the same as that required to make a will; and that the capacity required to

relinquish a power to revoke a trust is the same as that required to make a gift.

Section 7-A-6.2 of the Estates, Powers and Trusts Law maintains the presumption in New York law (current EPTL section 7-1.16) that a trust is irrevocable unless its terms expressly state that it is revocable, and provides rules for amending and revoking trusts, including the writing requirements of current EPTL section 7-1.17(b)). Section 7-A-6.2 supplements current law by shielding a trustee from liability for failure to comply with an amendment that revokes the trust or modifies the trustee's powers, obligations or compensation for a period of 60 days after being notified of the amendment.

Section 7-A-6.3 of the Estates, Powers and Trusts Law codifies New York common law setting forth the trustee's duty in a revocable trust and the requirement that the trustee follow the directions of the person with the power of revocation (or with a non-lapsing power of withdrawal). Exceptions are also provided.

Section 7-A-6.4 of the Estates, Powers and Trusts Law codifies existing law, which allows for the contest of the validity of a revocable trust. The law is significantly clarified by providing important standing and procedural rules. Standing is given to those who are interested in the trust, including distributees of the settlor who are adversely effected by the trust, the trustees of testamentary trusts, and trusts receiving pour-overs from the settlor's will. The proceeding must commence within 6 years of the settlor's death for preexisting trusts and 3 years of the settlor's death for all other trusts, a period which can be shortened to 120 days by sending a copy of the trust instrument and notice of the 120-day period to those who have standing.

Part 7 of Article 7-A of the Estates, Powers and Trusts Law is entitled "Office of Trustee".

Section 7-A-7.1 of the Estates, Powers and Trusts Law codifies current New York common law governing the acceptance of lifetime trusts. SCPA Article 7 will continue to govern testamentary trusts.

Section 7-A-7.2 of the Estates, Powers and Trusts Law deals with the posting of a bond by a trustee and continues the provisions of SCPA section 806 the exception of that section's default requirement that every testamentary trustee furnish a bond. Under the new section, a corporate trustee must obtain a bond but only if the terms of the trust expressly require it to do so.

Section 7-A-7.3 of the Estates, Powers and Trusts Law provides rules for co-trustees, including the expansion of reasons for which a co-trustee may act alone.

Section 7-A-7.3-A of the Estates, Powers and Trusts Law provides that a co-trustee who is to be directed by a co-trustee (an excluded co-trustee) is relieved from liability absent willful misconduct. It also allows a co-trustee to have exclusive authority over one or more trust powers, with concomitant duties and liabilities and relieves any other excluded co-trustee from having any duties or liabilities.

Section 7-A-7.4 of the Estates, Powers and Trusts Law deals with vacancies in the office of trustee and the appointment of successors. The section sets forth a hierarchy of persons who can fill a vacancy in the trusteeship of a noncharitable lifetime trust. It gives first priority to a designation in the trust instrument. If there is no such designation, it allows appointment by



unanimous agreement of the qualified beneficiaries. Finally, as a last resort, it allows appointment by the court. There are similar rules for lifetime charitable trusts. A vacancy in the trusteeship of a testamentary trust must be filled by the court under SCPA section 706 or section 1502.

Section 7-A-7.4-A of the Estates, Powers and Trusts Law makes EPTL section 7-2.5 (suspension of powers during war service) applicable to trusts under EPTL Article 7-A.

Section 7-A-7.5 of the Estates, Powers and Trusts Law changes the current law of resignation of trustees. Under this section the trustee of a revocable trust may resign on 30 days' notice to the trust contributor and all other trustees and a testamentary trustee may resign by giving 30 days' notice to the qualified beneficiaries, or with court approval. However, resignation has no effect on the trustee's possible liability for actions taken as trustee. The resignation of a testamentary trustee is not effective until written notice is given to the court that has jurisdiction over the trust.

Section 7-A-7.6 of the Estates, Powers and Trusts Law maintains existing law with the addition of allowing a court to remove a trustee if there has been "a substantial change of circumstances," or if a majority of the qualified beneficiaries request removal and the court finds that removal is in the interests of all beneficiaries and is not inconsistent with the purposes of the trust.

Section 7-A-7.7 of the Estates, Powers and Trusts Law codifies the procedures that well-advised fiduciaries currently follow for the delivery of trust property, such as the procedures in SCPA section 716.

Section 7-A-7.8 of the Estates, Powers and Trusts Law cross references with SCPA sections 2308 through 2313, in order to explicitly provide that those statutory sections should continue to govern the compensation of both individual and corporate trustees.

Section 7-A-7.9 of the Estates, Powers and Trusts Law expressly allows a trustee to collect appropriate interest at a reasonable rate when the trustee advances the trustee's her own funds for the benefit of the trust.

Section 7-A-7.10 of the Estates, Powers and Trusts Law clarifies that any proceeding for an accounting may be commenced by such notice to the beneficiaries of the trust as the Supreme Court may direct. The text of section 7-A-7.10 is identical to current section EPTL 2-7(a).

Part 8 of Article 7-A of the Estates, Powers and Trusts Law is entitled "Duties and Powers of Trustee".

Section 7-A-8.1 of the Estates, Powers and Trusts Law codifies New York's rule that a trustee has a non-waivable duty both to act in good faith and follow the terms of the trust when administering the trust.

Section 7-A-8.2 of the Estates, Powers and Trusts Law codifies New York's rule that the trustee has a duty of loyalty to the beneficiaries. The section also expands the related no-further-inquiry rule (when a trustee is on both sides of a transaction) to include indirect self-dealing cases. The section does not extend the exemption under EPTL 11-2.3(d) from the ban on self-dealing for investments in a corporate trustee's proprietary mutual funds to investments of other sorts, for example, investment in the hedge funds managed by the trustee

or its affiliate. However, a settlor may affirmatively provide for this exemption.

Section 7-A-8.3 of the Estates, Powers and Trusts Law codifies New York's rule that a trustee must act impartially, including with regard to administrative functions, unless otherwise directed by the settlor.

Section 7-A-8.4 of the Estates, Powers and Trusts Law applies to the duty of administering the trust the same duty of care as that provided under the Prudent Investor Act.

Section 7-A-8.5 of the Estates, Powers and Trusts Law imposes on the trustee the duty of only paying expenses that are reasonable in their relation to the trust's purpose or property.

Section 7-A-8.6 of the Estates, Powers and Trusts Law imposes a duty on specially skilled trustees to utilize their expertise. This excludes special investment skills, which are governed by current EPTL section 11-2.3(b)(6).

Section 7-A-8.7 of the Estates, Powers and Trusts Law extends the authority to delegate investment functions or management functions under the Prudent Investor Act (EPTL 11-2.3(b)(4)(C)) to all duties and powers subject the use of reasonable care, skill, and caution in making the delegation. Under paragraph (c), a trustee may delegate to a co-trustee using reasonable care, skill and caution.

Section 7-A-8.8 of the Estates, Powers and Trusts Law is a reserved section for potential future use. The previous proposal (the "6<sup>th</sup> Report") recommended using section 7-A-8.8 for a directed trust statute, but it is now proposed that the New York directed trust statute situated in Part 9 of Article 7-A rather than inserted here.

Section 7-A-8.9 of the Estates, Powers and Trusts Law codifies the protection of trust property already required under New York common law.

Section 7-A-8.10 of the Estates, Powers and Trusts Law requires a trustee to keep adequate and clear records, and to keep trust property separate from the trustee's own property. This section expands on and overlaps with EPTL sections 11-1.6 and 11-1.1, but such sections, and other relevant EPTL provisions, shall continue to apply.

Section 7-A-8.11 of the Estates, Powers and Trusts Law codifies current New York common law requiring a trustee to take reasonable steps to enforce claims and to defend against claims.

Section 7-A-8.12 of the Estates, Powers and Trusts Law codifies existing standards and requires a trustee to take reasonable steps to compel a former trustee or other person to deliver trust property to the current trustee, and to redress a breach of trust known to the current trustee to have been committed by a former trustee. Present New York law can be found in SCPA section 1506 and various cases.

Section 7-A-8.13 of the Estates, Powers and Trusts Law strengthens the law found in SCPA sections 2102, 2309, and 2312 regarding a trustee's duty to inform and report. The section requires a trustee to respond to a beneficiary's request for both information related to the administration of the trust and to obtain a copy of the trust instrument. It also provides time limits within which a

trustee must inform qualified beneficiaries about certain aspects about the trust. As noted under section 7-A-1.5(b)(20) and (21), the duty to furnish requested information and to fulfill certain notification duties are "mandatory provisions" with respect to qualified beneficiaries who have attained 25 years of age except with regard to lifetime trusts during the lifetimes of the settlor and the settlor's spouse (and if the settlor was not an individual for a maximum of 21 years). Section 7-A-8.13 also mandates that a trustee furnish annual reports to most beneficiaries and to other requesting beneficiaries. Beneficiaries can waive their rights to be informed and to receive reports

Section 7-A-8.14 of the Estates, Powers and Trusts Law codifies current New York common law: Notwithstanding the discretion granted to a trustee, the trustee has the duty to exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust. In addition, the trustee shall not be compelled to exercise such discretion in a way that would jeopardize a beneficiary's eligibility for public benefits.

Section 7-A-8.15 of the Estates, Powers and Trusts Law provides a default rule that a trustee, without authorization by the court, may exercise powers conferred by the terms of the trust and, unless limited by the trust, court order, decree or other law, all powers over trust property that an individual would have over individually owned property, any other powers appropriate to achieve proper investment, management, and distributions, and any other powers conferred by Article 7-A. The court may authorize additional powers which are deemed necessary. Reference to trustees in EPTL 11-1.1(a) 11 will be repealed, including the more restrictive default rules for trustees under EPTL 11-1.1(b).

Section 7-A-8.16 of the Estates, Powers and Trusts Law enumerates common trustee powers, including many that are currently found in EPTL sections 11-1.1(b) as well as powers under EPTL 11-1.8 through 11-1.10, without limiting the authority conferred or restrictions imposed by EPTL section 7-A-8.15.

Section 7-A-8.17 of the Estates, Powers and Trusts Law codifies current New York law and provides that, upon full or partial termination of a trust, a trustee may send to the beneficiaries a proposal for distribution. The right of a beneficiary to object to the proposed distribution terminates 30 days after the proposal is sent. Subject to a reasonable reserve, the trustee shall proceed expeditiously to distribute the trust property. In addition, a release by a beneficiary for breach of trust is invalid under certain circumstances.

Section 7-A-8.18 of the Estates, Powers and Trusts Law expands upon EPTL section 7-1.11 and provides that, notwithstanding any contrary provision of law, the trustee, unless otherwise provided in the trust, may pay to or on behalf of a trust contributor that has a power of revocation an amount equal to the income taxes on any portion of the trust income or principal that the trust contributor is treated as owning. Section 7-A-8.18 also safeguards against estate inclusion under sections 2036(a) or 2038(a) of the Internal Revenue Code.

Section 7-A-8.19 of the Estates, Powers and Trusts Law consolidates the rules regarding decanting, which are currently found in EPTL section 10-6.6(b)-(t), with one modification. EPTL section 10-6.6(s)(1) ("For purposes of creating the new trust, the requirement of section 7-1.17 of this chapter that the instrument be signed by the creator shall be deemed satisfied by the signature of the trustee of the appointed trust") is deleted because its substance is continued in EPTL section 7-A-4.2-A(c).

Section 7-A-8.20 of the Estates, Powers and Trusts Law clarifies the duty of the trustee when a resulting trust arises. Current EPTL section 7-1.7, which is based on 1830 trust legislation, is obsolete and will be repealed.

Part 9 of Article 7-A of the Estates, Powers and Trusts Law is entitled "New York Uniform Directed Trust Act."

Section 7-A-9.1 of the Estates, Powers and Trusts Law establishes the short title of Part 9 as the New York Uniform Directed Trust Act.

Section 7-A-9.2 of the Estates, Powers and Trusts Law adds new definitions for implementing the provisions of Part 9, including definitions of a directed trust, directed trustee, power of direction, and trust director.

Section 7-A-9.3 of the Estates, Powers and Trusts Law states that this Part applies to trusts which have their principal place of administration in New York, subject to certain limitations. It also clarifies that the terms of a directed trust which designate its principal place of administration will be valid and controlling if such designation satisfies the requirements of Section 7-A-1.8(a) of the EPTL.

Section 7-A-9.4 of the Estates, Powers and Trusts Law defines "power of appointment" by referencing the definition in Section 10-3.1(a) of the EPTL. This Section further provides that this Part does not apply to persons with certain powers, including, but not limited to, a power of appointment, a power to remove and replace trustees or trust directors, certain powers to affect beneficial interests, and certain powers held in a nonfiduciary capacity. Additionally, this Section provides that powers granted to persons which would otherwise be a power of appointment shall instead constitute a power of direction if the terms of the trust impose fiduciary duties on the exercise of such power.

Section 7-A-9.5 of the Estates, Powers and Trusts Law provides illustrative examples of powers which may be granted to a trust director in the terms of a trust, including the powers to direct investments, amend or decant a trust, and change the law governing the trust. It also provides examples of further powers that a trust director may exercise in conjunction with a power of direction. The Section also states that unless the terms of a trust provide otherwise, trust directors with joint powers must act by majority.

Section 7-A-9.6 of the Estates, Powers and Trusts Law imposes on trust directors the same limitations applicable to trustees with respect to distributions of income and principal as set forth in Section 10-10.1 of the EPTL.

Section 7-A-9.7 of the Estates, Powers and Trusts Law provides that a trust director is a fiduciary has the same duties and liabilities (as provided in parts 8 and 10 of this Article 7-A of the EPTL, respectively) that a trustee with the same powers as the trust director would have and further clarifies that these duties may be varied to the same extent such duties of a trustee could be varied.

Section 7-A-9.8 of the Estates, Powers and Trusts Law provides that a directed trustee is not liable for losses resulting from taking reasonable steps to comply with a trust director's exercise or nonexercise of a power of direction. It also provides that a directed trustee must not comply with such exercise or nonexercise of a power of direction to the extent such compliance would constitute willful misconduct.

Section 7-A-9.9 of the Estates, Powers and Trusts Law provides that, subject to Section 7-A-9.10, trustees and trust directors are required to exchange information to the extent such information is reasonably related to their powers or duties, and further provides that, absent willful misconduct, neither trustees nor trust directors will be liable for a breach of trust resulting from reliance on the information so provided.

Section 7-A-9.10 of the Estates, Powers and Trusts Law provides that trustees and trust directors do not have an affirmative duty to monitor the other, nor to inform any other party that such trustee or trust director might have acted differently.

Section 7-A-9.11 of the Estates, Powers and Trusts Law provides that an action against a trust director for breach of trust must be commenced within the same limitation period as an action for breach of trust against a trustee under Section 7-A-10.5 of the EPTL.

Section 7-A-9.12 of the Estates, Powers and Trusts Law provides that in an action against a trust director for breach of trust, the director may assert the same defenses as a trustee could assert in an action for breach of trust against the trustee.

Section 7-A-9.13 of the Estates, Powers and Trusts Law provides that by accepting an appointment as trust director of a trust which is subject to the New York Uniform Directed Trust Act, the trust director submits to personal jurisdiction in New York courts.

Section 7-A-9.14 of the Estates, Powers and Trusts Law sets forth the ways in which a trust director may accept such directorship, including by complying with the method for acceptance set forth in the trust. This Section also provides that persons designated as a trust director may reject such designation, and that a failure to accept such designation within a reasonable time shall be deemed to be a rejection.

Section 7-A-9.15 of the Estates, Powers and Trusts Law provides that trust directors (other than certain health-care professionals) and directed trustees are entitled to be compensated based on a stated trust provision or corporate trustees based on an agreement. In the absence of a provision or agreement, both fiduciaries shall be entitled to reasonable compensation, and that the reasonableness of such compensation is reviewable by the court upon application by a person interested in the trust. In the case of a charitable trust, the compensation of any trust director or directed trustee, other than a corporate trust director or corporate directed trustee, shall not exceed the amount provided in SCPA 2319(5) and the compensation of all trust directors and trustees (including directed trustees) of such trust shall be limited as provided in SCPA 2313.

Section 7-A-9.16 of the Estates, Powers and Trusts Law provides that a trust director will only be required to give bond if either the court finds that such bond is needed to protect the interests of the beneficiaries, or bond is required by the terms of the trust and the court has not dispensed with such requirement. It further provides that a trust company, as defined by banking law section 2(2), will not be required to give a bond unless expressly required by the terms of the trust.

Section 7-A-9.17 of the Estates, Powers and Trusts Law provides that vacancies in a trust directorship need not be filled unless required or authorized by the terms of the trust, and further provides an order of priority for filling such vacancies.

Section 7-A-9.18 of the Estates, Powers and Trusts Law provides that trust directors may resign upon 30 days' notice or with approval of the court.

Section 7-A-9.19 of the Estates, Powers and Trusts Law provides that, in addition to the methods prescribed in the trust, a settlor, trust director or beneficiary may request the court to remove a trust director, and further provides that a trust director may be removed by the court on its own initiative.

Section 7-A-9.20 of the Estates, Powers and Trusts Law provides that in applying and construing this Part 9, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact the Uniform Directed Trust Act.

Section 7-A-9.21 of the Estates, Powers and Trusts Law provides that if any provisions of this Part 9 are held invalid, such invalidity shall not affect the other provisions or applications of this Part 9.

Section 7-A-9.22 of the Estates, Powers and Trusts Law sets forth that the effective date for Part 9 of EPTL Article 7-A is 180 days after enactment.

Part 10 of Article 7-A of the Estates, Powers and Trusts Law is entitled "Liability of Trustees and Rights of Person Dealing with Trustee".

Section 7-A-10.1 of the Estates, Powers and Trusts Law defines a breach of trust and provides remedies that the court may use for such breach, in order to create a consolidated listing of such remedies in a single EPTL section. Some of these remedies are from current sections of the EPTL or SCPA, and others are codifications of New York common law. Nothing in section 7-A-10.1 shall limit the court's application of remedial provisions that are in the SCPA. Present New York law can be found in EPTL sections 7-2.6 and 7-2.7 and SCPA sections 209, 711, 719, 1501, 1509, 2205 and 2206.

Section 7-A-10.2 of the Estates, Powers and Trusts Law codifies New York law and defines the amount that a trustee is charged with in various breach-of-trust situations in cases where EPTL section 7-A-10.9 does not apply. This section also allows for additional charges by the court and covers when a liable trustee may or may not be entitled to contribution from another liable trustee.

Section 7-A-10.3 of the Estates, Powers and Trusts Law codifies the rule that a trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust. However, absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation or for not having made a profit.

Section 7-A-10.4 of the Estates, Powers and Trusts Law references the statutory authority for courts to fix the compensation of an attorney (SCPA section 2110) and award costs and allowances (Article 23 of the SCPA).

Section 7-A-10.5 of the Estates, Powers and Trusts Law provides that the statute of limitations will be two years from receipt by a beneficiary of proper notice

from the trustee. Otherwise current New York law is codified which requires that a judicial proceeding by a beneficiary for breach of trust be commenced within six years after the first to occur of the removal, resignation, or death of the trustee, the termination of the beneficiary's interest, the termination of the trust, or the open repudiation of the trust by the trustee. The two year statute will not apply to the attorney general.

Section 7-A-10.6 of the Estates, Powers and Trusts Law provides that to the extent EPTL 11-2.3 do not apply a trustee who acts in reasonable reliance on the terms of the trust is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

Section 7-A-10.7 of the Estates, Powers and Trusts Law codifies current New York law, and provides that if the occurrence of an event affects the administration or distribution of a trust, then a trustee who has exercised reasonable care to ascertain the occurrence of the event is not liable for a loss resulting from the trustee's ignorance of the occurrence of the event.

Section 7-A-10.8 of the Estates, Powers and Trusts Law provides that the rules for the exculpation (exoneration) of a lifetime trustee and trust director are found in EPTL section 11-1.7, as amended.

Section 7-A-10.9 of the Estates, Powers and Trusts Law codifies case law. Specifically, a trustee is not liable to a beneficiary for breach of trust if the beneficiary consented in writing to the conduct, executed a release of the trustee from liability, or ratified in writing the transaction constituting the breach, unless the beneficiary was induced by improper conduct or did not know of his or her rights or the material facts relating to the breach. Virtual representation will apply in determining the effect of such consent, release, or ratification.

Section 7-A-10.10 of the Estates, Powers and Trusts Law codifies current New York law by absolving a trustee who discloses his or her fiduciary capacity in a contract from personal liability on such contract. The section also provides that if a trustee fails to exercise reasonable care, diligence, and prudence, such 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. This section also simplifies existing law by allowing actions against a trustee in his or her fiduciary capacity whether or not the trustee will be personally liable. If liability of the trustee is found in a proceeding regarding an obligation or a tort, issues of liability as between the trustee in the trustee's fiduciary capacity or individual capacity shall be determined in an accounting proceeding.

Section 7-A-10.11 of the Estates, Powers and Trusts Law sets forth rules whether or not a trustee is liable when a trustee holds an interest as a general partner. There is no current New York law that corresponds to this section.

Section 7-A-10.12 of the Estates, Powers and Trusts Law provides that, after the effective date of Article 7-A, a non-beneficiary who deals with a trustee in good faith without knowledge that the trustee was improperly exercising powers is protected from liability, except in the case of a breach of the duty of loyalty. In addition, such non-beneficiary is not required to inquire into the extent of the trustee's powers. A non-beneficiary who in good faith deals with a former trustee without knowledge that the trusteeship has terminated is protected from liability. A person who transfers property to a trustee in good faith is not responsible for the proper application of such property.

Transactions before the date of enactment would be governed by EPTL sections 7-2.4 and 7-3.2, which are consolidated into paragraph (g).

Section 7-A-10.13 of the Estates, Powers and Trusts Law provides that a trustee may furnish a certification of trust instead of a copy of the trust to a non-beneficiary and such certification need only provide the information requested, as outlined within this section. There is no current New York law that corresponds to this section.

Part 11 of Article 11-A of the Estates, Powers and Trusts Law is entitled "Miscellaneous Provisions".

Section 7-A-11.1 of the Estates, Powers and Trusts Law is a reserved section for possible future use.

Section 7-A-11.2 of the Estates, Powers and Trusts Law section responds to the specific language of the Electronic Signatures in Global and National Commerce Act and is designed to avoid preemption of state law under that federal legislation.

Section 7-A-11.3 of the Estates, Powers and Trusts Law provides that any potential invalidity of any provision of EPTL Article 7-A does not affect other provisions or applications of EPTL Article 7-A, to the extent possible.

Section 7-A-11.4 of the Estates, Powers and Trusts Law sets forth that the effective date for EPTL Article 7-A is 180 days after enactment.

Section 7-A-11.5 of the Estates, Powers and Trusts Law is a reserved section for possible future use.

Section 7-A-11.6 of the Estates, Powers and Trusts Law provides rules regarding the application of EPTL Article 7-A, including its application to trusts created before, on, or after EPTL Article 7-A's effective date and to judicial proceedings concerning trusts commenced on or after its effective date. The section clarifies that if a right is acquired, extinguished, or barred under another statute upon the expiration of a period of time that has started to run before the effective date of EPTL Article 7-A, such other statute continues to apply even if it has been repealed or superseded. The section also makes clear that vested rights will not be adversely affected.

Section 2 of the bill amends section 1-2.4 of the Estates, Powers and Trusts Law to provide a cross-reference to CPLR 5205(c) that the cy pres provisions of EPTL section 8-1.1(c) may apply to certain nonprobate transfers.

Section 3 of the bill amends section 1-2.12 of the Estates, Powers and Trusts Law to revise and broaden the definition of "person."

Section 4 of the bill adds section 3-3.10 of the Estates, Powers and Trusts Law To provide a definition for charitable organization.

Section 5 of the bill adds section 3-3.10 of the Estates, Powers and Trusts Law to track the language of EPTL section 7-A-4.15 and explicitly allow the court to reform the terms of a will to conform to the testator's intention if such intention is proved by clear and convincing evidence and such terms cannot otherwise carry out the intention due to a mistake of fact or law in the expression or inducement of such terms. Current New York law does not allow for the reformation of will provisions.



Section 6 of the bill amends the title of Article 7 of the Estates, Powers and Trusts Law to read "NON-GRATUITOUS TRUSTS, TRANSFERS TO MINORS AND CHILD PERFORMANCE ACCOUNTS" in order to accurately reflect the contents of its new organizational scheme.

Section 7 of the bill amends the Summary of Article to reflect the limited scope of Article 7.

Section 8 of the bill repeals Part 1, which consists of sections 7-1.1 through 7-1.19 of EPTL Article 7.

Section 9 of the bill adds Part 1-A of Article which consists of the following:

Part 1-A of Article 7-A of the Estates, Powers and Trusts Law is entitled "Non-gratuitous Trusts."

Section 7-1.1-A of the Estates, Powers and Trusts Law sets forth the scope of Part 1-A, which is to provide rules for non-gratuitous trusts, including business and commercial trusts. Non-gratuitous trusts are defined as trusts not governed by Article 7-A.

Section 7-1.2-A of the Estates, Powers and Trusts Law provides that a non-gratuitous trust may be created for any lawful purpose.

Section 7-1.3-A of the Estates, Powers and Trusts Law provides that where an estate in real property vests in an assignee or other trustee for the benefit of creditors, that estate will cease after ten years and revert to the assignor. This section does not apply to trusts of personal property or trusts of real property created in connection with the salvaging of mortgage participation certificates, nor does it affect the rights to the proceeds of a sale of real property made by an assignee or other trustee for the benefit of creditors.

Section 7-1.4-A of the Estates, Powers and Trusts Law clarifies that where a non-domiciliary creates a non-gratuitous trust that states that it is governed by New York law, New York law shall govern any determination of the validity or interpretation of any provision disposing of (a) trust property situated in New York at the time of the trust's creation and (b) personal property, wherever situated, where the trustee is an individual residing or doing business in New York or is a national bank with an office in New York.

Section 7-1.5-A of the Estates, Powers and Trusts Law provides that certain trusts can acquire property in the name of the trust. It further clarifies that such acquired property can be conveyed, encumbered, or disposed of only in such name by a conveyance, encumbrance, or other instrument executed by the individuals authorized to do so or, where permitted, by a majority of the trustees.

Section 7-1.6-A of the Estates, Powers and Trusts Law clarifies that a New York court shall appoint a successor trustee to administer a non-gratuitous trust where the sole surviving trustee of the trust dies, the trust has not been executed, and the trust does not provide further direction regarding appointment of a successor. It further sets forth the rights and duties of such successor trustee.

Section 7-1.7-A of the Estates, Powers and Trusts Law clarifies that where the trustee of a non-gratuitous trust is engaged in war service and either no

successor is named in the trust instrument or the remaining trustee is the sole beneficiary of the trust, a person interested in the trust estate can petition the Surrogate's Court for the suspension of the trustee's powers and appointment of a successor trustee. The section defines "engaged in war." The section also provides a procedure for such a proceeding, limits commissions for the successor trustee, and permits the trustee to petition the court for reinstatement.

Section 7-1.8-A of the Estates, Powers and Trusts Law specifies that the Supreme Court has the power to accept a trustee's resignation, to suspend or remove a trustee of a non-gratuitous trust who is unable to act, and to appoint a successor trustee upon removal of a trustee.

Section 7-1.9-A of the Estates, Powers and Trusts Law makes clear that a trustee or successor trustee of a non-gratuitous trust can commence an accounting or related proceeding by giving notice to the trust's beneficiaries. This section further provides the circumstances under which the court may dispense with a formal accounting by a trustee who is resigning or being suspended or removed.

Section 7-1.10-A of the Estates, Powers and Trusts Law clarifies that a trustee of a trust to sell real property for the benefit of creditors is entitled to the same commissions as an assignee for the benefit of creditors.

Section 7-1.11-A of the Estates, Powers and Trusts Law provides that the common law of trusts and principles of equity may supplement Part 1-A of EPTL Article 7.

Section 10 of the bill repeals Part 2, which consists of sections 7-2.1 through 7-2.8 of EPTL Article 7.

Section 11 of the bill repeals Part 3, which consists of sections 7-3.1 through 7-3.5 of EPTL Article 7.

Section 12 of the bill repeals Part 5, which consists of sections 7-5.1 through 7-5.8 of EPTL Article 7.

Section 13 of the bill repeals Part 8, which consists of section 7-8.1 of EPTL Article 7.

Section 14 of the bill amends subparagraph (c)(1) of section 8-1.1 of the Estates, Powers and Trusts Law to: (1) make clear that the court having jurisdiction over a testamentary or lifetime trust has cy pres authority; (2) expand the persons allowed to apply to the court for cy pres treatment; (3) require the settlor, if competent, to receive notice of the application; (4) allow reformation "in a manner consistent" with the settlor's objectives (presuming a general charitable intent) rather than requiring the court to determine which alternative most effectively accomplishes the charitable purposes; and (5) recognize the validity of a gift over to a noncharitable beneficiary if the original charitable purpose fails.

Section 15 of the bill amends subparagraph (b) of section 10-6.6 of the Estates, Powers and Trusts Law to replace it with a cross-reference to EPTL section 7-A-8.19, which maintains the substance of current EPTL section 10-6.6(b).

Section 16 of the bill amends section 10-10.1 of the Estates, Powers and Trusts Law to replace the power "to make discretionary allocations in such person's favor of receipts or expenses as between principal and income" with the power "to make a discretionary distribution of either principal or income in discharge

of the trustee's personal obligation of support" as one of the powers held by a trustee that cannot be exercised unless certain listed requirements are met.

Section 17 of the bill amends section 10-10.6 of the Estates, Powers and Trusts Law to clarify that section 10-10.6 does not apply to the trust contributor of an express trust created after the effective date of EPTL section 7-A-5.5.

Section 18 of the bill amends section 10-10.7 of the Estates, Powers and Trusts Law to remove the references to trusts and trustees currently present in this section, so as to be consistent with the treatment of co-trustees in section 7-A-7.3 and trustee powers in sections 7-A-8.15 and 7-A.8.16.

Section 19 of the bill amends section 11-1.1 of the Estates, Powers and Trusts Law to remove the references to trusts and trustees currently present in this section, so as to be consistent with the consolidation of trustee powers in section 7-A.8.16. In addition, because subparagraph (b)(19) of EPTL section 11-1.1 is entirely addressed to trustees, that subparagraph is entirely removed, and the subsequent subparagraphs renumbered accordingly.

Section 20 of the bill amends section 11-1.7 of the Estates, Powers and Trusts Law to include trust directors.

Section 21 of the bill amends section 11-2.3 of the Estates, Powers and Trusts Law to allow a trustee to delegate its investment or management functions as set forth in EPTL section 7-A-8.7.

Section 22 of the bill amends section 13-3.3 of the Estates, Powers and Trusts Law to provide for application of the cy pres doctrine under section 8-1.1(c)(1) and application of section 1002-a(c)(1) to dissolved or dissolving charitable corporations.

Section 23 of the bill amends section 13-4.7 of the Estates, Powers and Trusts Law to provide for application of the cy pres doctrine under section 8-1.1(c)(1) and application of section 1002-a(c)(1) to dissolved or dissolving charitable corporations.

Section 24 of the bill amends subdivision 5 of section 100-a of the Banking Law, which generally provides that no bond is required from any trust company, by adding an exception where the settlor of a trust governed by EPTL Article 7-A expressly requires the trust company to furnish a bond. See section 7-A-7.2(c).

Section 25 of the bill amends section 5205(c) of the Civil Practice Law and Rules to conform with section 7-A-5.5-A(b) which limits creditors from reaching trust assets on the lapse, release or waiver of a power of withdrawal by treating such actions as contributions but only for the amount in excess of the 5/5 amount under tax law or the gift tax annual exclusion amount.

Section 26 of the bill amends subdivision 2 of section 706 of the Surrogate's Court Procedure Act to provide by reference to the provisions in section 7-A-7.4 that any vacancy in trusteeship of a lifetime noncharitable or charitable trust may be filled by unanimous agreement of the qualified beneficiaries without the need for court approval, in the absence of a designated successor.

Section 27 of the bill amends section 715 of the Surrogate's Court Procedure Act to allow testamentary trustees to resign without needing to petition for court approval. Under current New York law, a time-consuming and expensive

petitioning process is required even when all interested parties consent to the resignation, a requirement that burdens beneficiaries unnecessarily.

Section 28 of the bill amends section 806 of the Surrogate's Court Procedure Act to remove the default requirement that a testamentary trustee furnish a bond in order to serve.

Section 29 of the bill amends section 1502 of the Surrogate's Court Procedure Act to reference, and conform to, sections 7-A-7.4(c)(2) and 7-A-7.4(d)(2). These sections explicitly permit a vacancy in trusteeship to be filled by qualified beneficiaries (in the absence of a designated successor) before a court may act to fill a vacancy.

Section 30 of the bill provides that the effective for sections 2-25 is 180 days after enactment. These sections will apply to all trusts as provided by § 7-A-11.6.

JUSTIFICATION: There are several reasons for enactment of new Article 7-A of Estates, Powers and Trusts Law, which will embody a modern New York Trust Code for gratuitous trusts. First, although trust practices have dramatically changed over the past 50 years, New York has not comprehensively changed its trusts laws since 1967. The proposed New York Trust Code would change many statutory provisions to reflect contemporary needs, including the enactment of the New York Uniform Direct Trust Act. In addition, the New York Trust Code would codify virtually all existing trust case law thereby making it far simpler for lawyers to research and practice in this area. In turn, consumers would greatly benefit as costs for trust preparation and operation would be reduced. Finally, a modern New York Trust Code would also help to make New York more competitive with other states.

LEGISLATIVE HISTORY: New Bill

FISCAL IMPLICATIONS: None

EFFECTIVE DATE: 180 Days after Enactment

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## A.C.A. § 28-73-105

Current through all acts of the 2021 Regular Session, First Extraordinary Session, Extended Session, and Second Extraordinary Session, including corrections and edits by the Arkansas Code Revision Commission

***AR - Arkansas Code Annotated > Title 28 Wills, Estates, and Fiduciary Relationships > Subtitle 5. Fiduciary Relationships > Chapter 73 Arkansas Trust Code > Subchapter 1 — General Provisions and Definitions***

### **28-73-105. Default and mandatory rules.**

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- (a) Except as otherwise provided in the terms of the trust, this chapter governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.
- (b) The terms of a trust prevail over any provision of this chapter except:
  - (1) the requirements for creating a trust;
  - (2) subject to §§ 28-76-109, 28-76-111, and 28-76-112 of the Uniform Directed Trust Act, § 28-76-101 et seq., the duty of a trustee to act in good faith and in accordance with the purposes of the trust;
  - (3) the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve;
  - (4) the power of a court to modify or terminate a trust under §§ 28-73-410 — 28-73-416;
  - (5) the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in § 28-73-501 et seq.;
  - (6) the power of a court under § 28-73-702 to require, dispense with, or modify or terminate a bond;
  - (7) the power of a court under § 28-73-708(b) to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;
  - (8) the rights under §§ 28-73-1010 — 28-73-1013 of a person other than a trustee or beneficiary;
  - (9) periods of limitation for commencing a judicial proceeding;
  - (10) the power of a court to take such action and exercise such jurisdiction as may be necessary in the interests of justice; and
  - (11) the subject-matter jurisdiction of a court for commencing a proceeding as provided in § 28-73-203.

### **History**

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A.C.A. § 28-73-105

Acts 2005, No. 1031, § 1; 2019, No. 1021, § 2.

Annotations

## Notes

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Amendments.

The 2019 amendment added "subject to §§ 28-76-109, 28-76-111, and 28-76-112 of the Uniform Directed Trust Act" in (b)(2).

Effective Dates.

Acts 2019, No. 1021, § 6. Jan. 1, 2020.

## Case Notes

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Trust Amendments.

A.C.A. § 28-73-105

Consent of a secondary beneficiary to trust amendments was not required because the express terms of the trusts permitted the amendments at issue.

410, 591 S.W.3d 299 (2019)

Dawson v. Stoner-Sellers, 2019 Ark.

## Research References & Practice Aids

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### Ark. L. Notes.

Circo, How Does the Arkansas Trust Code Affect Real Estate Transactions?, 2007 Ark. L. Notes 45

### U. Ark. Little Rock L. Rev.

Lucy L. Holifield, Note: Property Law—Upending the Familiar Tools of Estate Planning: Equity Renders Revocable Trusts Subject to the Arkansas Spousal Election. In re Estate of Thompson, 38 U. Ark. Little Rock L. Rev. 75 (2015).

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End of Document





## *N.C. Gen. Stat. § 36C-1-105*

Current through Session Laws 2021-179 and Session Laws 2021-181 through 2021-183 of the 2021 Regular Session of the General Assembly, but does not reflect possible future codification directives relating to Session Laws 2021-163 through 2021-179 and Session Laws 2021-181 through 2021-183 from the Revisor of Statutes pursuant to G.S. 164-10.

*General Statutes of North Carolina > Chapter 36C. North Carolina Uniform Trust Code. (Arts. 1 — 11)  
> Article 1. General Provisions and Definitions. (§§ 36C-1-101 — 36C-1-114)*

### **§ 36C-1-105. Default and mandatory rules.**

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- (a) Except as otherwise provided in the terms of the trust, this Chapter governs the duties and powers of a trustee and a power holder under Article 8A of this Chapter, relations among trustees and those power holders, and the rights and interests of a beneficiary.
- (b) The terms of a trust prevail over any provision of this Chapter except:
- (1) The requirements for creating a trust.
  - (2) The duty of a trustee or a power holder under Article 8A of this Chapter to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries, except as follows:
    - a. This duty is subject to G.S. 36C-8A-4 with respect to the trustee.
    - b. This duty does not apply to the extent the power holder is acting in a nonfiduciary capacity as provided in G.S. 36C-8A-3.
  - (3) The requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve.
  - (4) The power of the court to modify or terminate a trust under G.S. 36C-4-410 through G.S. 36C-4-416.
  - (5) The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Article 5 of this Chapter.
  - (6) The effect of an exculpatory term under G.S. 36C-10-1008, except to the extent the power holder is acting in a nonfiduciary capacity as provided in G.S. 36C-8A-3.
  - (7) The rights under G.S. 36C-10-1010 through G.S. 36C-10-1013 of a person other than a trustee or beneficiary.

## N.C. Gen. Stat. § 36C-1-105

- (8) Periods of limitation for commencing a judicial proceeding.
- (9) The power of the court to take any action and exercise any jurisdiction as may be necessary in the interests of justice.
- (10) The subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in G.S. 36C-2-203 and G.S. 36C-2-204.
- (11) The requirement that the exercise of the powers described in G.S. 36C-6-602.1(a) shall not alter the designation of beneficiaries to receive property on the settlor's death under that settlor's existing estate plan.
- (12) The power of a trustee to renounce an interest in or power over property under G.S. 36C-8-816(32).
- (c) Repealed by Session Laws 2021-85, s. 2(b), effective July 8, 2021, and applicable to trusts created before, on, or after that date.

## History

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2005-192, s. 2, 2007-106, s. 3, 2009-48, s. 15, 2015-205, s. 7, 2021-85, s. 2(b).

### Annotations

## Notes

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### Editor's Note.

Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2009-48, s. 18, provides: "The Revisor of Statutes shall cause to be printed along with this act all explanatory comments of the drafters of this act as the Revisor deems appropriate."

Session Laws 2015-205, s. 11(a), as amended by Session Laws 2015-264, s. 31(b), provides: "The Revisor of Statutes shall cause to be printed, as annotations to the published General Statutes, all relevant portions of the Official Commentary to the Uniform Powers of Appointment Act and of the Official Commentary to the Uniform Trust Code and all explanatory comments of the drafters of Part III and Parts VI through X-A of this act, as the Revisor may deem appropriate."

## N.C. Gen. Stat. § 36C-1-105

Session Laws 2021-85, s. 2(d), provides: “The Revisor of Statutes shall cause to be printed, as annotations to the published General Statutes, all explanatory comments of the drafters of this section as the Revisor may deem appropriate.”

Session Laws 2021-85, s. 2(e), made the amendments to this section by Session Laws 2021-85, s. 2(b), effective July 8, 2021, and applicable to trusts created before, on, or after that date.

**Effect of Amendments.**

Session Laws 2007-106, s. 3, effective October 1, 2007, in subsection (b), made minor stylistic and punctuation changes in subdivisions (9) and (10), and added subdivision (11). See Editor’s note for applicability.

Session Laws 2009-48, s. 15, effective October 1, 2009, and applicable to renunciations and powers of attorney executed on or after that date, in subsection (b), made minor punctuation changes throughout, and added subdivision (b)(12).

Session Laws 2015-205, s. 7, effective October 1, 2015, in subsection (a), inserted “and a power holder under Article 8A of this Chapter” and “and those power holders”; inserted “or a power holder under Article 8A of this Chapter” in subdivision (b)(2); added “except as otherwise provided in subsection (c) of this section” in subdivisions (b)(2) and (b)(6); and added subsection (c). For applicability and effective date, see editor’s note.

Session Laws 2021-85, s. 2(b), rewrote subdivisions (b)(2), and (b)(6); and repealed subsection (c), which read: “The provisions of subdivisions (2) and (6) of subsection (b) of this section shall not apply to a power holder described in Article 8A of this Chapter with respect to powers conferred upon the power holder in a nonfiduciary capacity under G.S. 36C 8A 3(a) or under the terms of the trust.” For effective date and applicability, see editor’s note.

## **Commentary**

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**Official Comment**

Subsection (a) emphasizes that the Uniform Trust Code is primarily a default statute. While this Code provides numerous procedural rules on which a settlor may wish to rely, the settlor is generally free to override these rules and to prescribe the conditions under which the trust is to be administered. With only limited exceptions, the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary are as specified in the terms of the trust.

Subsection (b) lists the items not subject to override in the terms of the trust. Because subsection (b) refers specifically to other sections of the Code, enacting jurisdictions modifying these other sections may also need to modify subsection (b).

## N.C. Gen. Stat. § 36C-1-105

Subsection (b)(1) confirms that the requirements for a trust's creation, such as the necessary level of capacity and the requirement that a trust have a legal purpose, are controlled by statute and common law, not by the settlor. For the requirements for creating a trust, see Sections 401-409. Subsection (b)(12) makes clear that the settlor may not reduce any otherwise applicable period of limitations for commencing a judicial proceeding. *See* Sections 604 (period of limitations for contesting validity of revocable trust), and 1005 (period of limitation on action for breach of trust). Similarly, a settlor may not so negate the responsibilities of a trustee that the trustee would no longer be acting in a fiduciary capacity. Subsection (b)(2) provides that the terms may not eliminate a trustee's duty to act in good faith and in accordance with the purposes of the trust and the interests of the beneficiaries. For this duty, see Sections 801 and 814(a). Subsection (b)(3) provides that the terms may not eliminate the requirement that a trust and its terms must be for the benefit of the beneficiaries. Subsection (b)(3) also provides that the terms may not eliminate the requirement that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve. Subsections (b)(2)-(3) are echoed in Sections 404 (trust and its terms must be for benefit of beneficiaries; trust must have a purpose that is lawful, not contrary to public policy, and possible to achieve), 801 (trustee must administer trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries), 802(a) (trustee must administer trust solely in interests of the beneficiaries), 814 (trustee must exercise discretionary power in good faith and in accordance with its terms and purposes and the interests of the beneficiaries), and 1008 (exculpatory term unenforceable to extent it relieves trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust and the interests of the beneficiaries).

The terms of a trust may not deny a court authority to take such action as necessary in the interests of justice, including requiring that a trustee furnish bond. Subsection (b)(6), (13). Additionally, should the jurisdiction adopting this Code enact the optional provisions on subjectmatter jurisdiction and venue, subsection (b)(14) similarly provides that such provisions cannot be altered in the terms of the trust. The power of the court to modify or terminate a trust under Sections 410 through 416 is not subject to variation in the terms of the trust. Subsection (b)(4). However, all of these Code sections involve situations which the settlor could have addressed had the settlor had sufficient foresight. These include situations where the purpose of the trust has been achieved, a mistake was made in the trust's creation, or circumstances have arisen that were not anticipated by the settlor.

Section 813 imposes a general obligation to keep the beneficiaries informed as well as several specific notice requirements. Subsections (b)(8) and (b)(9), which were placed in brackets and made optional provisions by a 2004 amendment, specify limits on the settlor's ability to waive these information requirements. With respect to beneficiaries age 25 or older, a settlor may dispense with all of the requirements of Section 813 except for the duties to inform the beneficiaries of the existence of the trust, of the identity of the trustee, and to provide a beneficiary upon request with such reports as the trustee may have prepared. Among the specific requirements that a settlor may waive include the duty to provide a beneficiary upon request with a copy of the trust instrument (Section 813(b)(1)), and the requirement that the trustee provide annual reports to the qualified beneficiaries (Section 813(c)). The furnishing of a copy of the entire trust instrument and preparation of annual reports may be

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required in a particular case, however, if such information is requested by a beneficiary and is reasonably related to the trust's administration.

Responding to the desire of some settlors that younger beneficiaries not know of the trust's bounty until they have reached an age of maturity and self-sufficiency, subsection (b)(8) allows a settlor to provide that the trustee need not even inform beneficiaries under age 25 of the existence of the trust. However, pursuant to subsection (b)(9), if the younger beneficiary learns of the trust and requests information, the trustee must respond. More generally, subsection (b)(9) prohibits a settlor from overriding the right provided to a beneficiary in Section 813(a) to request from the trustee of an irrevocable trust copies of trustee reports and other information reasonably related to the trust's administration.

During the drafting of the Uniform Trust Code, the drafting committee discussed and rejected a proposal that the ability of the settlor to waive required notice be based on the nature of the beneficiaries' interest and not on the beneficiaries' age. Advocates of this alternative approach concluded that a settlor should be able to waive required notices to the remainder beneficiaries, regardless of their age. Enacting jurisdictions preferring this alternative should substitute the language "adult and current or permissible distributees of trust income or principal" for the reference to "qualified beneficiaries" in subsection (b)(8). They should also delete the reference to beneficiaries "who have attained the age of 25 years."

Waiver by a settlor of the trustee's duty to keep the beneficiaries informed of the trust's administration does not otherwise affect the trustee's duties. The trustee remains accountable to the beneficiaries for the trustee's actions.

Neither subsection (b)(8) nor (b)(9) apply to revocable trusts. The settlor of a revocable trust may waive all reporting to the beneficiaries, even in the event the settlor loses capacity. If the settlor is silent about the subject, reporting to the beneficiaries will be required upon the settlor's loss of capacity. *See* Section 603.

In conformity with traditional doctrine, the Uniform Trust Code limits the ability of a settlor to exculpate a trustee from liability for breach of trust. The limits are specified in Section 1008. Subsection (b)(10) of this section provides a cross-reference. Similarly, subsection (b)(7) provides a cross-reference to Section 708(b), which limits the binding effect of a provision specifying the trustee's compensation.

Finally, subsection (b)(11) clarifies that a settlor is not free to limit the rights of third persons, such as purchasers of trust property. Subsection (b)(5) clarifies that a settlor may not restrict the rights of a beneficiary's creditors except to the extent a spendthrift restriction is allowed as provided in Article 5.

**2001 Amendment.** By amendment in 2001, subsections (b) (3), (8) and (9) were revised. The language in subsection (b)(3) "that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve" is new. This addition clarifies that the settlor may not waive this common law requirement, which is codified in the Code at Section 404.

Subsections (b)(8) and (9) formerly provided:

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(8) the duty to notify the qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, and of their right to request trustee's reports and other information reasonably related to the administration of the trust;

(9) the duty to respond to the request of a beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust.

The amendment clarifies that the information requirements not subject to waiver are requirements specified in Section 813 of the Code.

**2003 Amendment.** By amendment in 2003, subsection (b)(8) was revised. Under the previous provision, as amended in 2001, the presence of two "excepts" in the same sentence, the first in the introductory language to subsection (b) and the second at the beginning of subsection (b)(8), has caused considerable confusion. The revision eliminates the second "except" in (b)(8) without changing the meaning of the provision.

**2004 Amendment.** Sections 105(b)(8) and 105(b)(9) address the extent to which a settlor may waive trustee notices and other disclosures to beneficiaries that would otherwise be required under the Code. These subsections have generated more discussion in jurisdictions considering enactment of the UTC than have any other provisions of the Code. A majority of the enacting jurisdictions have modified these provisions but not in a consistent way. This lack of agreement and resulting variety of approaches is expected to continue as additional states enact the Code.

Placing these sections in brackets signals that uniformity is not expected. States may elect to enact these provisions without change, delete these provisions, or enact them with modifications. In Section 105(b)(9), an internal bracket has been added to make clear that an enacting jurisdiction may limit to the qualified beneficiaries the obligation to respond to a beneficiary's request for information.

The placing of these provisions in brackets does not mean that the Drafting Committee recommends that an enacting jurisdiction delete Sections 105(b)(8) and 105(b)(9). The Committee continues to believe that Sections 105(b)(8) and (b)(9), enacted as is, represent the best balance of competing policy considerations. Rather, the provisions were placed in brackets out of a recognition that there is a lack of consensus on the extent to which a settlor ought to be able to waive reporting to beneficiaries, and that there is little chance that the states will enact Sections 105(b)(8) and (b)(9) with any uniformity.

The policy debate is succinctly stated in Joseph Kartiganer & Raymond H. Young, *The UTC: Help for Beneficiaries and Their Attorneys*, Prob. & Prop., Mar./April 2003, at 18, 20:

The beneficiaries' rights to information and reports are among the most important provisions in the UTC. They also are among the provisions that have attracted the most attention. The UTC provisions reflect a compromise position between opposing viewpoints.

Objections raised to beneficiaries' rights to information include the wishes of some settlors who believe that knowledge of trust benefits would not be good for younger beneficiaries, encouraging them to take up a life of ease

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rather than work and be productive citizens. Sometimes trustees themselves desire secrecy and freedom from interference by beneficiaries.

The policy arguments on the other side are: that the essence of the trust relationship is accounting to the beneficiaries; that it is wise administration to account and inform beneficiaries, to avoid the greater danger of the beneficiary learning of a breach or possible breach long after the event; and that there are practical difficulties with secrecy (for example, the trustee must tell a child that he or she is not eligible for financial aid at college because the trust will pay, and must determine whether to accumulate income at high income tax rates or pay it out for inclusion in the beneficiary's own return). Furthermore, there is the practical advantage of a one-year statute of limitations when the beneficiary is informed of the trust transactions and advised of the bar if no claim is made within the year. UTC §§ 1005. In the absence of notice, the trustee is exposed to liability until five years after the trustee ceases to serve, the interests of beneficiaries end, or the trust terminates. UTC §§ 1005(c).

**2005 Amendment.** Subsection (b)(2) is revised to make the language consistent with the corresponding duties in Sections 801 and 814(a), which require that a trustee act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. Previously, subsection (b)(2) provided that the settlor could not waive the duty of a trustee to act in good faith and in accordance with the purposes of the trust. The amendment adds that also cannot waive the obligation to act in accordance with the terms of the trust and the interests of the beneficiaries.

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

**North Carolina Comment**

The drafters substantially modified subsection (b) of the Uniform Trust Code by omitting the following four paragraphs of the fourteen listed in subsection (b) which describes matters known as "mandatory rules" that a settlor may not override in the terms of the trust:

(i) Paragraph (6) regarding the power of the court to require, dispense with, or modify or terminate a bond. The drafters omitted this paragraph to be consistent with the provision in G.S. 36C-7-702(a), which brings forward the provision in former G.S. 36A-31(b), that in no event shall the court require a bond where the terms of the trust direct otherwise. A beneficiary who has complaints about a trustee's administration of the trust could bring an action to remove the trustee rather than to seek to have the trustee provide bond.

(ii) Paragraph (7) regarding the power of the court to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high. This paragraph was omitted to be consistent with the omission in G.S. 36C-7-708(b) of the provisions in Section 708(b) of the Uniform Trust Code authorizing the court to adjust trustee compensation set by the terms of the trust. The drafters concluded that the settlor should have the right to



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compensate a trustee in whatever amount the settlor chooses regardless of whether a court would find such compensation to be unreasonably high or low.

(iii) Paragraph (8) regarding the trustee's duty under Section 813(b)(2) and (3) of the Uniform Trust Code to notify qualified beneficiaries who have reached age 25 of the existence of the trust and other matters, and paragraph (9) regarding the trustee's duty under Section 813(a) of the Uniform Trust Code to respond to the request of a qualified beneficiary for reports and other information. The drafters substantially modified Section 813(a) and (b) of the Uniform Trust Code, but the modified provisions still impose a duty on the trustee to give the beneficiary specified information upon request, a duty that can be discharged for matters disclosed in a report given to the beneficiary. See G.S. 36C-8-813(a) and (b) and the North Carolina Comments to that section. Whether and to what extent the settlor by the terms of the trust could prevent a beneficiary from receiving trust information was one of the more debatable issues of the Uniform Trust Code. The drafters concluded that in North Carolina the settlor should have the right to override any duty to furnish information imposed by G.S. 36C-8-813(a) and (b). Accordingly, the drafters decided not to impose a mandatory rule with respect to these provisions. This is consistent with the statement in *Taylor v. NationsBank*, 125 N.C. App. 515, 521, 481 S.E.2d 358, 362 (1997) where the court said that "trust beneficiaries are entitled to view the trust instrument from which their interest is derived" so long as that right is not waived by the settlor through "an explicit provision in the trust to the contrary".

**Supplemental North Carolina Comment (2007)**

Effective October 1, 2007, subsection (b) is amended to add paragraph (11) providing that the terms of the trust may not override the rule in G.S. 36C-6-602.1(a) that the powers described in that subsection authorizing an agent under a power of attorney to exercise the settlor's powers with respect to a revocable trust cannot be exercised to alter the designation of beneficiaries to receive property on the settlor's death under that settlor's existing estate plan.

**Supplemental North Carolina Comment (2009)**

Effective October 1, 2009, with respect to renunciations executed on or after that date, subsection (b) of this section is amended by adding paragraph (12).

**Supplemental North Carolina Comment (2015)**

Effective October 1, 2015, subsection (a) and subdivision (b)(2) are amended to apply to a power holder under Article 8A the mandatory rule of subdivision (b)(2) applicable to a trustee to act in good faith in accordance with the terms and purposes of the trust and the interest of the beneficiaries. In addition, subsection (a) is amended to apply to a power holder the mandatory rule of subdivision (b)(6) regarding the limitations on the enforceability of the exculpatory provisions of a trust under G.S. 36C-10-1008.

Also effective October 1, 2015, subsection (c) is added to provide that the mandatory requirement of subdivision (b)(2) that the power holder must act in good faith and rule of subdivision (b)(6) regarding the limitations on the

## N.C. Gen. Stat. § 36C-1-105

exculpatory terms of a trust under G.S. 36C-10-1008 shall not apply to a power holder with respect to powers conferred upon the power holder in a nonfiduciary capacity. Unlike a trustee, under G.S. 36C-8A-3(a) and the terms of the trust the power holder may act in a nonfiduciary capacity as to certain powers conferred upon the powerholder.

As noted in the North Carolina Comment to Article 8A, the drafters caution against the terms of the trust providing that the powerholder is a nonfiduciary as to a power that does not fall within the exceptions provided by G.S. 36C-8A-3(a). In other cases, a powerholder's status as a fiduciary may be essential to the administration of a trust because this assures that the beneficiaries will have recourse against the powerholder for misuse of the power.

## CASE NOTES

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### Provision Limiting Trustee's Obligation to Provide Accounting Did Not Limit Beneficiaries' Rights to Discover Trust Information in Suit for Accounting. —

G.S. 36C-8-813 did not override the duty of the trustee to act in good faith, nor could it obstruct the power of the trial court to take such action as was necessary in the interests of justice, pursuant to G.S. 36C-1-105(b)(2), (9), including compelling discovery where necessary to enforce the beneficiary's rights under the trust. Therefore, a trial court erred in granting the trustee a protective order on the beneficiaries' discovery requests seeking information about their trusts' assets. *Wilson v. Wilson*, 203 N.C. App. 45, 690 S.E.2d 710, 2010 N.C. App. LEXIS 501 (2010).

## Research References & Practice Aids

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### Legal Periodicals.

For article, "Back to the Future: An Empirical Study of Child Custody Outcomes," see *85 N.C.L. Rev. 1629 (2007)*.

### Hierarchy Notes:

*N.C. Gen. Stat. Ch. 36C, Art. 1*

General Statutes of North Carolina  
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*N.D. Cent. Code, § 59-09-05*

Current through all acts approved by the governor through the end of the 67th Legislative Assembly Special 2021  
Session.

*North Dakota Century Code Annotated > TITLE 59 Trusts (Chs. 59-01 — 59-21) > CHAPTER 59-09  
General Provisions and Definitions (§§ 59-09-01 — 59-09-13)*

**59-09-05. (105) Default and mandatory rules.**

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1. Except as otherwise provided in the terms of the trust, this title governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.
2. The terms of a trust prevail over any provision of this title except:
  - a. The requirements for creating a trust;
  - b. The duty of a trustee to act in good faith and in accordance with the purposes of the trust;
  - c. The requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful and possible to achieve;
  - d. The power of the court to modify or terminate a trust under sections 59-12-10, 59-12-11, 59-12-12, 59-12-13, 59-12-14, 59-12-15, and 59-12-16;
  - e. The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in chapter 59-13;
  - f. The power of the court under section 59-15-02 to require, dispense with, or modify or terminate a bond;
  - g. The power of the court under subsection 2 of section 59-15-08 to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;
  - h. The effect of an exculpatory term under section 59-18-08;
  - i. The rights under sections 59-18-10, 59-18-11, 59-18-12, and 59-18-13 of a person other than a trustee or beneficiary;
  - j. Periods of limitation for commencing a judicial proceeding;
  - k. The power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice; and

N.D. Cent. Code, § 59-09-05

I. The subject matter jurisdiction of the court and venue for commencing a proceeding as provided in section 59-10-04.

## History

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S.L. 2007, ch. 549, § 15.

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## 12 Del. C. § 3339

This document is current through 83 Del. Laws, c. 267.

*Delaware Code Annotated > Title 12 Decedents' Estates and Fiduciary Relations (Pts. I — VI) > Part V  
Fiduciary Relations (Chs. 33 — 50) > Chapter 33 Administrative Provisions (§§ 3301 — 3344)*

### **§ 3339. Designated representatives of trusts.**

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(a) For purposes of this title, the term “designated representative” means a person who has delivered to the trustee such person’s written acceptance of the office of designated representative or who has otherwise agreed, through service or similar action, to serve as designated representative following such person’s appointment to act as a designated representative in the manner described in at least 1 of the following paragraphs of this subsection:

- (1) Express appointment under the terms of a governing instrument as a designated representative or by reference to this section;
- (2) Authorization, appointment, or direction under the terms of a governing instrument to represent or bind 1 or more beneficiaries in connection with a judicial proceeding or nonjudicial matter, as those terms are defined in § 3303(e) of this title;
- (3) Appointment by 1 or more persons who are expressly authorized under a governing instrument to appoint a person who is described in paragraph (a)(1) or (2) of this section;
- (4) To the extent that a designated representative is not appointed in accordance with paragraphs (a)(1) through (a)(3) of this section, appointment by the trustor to act as designated representative for 1 or more beneficiaries; provided, however, when a trustor is appointing a designated representative for purposes of paragraph (b)(2) of this section:
  - a. The appointed designated representative shall serve in a fiduciary capacity, notwithstanding any provision to the contrary in the governing instrument;
  - b. The appointed designated representative must not be related or subordinate to the trustor within the meaning of § 672(c) of the Internal Revenue Code of 1986 [26 U.S.C. § 672(c)], as amended; and
  - c. The trustor, within 30 days of appointment of the designated representative under this paragraph (a)(4), must provide written notice to the surviving and competent parent or parents or custodial parent (in cases where 1 parent has sole custody of the beneficiary), or guardian of the property of the beneficiary who will be represented by the appointed designated representative; or

## 12 Del. C. § 3339

- (5) To the extent that a designated representative is not appointed in accordance with paragraphs (a)(1) through (4) of this section, appointment by a beneficiary to act as a designated representative of such beneficiary.
- (b) A designated representative may be appointed under paragraph (a) of this section:
- (1) For purposes of representing a beneficiary in accordance with § 3303(d) of this title;
  - (2) For purposes of representing a minor beneficiary, a beneficiary who is incapacitated, an unborn beneficiary, or a beneficiary whose identity or location is unknown and not reasonably ascertainable, in any nonjudicial matter, as such term is defined in § 3303(e) of this title;
  - (3) With respect to appointment under paragraph (a)(5) of this section, for purposes of representing the appointing beneficiary, in any nonjudicial matter, as such term is defined in § 3303(e) of this title.
- (c) For purposes of paragraphs (b)(2) and (b)(3) of this section, any designated representative then serving may represent and bind the applicable beneficiary for purposes of any nonjudicial matter, as such term is defined in § 3303(e) of this title, notwithstanding that the governing instrument does not restrict or eliminate the right of such beneficiary to be informed of the beneficiary's interest in the trust.
- (d) A designated representative shall be presumed to be a fiduciary. A person who accepts an appointment as a designated representative of a trust, or acts as a designated representative of a trust under this section, submits to personal jurisdiction of this State regarding any matter related to the trust. This provision does not preclude other methods of obtaining jurisdiction over such designated representative of a trust.

## History

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*80 Del. Laws, c. 89, § 1; 83 Del. Laws, c. 69, § 2.*

Annotations

## Notes

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Revisor's note.

Section 2 of *80 Del. Laws, c. 89*, provided: "The provisions of this act shall become effective upon enactment and shall apply to all trusts whenever created." The act was signed by the Governor on July 10, 2015.

Effect of amendments.



12 Del. C. § 3339

83 Del. Laws, c. 69, effective June 30, 2021, rewrote (a); added present (b) and (c); redesignated former (b) as (d) and added the second and third sentences therein.

## Research References & Practice Aids

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### Hierarchy Notes:

*12 Del. C. Pt. V, Ch. 33*

Delaware Code Annotated

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## Fla. Stat. § 736.0306

Current through the 2021 Regular and First and Second Extraordinary Sessions.

*LexisNexis® Florida Annotated Statutes > Title XLII. Estates and Trusts. (Chs. 731 — 740) > Chapter 736. Florida Trust Code. (§§ 736.0101 — 736.1512) > Part III. Representation. (§§ 736.0301 — 736.0306)*

### **§ 736.0306. Designated representative.**

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- (1) If specifically nominated in the trust instrument, one or more persons may be designated to represent and bind a beneficiary and receive any notice, information, accounting, or report. The trust instrument may also authorize any person or persons, other than a trustee of the trust, to designate one or more persons to represent and bind a beneficiary and receive any notice, information, accounting, or report.
- (2) Except as otherwise provided in this code, a person designated, as provided in subsection (1) may not represent and bind a beneficiary while that person is serving as trustee.
- (3) Except as otherwise provided in this code, a person designated, as provided in subsection (1) may not represent and bind another beneficiary if the person designated also is a beneficiary, unless:
  - (a) That person was named by the settlor; or
  - (b) That person is the beneficiary's spouse or a grandparent or descendant of a grandparent of the beneficiary or the beneficiary's spouse.
- (4) No person designated, as provided in subsection (1), is liable to the beneficiary whose interests are represented, or to anyone claiming through that beneficiary, for any actions or omissions to act made in good faith.

### **History**

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S. 3, *ch. 2006-217*, eff. July 1, 2007; s. 4, *ch. 2009-117*, eff. July 1, 2009.

Annotations

### **Notes**

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## Fla. Stat. § 736.0306

**Amendments.**

The 2009 amendment, in (1), substituted “specifically nominated” for “authorized” in the first sentence and added the second sentence.

**Research References & Practice Aids**

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**RESEARCH REFERENCES & PRACTICE AIDS****Florida Statutes references.**

Chapter 736. Florida Trust Code, *F.S. § 736.0105*. Default and mandatory rules.

**Treatises**

*Florida Estates Practice Guide, Chapter 27 Testamentary Trusts, Part I. Legal Background, § 27.01 Testamentary Trusts.*

*Florida Estates Practice Guide, Chapter 27 Testamentary Trusts, Part I. Legal Background, § 27.10 in General.*

*Florida Estates Practice Guide, Chapter 39 Administration of Trust Estates, Part I. Legal Background, § 39.01 the New Florida Trust Code (Effective July 1, 2007).*

Heckerling Institute on Estate Planning — University of Miami School of Law, Volume 41 The Forty-First Annual Philip E. Heckerling Institute on Estate Planning, Chapter 1 Recent Developments in Transfer and Income Taxation of Trusts and Estates and State Trust and Estate Law, P 134 Uniform Trust Code (UTC).

Planning for the Elderly in Florida, Chapter 14 Planning for Incapacity: Property Management, § 14.04 Living Trusts.

**Practice Guides**

*Southeast Transaction Guide, Unit II. Estate Planning, Division 3. Testamentary Trusts and Gifts, § 120.20 Introduction.*

**FLORIDA BAR PUBLICATIONS**

Trust Me: Practical Advice for Drafting Florida Trusts, by Nancy S. Freeman, May, 2009, *83 Fla. Bar J. 20*.

Florida Will and Trust Forms Manual, Part IV. Married Persons with Medium to Large Estate, Chapter 401. Married—U.S. Citizen Spouse A-B Plan—Two Trust, 5. Model 401 Master Alternate and Supplemental Provisions, ASP-401-151. Judicial and Nonjudicial Reformation of Trusts.

Fla. Stat. § 736.0306

Florida Will and Trust Forms Manual, Part VI. Model Revocable Living Trust Agreements: Married Persons, Chapter 601. Married—U.S. Citizen Spouse Revocable Declaration of Trust A-B Plan, 5. Model 601 Trust Master Alternate and Supplemental Provisions, ASP-601-78. Judicial and Nonjudicial Reformation of Trusts.

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## 760 ILCS 3/307

Statutes current with legislation through P.A. 102-557 and P.A. 102-662 of the 2021 Session of the 102nd Legislature.

*Illinois Compiled Statutes Annotated > Chapter 760 TRUSTS AND FIDUCIARIES (§§ 101 — 105/604.3) > Illinois Trust Code (§§ 101 — 9999) > Article 3. Representation (§§ 301 — 307)*

### 760 ILCS 3/307 Designated representative.

- (a) If specifically nominated in the trust instrument, one or more individuals with legal capacity may be designated to represent and bind an individual who is a qualified beneficiary. The trust instrument may also authorize any person or persons, other than a trustee of the trust, to designate one or more individuals with legal capacity to represent and bind an individual who is a qualified beneficiary. Any person so nominated or designated is referred to in this Section as a “designated representative”.
- (b) Notwithstanding subsection (a):
- (1) A designated representative may not represent and bind a current beneficiary who is age 30 or older and is not incapacitated.
  - (2) A designated representative may not represent and bind a qualified beneficiary while the designated representative is serving as a trustee.
  - (3) Subject to paragraphs (1) and (2) of this subsection (b), a designated representative may not represent and bind a qualified beneficiary if the designated representative is also a qualified beneficiary of the trust, unless:
    - (A) the designated representative was specifically nominated in the trust instrument; or
    - (B) the designated representative is the qualified beneficiary’s spouse or a grandparent or descendant of a grandparent of the qualified beneficiary or of the qualified beneficiary’s spouse.
- (c) Each designated representative is a fiduciary of the trust subject to the standards applicable to a trustee of a trust under applicable law.
- (d) In no event may a designated representative be relieved or exonerated from the duty to act, or withhold from acting, in good faith and as the designated representative reasonably believes is in the best interest of the represented qualified beneficiary.

### History

760 ILCS 3/307

2019 P.A. 101-48, § 307, effective January 1, 2020.

Illinois Compiled Statutes Annotated  
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*Friedrich v. Klaristenfeld*

Supreme Court of New York, Appellate Division, Second Department

June 2, 2021, Decided

2019-04459, (Index No. 523653/18)

**Reporter**

195 A.D.3d 597 \*; 144 N.Y.S.3d 635 \*\*; 2021 N.Y. App. Div. LEXIS 3564 \*\*\*; 2021 NY Slip Op 03443 \*\*\*\*; 2021 WL 2213760

[\*\*\*\*1] Sarah Friedrich, respondent, v Rifka Klaristenfeld, etc., appellant.

**Notice:** THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

**Prior History:** *Friedrich v. Klaristenfeld*, 2019 N.Y. Misc. LEXIS 897 (N.Y. Sup. Ct., Feb. 25, 2019)

**Core Terms**

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lack of standing, cross motion, inter alia, accounting, grantor, inter vivos trust, irrevocable, appeals

**Counsel:** [\*\*\*\*1] Alexander M. Dudelson, Brooklyn, NY, for appellant.

Storch Law, P.C., Brooklyn, NY (Zvi A. Storch of counsel), for respondent.

**Judges:** SYLVIA O. HINDS-RADIX, J.P., FRANCESCA E. CONNOLLY, ANGELA G. IANNACCI, LINDA CHRISTOPHER, JJ. HINDS-RADIX, J.P., CONNOLLY, IANNACCI and CHRISTOPHER, JJ., concur.

**Opinion**

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[\*598] [\*\*636] DECISION & ORDER

In an action, inter alia, for an accounting, the defendant appeals from an order of the Supreme Court, Kings County (Leon Ruchelsman, J.), dated February 25, 2019. The order, insofar as appealed from, denied that branch of the defendant's cross motion which was pursuant to *CPLR 3211(a)(3)* to dismiss the complaint for lack of standing.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The plaintiff and the defendant are sisters. On November 25, 2010, their parents, as grantors, and the defendant, as trustee, established an inter vivos trust of which the plaintiff is a remainderman (hereinafter the Trust).

In 2018, the plaintiff, in her capacity as a remainderman under the Trust, commenced this action against the defendant, individually and in her capacity as trustee of the Trust, inter alia, for an accounting of the Trust and related relief. Subsequently, the defendant cross-moved, [\*\*\*\*2] among other things, pursuant to *CPLR 3211(a)(3)* to dismiss the complaint for lack of standing.

In an order dated February 25, 2019, the Supreme Court, inter alia, denied that branch of the defendant's cross motion. The defendant appeals.

Contrary to the defendant's contention, the plaintiff has standing in her capacity as a remainderman to seek an accounting and related relief with regard to the Trust, since the Trust is irrevocable, and thus, the plaintiff has a pecuniary interest therein (*see Matter of Pavlyak*, 139 AD3d 1338, 1339, 32 N.Y.S.3d 750; cf. *Matter of Kalik*, 117 AD3d 590, 590-591, 986 N.Y.S.2d 109; *Matter of Malasky*, 290 AD2d 631, 632, 736 N.Y.S.2d 151). Even assuming that the grantor of an irrevocable inter vivos trust may properly relieve the trustee from accountability to the remainderman during the grantor's lifetime, the Trust does not expressly do so (cf. *Matter of O'Malley*, 206 Misc 687, 691-693 [Sup Ct, Westchester County], mod 286 App Div 869; *Matter of Central Hanover Bank & Trust Co. [Momand]*, 176 Misc 183, 26 N.Y.S.2d 924 [Sup Ct, NY County], affd 263 App Div 801, affd 288 NY 608).

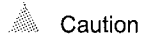
Accordingly, the Supreme Court properly denied that branch of the defendant's cross motion which was pursuant to CPLR 3211(a)(3) to dismiss the complaint for lack of standing.

HINDS-RADIX, J.P., CONNOLLY, IANNACCI and CHRISTOPHER, JJ., concur.

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Caution

As of: February 1, 2022 8:25 PM Z

## *In re Kassover*

Surrogate's Court of New York, Nassau County

June 18, 1984

No Number in Original

### Reporter

124 Misc. 2d 630 \*; 476 N.Y.S.2d 763 \*\*; 1984 N.Y. Misc. LEXIS 3254 \*\*\*

In the Matter of the Accounting of Julius Kassover, as  
Trustee of an Inter Vivos Trust, Created by Julius  
Kassover, Respondent

**Disposition:** [\*\*\*1] Accordingly, the trustee is directed to  
file his account within 30 days of the date of the order  
following this decision.

### Core Terms

accounting, inter vivos trust, gift, rights of a beneficiary,  
time to prepare, compulsory, contends, grantor

### Case Summary

#### Procedural Posture

Petitioner, beneficiary of an irrevocable inter vivos trust,  
brought a compulsory accounting proceeding.

#### Overview

The trustee was the grantor of a trust created for the  
beneficiary, his daughter. The beneficiary contended  
that the settlor wrongfully withdrew moneys from the  
trust to pay personal obligations. The beneficiary, as  
beneficiary of the irrevocable inter vivos trust, brought a  
compulsory accounting proceeding. The trustee filed an  
answer, which raised the defense of waiver. The trustee  
contended that he and the beneficiaries agreed that the  
trust would be administered in an informal manner and

that the settlor would have no duty to account. The  
allegation was that such an agreement existed at the  
inception of the trust. There was no contention that  
there was a release and waiver by the beneficiary at a  
subsequent time. The trustee further argued that he  
should not be called upon to account for what was  
essentially a gift to his children inspired solely by  
affection for them. The court found, however, that once  
the valid trust was created, accountability had to  
inevitably follow as an incident. Accordingly, the court  
directed the trustee to file his account within 30 days of  
the date of the order following this decision.

#### Outcome

In a compulsory accounting proceeding brought by the  
beneficiary of an irrevocable inter vivos trust, the court  
directed the trustee to file his account within 30 days.

### LexisNexis® Headnotes

Estate, Gift & Trust Law > ... > Trustees > Duties &  
Powers > General Overview

Estate, Gift & Trust Law > Trusts > General  
Overview

Estate, Gift & Trust Law > ... > Private Trusts

Characteristics > Trust Beneficiaries > General Overview

Estate, Gift & Trust Law > ... > Private Trusts  
Characteristics > Trust Beneficiaries > Single Beneficiaries

Estate, Gift & Trust Law > ... > Private Trusts  
Characteristics > Trustees > General Overview

### HN1 Trustees, Duties & Powers

The settlor of an inter vivos trust may limit the rights of beneficiaries to compel an accounting.

Business & Corporate Compliance > ... > Estate, Gift & Trust Law > Trusts > Creation of Trusts

Estate, Gift & Trust Law > ... > Private Trusts  
Characteristics > Trustees > General Overview

Estate, Gift & Trust Law > Trusts > General Overview

Business & Corporate Compliance > ... > Estate, Gift & Trust Law > Trusts > Trust Administration

Estate, Gift & Trust Law > ... > Trustees > Duties & Powers > General Overview

### HN2 Trusts, Creation of Trusts

An essential element of a trust is accountability of the trustee for his administration. Once a valid trust is created, accountability must inevitably follow as an incident.

## Headnotes/Summary

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### Headnotes

## Trusts -- Accounting -- Grantor as Trustee

A trustee, who is also the grantor of an *inter vivos* trust created for the benefit of his daughter, may be compelled to render an accounting where the daughter alleges that he wrongfully withdrew money from the trust to pay personal obligations, since an essential element of a trust is accountability of the trustee for his administration; the instant situation, in which the settlor is the trustee and asserts that he is accountable only to himself on the theory that the creating of the trust was actually the making of a gift which the beneficiary could not demand be made, and that, therefore, in such a situation the trustee is only accountable to the grantor, is the equivalent of a provision in which the trustee is accountable to no one.

**Counsel:** *Farrell, Fritz, Caemmerer, Cleary, Barnosky & Armentano* for Kathi A. Kassover, petitioner.

*Gainsburg, Gottlieb, Levitan & Cole* for respondent.

**Judges:** C. Raymond Radigan, J.

**Opinion by:** RADIGAN

## Opinion

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### [\*630] OPINION OF THE COURT

[\*\*764] This is a compulsory [\*\*\*2] accounting proceeding commenced by the beneficiary of an irrevocable *inter vivos* trust. The trustee is the grantor of a trust created for the benefit of his daughter, the petitioner. The petitioner contends that the settlor wrongfully withdrew moneys from the trust to pay personal obligations.

On December 14, 1983, the court directed a voluntary

accounting to be filed on or before February 8, 1984, or a compulsory order would issue. On December 16, 1983, the trustee consented to an order directing an accounting, which accounting would be due on February 8, 1984. The date was then adjourned four times to a final date of March 14, 1984, at which time the court directed that an account be filed by April 11, 1984, and directed a conference on March 21, 1984. On March 24, 1984, the trustee indicated that he needed more time to prepare an accounting.

At a conference before a law assistant-referee, the parties stipulated to permit the trustee to file an answer to the petition requesting more time to prepare an accounting, [\*631] after which the matter would be submitted for decision to determine whether an extension would be granted.

The trustee has filed an answer which [\*\*\*3] raises the defense of waiver. The trustee contends that he and the beneficiaries agreed that the trust would be administered in an informal manner and that the settlor would have no duty to account. The allegation is that such an agreement existed at the inception of the trust. There is no contention that there was a release and waiver by the beneficiary at a subsequent time.

The trustee further argues that he should not be called upon to account for what is essentially a gift to his children inspired solely by affection for them.

With respect to testamentary trusts, the law is well settled that a provision excusing the fiduciary from accounting violates public policy and is therefore invalid (*Matter of Brush*, 46 Misc 2d 277), because the creator is dead and unless the beneficiaries have a right to an accounting there is no one able to enforce the trust.

HNA [§] The settlor of an *inter vivos* trust may, however, limit the rights of beneficiaries to compel an accounting. The trustee relies on *Matter of Central Hanover Bank &*

*Trust Co. (Momand)* (176 Misc 183, affd 263 App Div 801, affd 288 NY 608) in which the court held valid a provision in an *inter vivos* trust instrument [\*\*\*4] which limited the rights of beneficiaries to compel an accounting and required that the trustee be held accountable only to the settlor. In that case the court observed that: "In nearly all cases \* \* \* the settlor is making a gift and since the *cestuis* have no right to demand that any gift be made, it would seem that they can hardly be said to have any [interest] to control the action of the settlor with respect to exonerating the trustee for any act performed by him during the lifetime of the grantor or \* \* \* limiting the number of persons authorized to object to the acts of the trustee" (p 186).

However, that case also recognized the difference between requiring that the trustee account to the settlor and a situation where the trustee was not subject to account to anyone at all (*Matter of Central Hanover Bank & Trust Co. [Momand]*, 176 Misc 183, 186, *supra*; see, also, *Matter of Uran v Uran*, 24 Misc 2d 1069). The court considers a [\*632] circumstance in which the settlor who is the trustee and accountable only to himself is the equivalent of a provision in which the trustee is accountable to no one.

HNA [§] An essential element of a trust is accountability of the [\*\*\*5] trustee for his administration. Once a valid trust is created accountability must inevitably follow as an incident (Bogert, *Trust & Trustees* [2d ed], § 973).

Accordingly, the trustee is directed to file his account within 30 days of the date of the order following this decision.

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**User Name:** Jennifer Hillman

**Date and Time:** Tuesday, February 1, 2022 3:25:00 PM EST

**Job Number:** 163260746

## Document (1)

1. *NY CLS SCPA § 2309*

**Client/Matter:** 999999-00924

**Search Terms:** scpa 2309

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**  
Statutes and Legislation

**Narrowed by**  
-None-



*NY CLS SCPA § 2309*

Current through 2022 released Chapters 1-12

*New York Consolidated Laws Service > Surrogate's Court Procedure Act (Arts. 1 — 28) > Article 23  
Costs, Allowances and Commissions (§§ 2301 — 2313)*

**§ 2309. Commissions of trustees, of donees of powers during minority and of donees of powers in trust under wills of persons dying, or lifetime trusts established, after August 31, 1956.**

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1. On the settlement of the account of any trustee or donee of a power in trust under the will of a person dying after August 31, 1956, or under a lifetime trust established after August 31, 1956, the court must allow to him or her his or her reasonable and necessary expenses actually paid by him or her and if he or she be an attorney of this state and shall have rendered legal services in connection with his or her official duties, such compensation for his or her legal services as shall appear to the court to be just and reasonable and in addition thereto it must allow to the trustee or donee of a power in trust for his or her services as trustee or donee of a power in trust a commission from principal or from the property subject to the power in trust, for paying out all sums of money constituting principal or property subject to the power in trust at the rate of 1 per cent.
2. In addition to the commission allowed by subdivision 1 hereof a trustee or donee of a power in trust shall be entitled to annual commissions at the following rates:
  - (a) \$10.50 per \$1,000 or major fraction thereof on the first \$400,000 of principal or property subject to the power in trust.
  - (b) \$4.50 per \$1,000 or major fraction thereof on the next \$600,000 of principal or property subject to the power in trust.
  - (c) \$3.00 per \$1,000 or major fraction thereof on all additional principal or property subject to the power in trust.

Such annual commissions shall be computed either on the value of the principal of the trust or of the property subject to the power in trust at the end of the period for which the commissions are payable or, at the option of the trustee or donee of the power in trust, on the value of the principal of the trust or of the property subject to the power in trust at the beginning of such period, provided that the option elected by the trustee or donee of the power in trust for the first period for which such commissions are payable shall be used during the continuance of the trust or of the power in trust and shall be binding

## NY CLS SCPA § 2309

on any successor or substitute trustee or trustees, donee or donees. In the case of a trust which prior to January 1, 1994 computed annual commissions on the basis of a 12 month period (other than a calendar year), the trustee's prior election of such 12 month period shall be binding unless, prior to January 1, 1995, the trustee makes a new election to compute annual commissions on the basis of a calendar year either on the value of the principal of the trust at the end of, or at the option of the trustee at the beginning of, the calendar year for which the commissions were payable, which new election shall be used during the remaining continuance of the trust and shall be binding on any successor or substitute trustee or trustees. The computation shall be made on the basis of a 12-month period but the amount so computed payable to a trustee shall be proportionately reduced or increased for any payments made in partial distribution of the trust or the receipt of any additional property into the trust within such period and shall be proportionately reduced in any period for which such commissions are payable to the trustee if the period is less than 12 months. For the purpose of computing the annual commissions the value of any principal asset when received by the trust or donee of a power in trust shall be the presumptive value of the asset at the beginning and end of the period for which such commissions are payable. In computing the value of the principal of the trust or of the property subject to the power in trust the trustee or donee of the power in trust may use the presumptive value in respect of any principal asset or may use the actual value of the asset. On the settlement of the account of the trustee or donee of a power in trust any person interested may dispute the amount of any commission claimed or retained. The burden of proving that the actual value of any principal asset or asset subject to the power in trust differs from its presumptive value is upon the trustee or donee of a power in trust or other person claiming the difference.

3. Unless the will or lifetime trust instrument otherwise explicitly provides the annual commissions allowed by subdivision 2 shall be payable one-third from the income of the trust or property subject to the power in trust and two-thirds from the principal of the trust or property subject to the power in trust. However, in the case of a trust whose definition of income is governed by section 11-2.4 of the estates, powers and trusts law or a charitable remainder annuity trust or a charitable remainder unitrust, as defined in section six hundred sixty-four of the Internal Revenue Code of nineteen hundred eighty-six, as amended, such annual commissions shall be payable from the corpus of any such trust after allowance for the annuity or unitrust amounts and shall not be payable out of such annuity or unitrust amounts.
4. The commissions allowed by subdivision 2 may be retained by a trustee provided he or she furnishes annually as of a date no more than 30 days prior to the end of the trust year selected by the trustee, to each beneficiary currently receiving income, and to any other beneficiary interested in the income and to any person interested in the principal of the trust who shall make a demand therefor and by a donee of a power in trust if he or she furnishes annually as of a date no more than 30 days prior to the end of the calendar year to the beneficiary of the power in trust, a statement showing the principal assets on hand on that date, and at least annually or more frequently if the trustee or donee of the power in trust so elects, a statement showing all his or her receipts of income and principal or property subject to the power in trust during the period with respect to which the statement is rendered including the amount of any commissions retained

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and the basis upon which the commissions were computed. A trustee or donee of a power in trust shall not be deemed to have waived any commissions by reason of his or her failure to retain them at the time when he or she becomes entitled thereto; provided however that in the case of a trust commissions payable from income for any given trust year shall be allowed and retained only from income derived from the trust during that year and shall not be supplied from income on hand in respect of any other trust year and in the case of property subject to a power in trust commissions payable from income for any given calendar year shall be allowed and retained only from income derived from the property during that year and shall not be supplied from income on hand in respect of any other calendar year. If a beneficiary receiving income does not desire to be furnished with any such statements his or her advice to the trustee or to the donee of the power in trust to that effect in writing shall thereafter excuse the trustee or donee of the power in trust from furnishing such statement to the beneficiary unless and until the beneficiary requests such annual statements from the trustee or donee of the power in trust.

## 5.

- (a) During the continuance of a trust created solely for public, religious, charitable, scientific, literary, educational or fraternal uses and during the period of continuance of such a trust after the termination of a life use or uses the trustee shall be entitled to and may retain commissions from income in an amount annually equal to 6 per cent of income collected in each year.
- (b) In the case of a trust created solely for public, religious, charitable, scientific, literary, educational or fraternal uses the trustee shall not be entitled to any commission from principal.
- (c) In the case of such a trust which continues after the termination of the measuring life use or uses the trustee for the period of the measuring life use or uses shall be entitled to commissions from income and principal at the rates and according to the terms specified in subdivision 2 and except in respect of principal paid out to a charity or for charitable uses shall be entitled to a commission for distributing all sums of principal at the rate specified in subdivision 1.

## 6.

- (a) Subject to section 2313 regarding multiple commissions of executors, trustees, or donees of a power in trust created under wills of persons dying, or lifetime trusts established, after August 31, 1993, if the gross value of the principal of the trust or of the property subject to the power in trust accounted for amounts to \$400,000 or more and there is more than 1 trustee or donee each trustee or donee is entitled to the full compensation for paying out principal allowed herein to a sole trustee or donee unless there are more than 3, in which case the compensation to which 3 would be entitled must be apportioned among the trustees or donees of the power in trust according to the services rendered by them respectively unless they shall have agreed in writing among themselves to a different apportionment which, however, shall not provide for more than one full commission for any one of them. If the gross value of the principal of the trust or of the property subject to the power in trust accounted for is:

## NY CLS SCPA § 2309

- (i) less than \$100,000 and there is more than 1 trustee or donee of the power in trust, the full compensation for paying out principal allowed herein to a sole trustee or donee of the power in trust must be apportioned among them according to the services rendered by them respectively, or
- (ii) \$100,000 or more but less than \$400,000, each trustee or donee of the power in trust is entitled to the full compensation for paying out principal allowed herein to a sole trustee or donee of the power in trust unless there are more than 2 trustees or donees of the power in trust in which case the full compensation for paying out principal allowed herein to 2 trustees or donees of a power of trust must be apportioned among them according to the services rendered by them respectively, unless the trustees or donees of the power in trust shall have agreed in writing between or among themselves to a different apportionment which, however, shall not provide for more than one full commission for any one of them.
- (b) Subject to section 2313 regarding multiple commissions of executors, trustees, or donees of a power in trust created under wills of persons dying, or lifetime trusts established, after August 31, 1993, if the value of the principal of the trust or of the property subject to the power in trust for the purpose of computing the annual commissions allowed by subdivision 2 amounts to \$400,000 or more and there is more than one trustee or donee of a power in trust each trustee or donee of a power in trust is entitled to the full annual commission allowed herein to a sole trustee or donee of a power in trust unless there are more than 3, in which case the annual commissions to which 3 would be entitled must be apportioned among the trustees or donees of the power in trust according to the services rendered by them respectively unless the trustees or donees of the power in trust shall have agreed in writing among themselves to a different apportionment which, however, shall not provide for more than one full annual commission for any one of them. If the value of the principal of the trust or of the property subject to the power in trust for the purpose of computing the annual commission allowed by subdivision 2 amounts to:
- (i) less than \$100,000 and there is more than 1 trustee or donee of the power in trust, the annual commission allowed herein to a sole trustee or donee of a power in trust must be apportioned among the trustees or donees of the power in trust according to the services rendered by them respectively, or
- (ii) \$100,000 or more but less than \$400,000, each trustee or donee of the power in trust is entitled to the full annual commission allowed herein to a sole trustee or donee of a power in trust unless there are more than 2 trustees or donees of the power in trust in which case the full annual commissions allowed herein to 2 trustees or donees of a power in trust must be apportioned among them according to the services rendered by them respectively, unless the trustees or donees of the power in trust shall have agreed in writing between or among themselves to a different apportionment which, however, shall not provide for more than one full annual commission for any one of them. However, if from a trust or from property subject to a power in trust having a value of \$400,000 or more, or if from a trust or from property subject to a power in trust having a value of

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\$100,000, or more but less than \$400,000, as the case may be, at the beginning of a trust year or of the calendar year any payments in partial distribution of the trust or of the property subject to the power in trust shall be made during the trust or calendar year so as to reduce the trust or the property subject to the power in trust to a value of less than \$400,000 or \$100,000, as the case may be, at the end of the trust or calendar year, then the annual commissions allowed herein shall, on a proportionate basis, be those allowed to trustees of a trust or to donees of a power in trust over property having a value of \$400,000 or more, or of a trust or to donees of a power in trust over property having a value of \$100,000 or more but less than \$400,000, as the case may be, for the period from the beginning of the trust or calendar year to the date of the distribution and shall, on a proportionate basis, be those allowed to trustees of a trust or to donees of a power in trust over property having a value of either \$100,000 or more but less than \$400,000 or less than \$100,000, as the case may be, for the remainder of the trust or calendar year and the part of such commissions payable from principal and computed from the beginning of the trust or calendar year to the date of distribution shall be charged ratably to the property remaining in the trust or still subject to the power in trust after such distribution and to the property distributed from the trust or to the beneficiary of the power in trust on the basis of their respective values. Further, if during a trust or calendar year additional property shall be received into a trust which had a value of less than \$100,000 or by a donee of a power in trust the property subject to which had a value of less than \$100,000, or into a trust which had a value of \$100,000 or more but less than \$400,000 or by a donee of a power in trust the property subject to which had a value of \$100,000 or more but less than \$400,000, as the case may be, at the beginning of the trust year or calendar year, so that because of the additional property the trust or the property subject to the power in trust has a value of \$100,000 or more but less than \$400,000, or of \$400,000 or more, as the case may be, at the end of the trust or calendar year, then the annual commissions allowed herein to the trustee or to the donee of the power in trust shall, on a proportionate basis, be those allowed to trustees of a trust or to donees of a power in trust over property having a value of less than \$100,000, or to trustees of a trust or to donees of a power in trust over property having a value of \$100,000 or more but less than \$400,000, as the case may be, for the period from the beginning of the trust or calendar year to the date of the receipt of the additional property and shall, on a proportionate basis, be those allowed to trustees of a trust or to donees of a power in trust over property having a value of \$100,000 or more but less than \$400,000, or to trustees of a trust or to donees of a power in trust over property having \$400,000 or more, as the case may be, for the remainder of the trust or calendar year.

(c) Notwithstanding any provision of paragraphs (a) and (b) of this subdivision to the contrary, if during the continuance of a trust not measured at any time directly or indirectly by a life or lives or during the continuance of a trust after the termination of the measuring life or lives, the annual income of the trust amounts to \$4,000 or more and there is more than 1 trustee, each trustee is entitled to the full commissions allowed under subdivision 5 to a sole trustee unless there are more than 2, in which case

## NY CLS SCPA § 2309

the commissions to which 2 trustees would be entitled must be apportioned among the trustees according to the services rendered by them respectively unless they shall have agreed in writing among themselves to a different apportionment which, however, shall not provide for more than one full commission to any one of them. If the annual income of the trust amounts to less than \$4,000 and there is more than 1 trustee the commissions to which a sole trustee would be entitled under subdivision 5 must be apportioned among the trustees according to the services rendered by them respectively unless they shall have agreed in writing among themselves to a different apportionment.

7. Where a trustee or donee of a power in trust is for any reason entitled or required to collect the rents of and manage real property the net amount of rents collected and not the gross amount shall be used in making computation of commissions allowed by subdivision 5 and in addition to the commissions herein provided he or she shall be allowed and may retain for such services 6 percent of the gross rents collected, but there shall be only one such additional commission regardless of the number of trustees or donees of the power in trust. If there are 2 or more trustees or donees of the power in trust the additional commission herein provided for must be apportioned among them according to the services rendered by them respectively unless they shall have agreed in writing among themselves to a different apportionment.

8. If a trustee or donee of a power in trust is either authorized or required by the terms of the will to accumulate income for any purpose permitted by law he or she shall be entitled to commissions from the income so accumulated, including income derived from the investment of such accumulated income, at the rate of 2 percent of the first \$2,500 of such income distributed during the administration of the trust and 1 percent of all such income distributed in excess of \$2,500 and he or she may retain such commissions at the time or times such income is distributed.

9. The value of any property to be determined in such manner as directed by the court and the increment thereof received, distributed or delivered, shall be considered as money in making computation of commissions. Whenever any portion of the dividends, interests or rents payable to a trustee or to a donee of a power in trust is required by any law of the United States or other governmental unit to be withheld by the person paying it for income tax purposes, the amount so withheld shall be deemed to have been collected.

10. Where the will provides a specific compensation for a trustee or for a donee of a power in trust he or she is not entitled to any other allowances for his or her services.

11. For the purposes of this section, the term "trustee" shall mean any trustee who is not a corporate trustee and the term "donee of a power in trust" shall mean any such donee including a donee of a power during minority who is not a corporate fiduciary provided, however, that as used in subdivision 6 of this section, the term trustee shall include a corporate trustee and further provided that the term "property subject to the power in trust" shall include property subject to a power during minority.

## History

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## NY CLS SCPA § 2309

Add, L 1966, ch 953, eff Sept 1, 1967; amd, L 1969, ch 1050, § 3; L 1976, ch 303, §§ 2, 3; L 1977, ch 180, § 1; L 1980, ch 503, § 36, eff June 24, 1980; L 1984, ch 936, §§ 5–7; L 1991, ch 245, §§ 3, 4, eff July 1, 1991; L 1993, ch 514, § 57, eff Jan 1, 1994; L 1993, ch 640, § 2; L 1993, ch 654, § 2, eff Aug 4, 1993; L 2001, ch 243, § 7, eff Jan 1, 2002; L 2019, ch 601, § 4, effective January 1, 2020.

Annotations

## Notes

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### Editor's Notes:

Laws 1984, ch 936, § 12, provides as follows:

§ 12. This act shall take effect immediately, and shall apply to any trust whether in existence on or after the effective date of this act provided, however, nothing contained in this act shall be deemed to change, alter, reduce, eliminate or otherwise affect the right of any trustee to any receiving or paying commission or annual commission which such trustee has earned or is entitled to claim or be paid immediately prior to the effective date of this act and further provided however that an individual trustee shall continue to receive commissions in the manner provided for an individual trustee under sections twenty-three hundred eight and twenty-three hundred nine of the surrogate's court procedure act, as the case may be, in effect immediately before the effective date of this act until the end of the then current trust year, and thereafter, at the rates then in effect under such sections.

Laws 1991, ch 245, § 6, eff July 1, 1991, provides as follows:

§ 6. This act shall take effect immediately, and shall apply to any trust whether in existence on or after the effective date of this act provided, however, nothing contained in this act shall be deemed to change, alter, reduce, eliminate or otherwise affect the right of any trustee to any receiving or paying commission or annual commission which such trustee has earned or is entitled to claim or be paid immediately prior to the effective date of this act and further provided, however, that an individual trustee shall continue to receive commissions in the manner provided for an individual trustee under sections 2308 and 2309 of the surrogate's court procedure act, as the case may be, in effect immediately before the effective date of this act until the end of the then current trust year, and thereafter, at the rates then in effect under such sections.

Laws 2019, ch 601, § 7, eff January 1, 2020, provides:

§ 7. This act shall take effect on the first of January next succeeding the date on which it shall have become a law.

Earlier Statutes:

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Earlier statutes: SCA § 285-b.

**Revision Notes:**

Surr Ct Act § 285-b with minor changes in phraseology and the conformance of the language of subdivision 7 of this and the preceding section. The language of subdivision 5 has been substituted for “not measured at any time directly or indirectly by a life or lives” to insure that this provision does not apply to the “so-called Clifford Trust.”

As to annual statement see Report No. 7.11B, Legis Doc (1964) No. 19, pp. 691–712 and the supplement to same. Legis Doc (1965) No. 19, pp. 128–134.

**Amendment Notes**

The 2019 amendment by ch 601, § 4, rewrote the section.

**Commentary**

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**Committee Comments****2019 Recommendations of the Surrogate’s Court Advisory Committee:**

The Committee recommends an amendment to the SCPA to create rules governing the commissions of donees of powers in trust, including donees of powers during minority, identical to the existing rules governing commissions of trustees.

The concept of a “power in trust” is long established in New York law and were given great importance by the Revised Statutes enacted in 1829-1830. Under those statutes, trusts could be created for only limited purposes and failed attempts to create trusts created instead powers in trust in the purported trustees. Current law in EPTL 10-3.1(b) refers to “a power during minority to manage property vested in an infant” as one of the powers which is not a power of appointment but to which the provisions of Article 10 generally apply. Such a donee is included in the definition of “fiduciary” in the EPTL (EPTL 2-1.7) and in the SCPA (103(21)) (both referring to “donee of a power during minority”).

It is clear, however, that donees of a power in trust are not limited to donees holding the power during the minority of the beneficiary. Although the express statutory references to powers in trust refer only to powers to manage property vested in an infant, EPTL 10-10.1, which expressly retains as the law of New York the common law of powers except as modified by Article 10, the statement by the Bennett Commission that this provision does not



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invalidate other powers not specifically mentioned <sup>1</sup>, and case law <sup>2</sup> clearly indicate that a power in trust to manage property vested in an incapacitated person does exist under New York law.

The question of compensation of such donees of the various powers to manage property belonging to others is not clearly answered by our statutes. *Matter of Chase Manhattan Bank (Golding)* <sup>3</sup> authorized advance payment of commissions under SCPA 2311 to a corporate trustee acting as donee of a power to manage property during minority under a lifetime trust. The court also ordered that the calculation of commissions was to be made under SCPA 2307 which governs payments to fiduciaries other than trustees because the donee was not a trustee. The court did suggest that commissions would more appropriately be calculated under SCPA 2308 and 2309, which govern commissions of trustees. Today SCPA 2312 governing the commissions of corporate trustees would be relevant to the compensation of corporate donees.

The amendments to the SCPA make the provisions applicable to trustees' commissions applicable to all donees of powers to manage property whether during minority or vested in an incapacitated person or of any other sort, with one exception. Under New York law, a failed attempt to appoint by will an individual to be the guardian of the property of an infant result in the nominated person being a donee of a power to manage property during minority. Under SCPA 1714, this donee "has all the rights and duties of a guardian and shall be entitled to receive the commissions allowed to a guardian." Donees governed by SCPA 1714 are excluded from the changes made by this proposal.

The specific sections of the SCPA to be amended are 2308, 2309, and 2312 governing trustees' commissions, thus codifying Chase Manhattan Bank (Golding) and extending its holding to other donees of a powers in trust, and 2313 dealing with multiple commissions of executors or trustees under wills and lifetime trusts established after August 31, 1993. <sup>4</sup>

The amendments to SCPA 2308, 2309, and 2312 use the language "donee of a power to in trust" in order to make sure that every sort of power in trust that could still exist under the common law is included in the new provisions. Each section has also been amended to make it clear that the new language includes donees of powers

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<sup>1</sup> 4th Report of Temporary State Comm. on Modernization, Revision and Simplification of Law of Estates, Fourth Report, N.Y. Legis. Doc., 1965, No. 19, at 24.

<sup>2</sup> See Matter of Schaper, 151 Misc.2d 923, 574 N.Y.S.2d 137 (Sur. Ct. New York County 1991).

<sup>3</sup> 129 Misc.2d 952, 494 N.Y.S.2d 660 (Sur. Ct. New York County 1985).

<sup>4</sup> The proposed amendments deal only with the computation of commissions and do not deal with the question of jurisdiction over donees of powers created in lifetime trusts that was at the heart of the question in *Matter of Chase Manhattan Bank (Golding)*. Codifying that part of the holding requires changing the phrase "from which his letters issued" with the phrase "the court having jurisdiction over the estate or trust" in SCPA 2011 which, as the opinion in *Matter of Chase Manhattan Bank (Golding)* points out, is the meaning of the phrase under CPLR 8005. Such an amendment is beyond the remit of this project.

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during minority. The phrase “donee of a power in trust” has been added to every reference to “trustee” except in those provisions dealing with trustees of charitable trusts and those providing for the transition from the previous rules governing commissions. Because donees of a power in trust will be entitled to trustees’ commissions only from the enactment of these amendments, the transition rules are not relevant. The term “property subject to the power in trust” has been used as the equivalent of “trust property” and the term “calendar year” has been added to references to “trust year” because the property subject to the power does indeed belong to the beneficiary of the power, the items of income and deduction attributable to it would be included in the beneficiary’s gross income reported on form 1040 and the tax year would indeed be the calendar year. Finally, consideration should be given to making the amendments applicable to donees of powers during minority and of other powers in trust effective on January 1 of the year following their enactment, thus making transition rules unnecessary.

## Notes to Decisions

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### 1. Generally

### 2. Procedural issues

### 3. Applicability; entitlement to statutory commissions

### 4. Calculating and allocating annual commissions

### 5. Particular types of commissions

### 6. Denial of commissions

### 7. Double commissions to trustee-executor

### 8. Under former Surrogate’s Court Act § 285-b

#### 1. Generally

Fees awarded to executor-attorney for legal services rendered by him in settling claim based on promissory note held by estate should be determined on a quantum meruit basis, and award would be reversed for new hearing where record did not include a sufficient description of the services or contain sufficient evidence as to the value of such services to enable court to determine its reasonableness. *In re Estate of Wilkinson*, 41 A.D.2d 1024, 343 N.Y.S.2d 959, 1973 N.Y. App. Div. LEXIS 4387 (N.Y. App. Div. 4th Dep’t 1973).

In proceeding for final accountings of testamentary and inter vivos trusts established by decedent, where surrogate reopened decedent’s estate which had been administered by 2 trustees who were also named executors, it was error to order trustee to forfeit all of her commissions because of her passive role with respect to trust investments,

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since almost 90 percent of commission was received by her in her capacity as executrix between time of decedent's death and settlement of estate, and that amount was now beyond retrieval by beneficiaries; only balance plus trustee's commission was subject to forfeiture. In re Goldstick, 177 A.D.2d 225, 581 N.Y.S.2d 165, 1992 N.Y. App. Div. LEXIS 2913 (N.Y. App. Div. 1st Dep't), app. denied, 183 A.D.2d 684, 586 N.Y.S.2d 490, 1992 N.Y. App. Div. LEXIS 9465 (N.Y. App. Div. 1st Dep't 1992), modified, 183 A.D.2d 684, 586 N.Y.S.2d 490, 1992 N.Y. App. Div. LEXIS 9467 (N.Y. App. Div. 1st Dep't 1992).

Trustee was entitled to annual commission on income only where trust was to continue for a period of 20 years, during which the income was to be used for a specified charitable purpose, and upon termination of the trust the principal was to be distributed to the charitable organization on condition that it execute an agreement providing for the continuance of the charitable activity, and if the agreement was not executed, the principal was to be paid to another named charity. In re Durland's Will, 64 Misc. 2d 810, 315 N.Y.S.2d 1011 (1970).

Surcharge on commissions of testamentary trustee for use as payment for services of expert witness for correcting errors in trustee's account would not be permitted since no authority existed for allowance of such diversion of funds. In re Estate of Herrmann, 141 Misc. 2d 214, 533 N.Y.S.2d 236 (N.Y. Sur. Ct. 1988).

Surrogate court abused its discretion in disallowing fees paid for professional accounting services rendered on behalf of the trust because under the circumstances presented, the professional accounting services incurred by the trust over the span of six years in the total sum of \$15,059.67 were both reasonable and necessary in the administration of the trust. Matter of The Petition for Jud. Settlement of The Account of Michele M. Pavlyak, 139 A.D.3d 1338, 32 N.Y.S.3d 750, 2016 N.Y. App. Div. LEXIS 3483 (N.Y. App. Div. 4th Dep't 2016).

Court approved application by attorney co-trustee of supplemental needs trust for approval of annual commissions of \$78.75 for each trustee, and payment of disbursements of \$172.85 for duplicating, postage, facsimile transmission and local transportation expenses, as such amounts were reasonable, fair, just and proper. Perez v Rodino, 184 Misc. 2d 855, 710 N.Y.S.2d 770, 2000 N.Y. Misc. LEXIS 237 (N.Y. Sup. Ct. 2000).

## 2. Procedural issues

Trustee's motion for payment of interest on unpaid commissions was properly denied where it was made in equitable proceeding to remove trustees, and thus issue of whether to award interest was within Surrogate Court's discretion; application for interest was not action to recover damages for breach of contract. Carvel v Davis, 255 A.D.2d 315, 679 N.Y.S.2d 644, 1998 N.Y. App. Div. LEXIS 11566 (N.Y. App. Div. 2d Dep't 1998).

Proceeding to review unreasonableness of compensation of corporate trustee will be entertained as nonenumerated miscellaneous proceeding pursuant to SCPA § 2114, notwithstanding that corporate cotrustee claims statutory commissions under SCPA § 2309 rather than reasonable commissions under § 2312 since, if petition is dismissed, petitioner will be relegated to statutory remedy of compelling account, proceeding that is

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unnecessary when only issue is valuation of trust asset for commission purposes. *In re Estate of Babcock*, 129 Misc. 2d 367, 493 N.Y.S.2d 91, 1985 N.Y. Misc. LEXIS 3070 (N.Y. Sur. Ct. 1985).

### 3. Applicability; entitlement to statutory commissions

Where decedent's will provided that "all laws referred to in this Will shall, unless otherwise indicated, refer to said laws as they exist at the time of my death," trustees of the testamentary trust established by the will improperly took commissions at an unlawful rate when they applied new rates of annual commissions prospectively each time the legislature increased the rates; accordingly, the matter is remitted for a determination as to the surcharge to be imposed with respect to the excessive commissions. *In re Miller*, 99 A.D.2d 780, 471 N.Y.S.2d 877, 1984 N.Y. App. Div. LEXIS 17165 (N.Y. App. Div. 2d Dep't 1984).

Surrogate's Court did not abuse its discretion in calculating the guardian's commission after consulting N.Y. Surr. Ct. Proc. Act Law § 2309, regarding trustee commission, even though the guardian was only briefly a co-trustee, as *N.Y. Mental Hyg. Law § 81.29* specifically recognized that the trustee commission statute could be used for guidance in computing compensation for guardians and the co-trustee failed to raise the argument in the Surrogate's Court that it was improper to consider the trustee commission statute in determining the guardian's compensation. *Louis BB. v Richard BB. (In re Trust Created by Rose BB.)*, 303 A.D.2d 873, 757 N.Y.S.2d 132, 2003 N.Y. App. Div. LEXIS 2490 (N.Y. App. Div. 3d Dep't 2003).

Beneficiaries' claim that a trustee was not entitled to annual commissions pursuant to *N.Y. Surr. Ct. Proc. Act § 2309(2)* because he failed to render the annual statements required by § 2309(4) was unavailing with respect to the two-thirds of the commission payable from principal. *Matter of Lasdon*, 105 A.D.3d 499, 963 N.Y.S.2d 99, 2013 N.Y. App. Div. LEXIS 2416 (N.Y. App. Div. 1st Dep't), app. denied, *22 N.Y.3d 856, 980 N.Y.S.2d 920, 3 N.E.3d 1168, 2013 N.Y. LEXIS 3223 (N.Y. 2013).*

Surrogate properly granted a trustee's request for commissions for the year 2005 because the nature of the trustee's misconduct, both during 2005 and afterwards, did not warrant denial of an annual commission for 2005, and there was no evidence that the trust suffered any significant loss due to the trustee's actions. *Matter of Gregory Stewart Trust*, 108 A.D.3d 461, 969 N.Y.S.2d 458, 2013 N.Y. App. Div. LEXIS 5207 (N.Y. App. Div. 1st Dep't), recalled, vacated, sub. op., *109 A.D.3d 755, 974 N.Y.S.2d 11, 2013 N.Y. App. Div. LEXIS 6034 (N.Y. App. Div. 1st Dep't 2013).*

Trustee was entitled to a commission for two-thirds of the last year of her service because there was no evidence that the trust suffered any significant loss due to her actions, denying her a commission would serve only as punishment, and the nature of her misconduct did not warrant denial of an annual commission. *Matter of Gregory Stewart Trust*, 109 A.D.3d 755, 974 N.Y.S.2d 11, 2013 N.Y. App. Div. LEXIS 6034 (N.Y. App. Div. 1st Dep't 2013).

A trustee of a nominal trust with additional loan funding designed to permit a high income tax payer to shift investment income to a near relative in a lower tax bracket without suffering any gift tax would not be permitted to

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charge a 1 percent paying-out commission against the principal sum loaned, since the loaned funds would not constitute principal within the meaning of SCPA § 2309(1) in that title to the loaned funds remained with the lender, vested in no future estate, and, in due course, the funds would be repayable to the lender or his estate. In re Manasen, 117 Misc. 2d 229, 457 N.Y.S.2d 720, 1982 N.Y. Misc. LEXIS 4046 (N.Y. Sup. Ct. 1982).

Right of trustee of pre-1956 trust to receive paying-out commissions was governed by CLS SCPA § 2309 applicable to post-1956 trusts, where testator created trust in will for his wife and one for his children, and also gave his wife, life income beneficiary, right to appoint principal of her trust either outright or in further trust to their children, and where wife died in 1980 and exercised her power of appointment, appointing principal in further trust for life of children, and designating trustee of her trust as trustee for children's subtrusts, since, by giving wife power to appoint principal of her trust either outright or in further and thus different trust, testator in effect amended earlier part of trust provision which provided for pour-over of principal to subtrusts for children; thus, paying out commissions were allowed to trustee of donor's trust for distribution of principal to itself as trustee of new trusts created by donee in exercise over testamentary power of appointment. In re Estate of Lynch, 129 Misc. 2d 679, 493 N.Y.S.2d 742, 1985 N.Y. Misc. LEXIS 3081 (N.Y. Sur. Ct. 1985).

Bank was entitled to commission on its payment of principal from testamentary trust to itself as trustee of inter vivos trust; whenever 2 distinct trusts are created by separate instruments under which trustees in each trust must separately account, allowance of commission on paying principal to second trust is proper, and coincidence of naming same bank as trustee of both trusts cannot be construed as continuance or merger of second trust into first. In re Steen, 133 Misc. 2d 121, 506 N.Y.S.2d 640, 1986 N.Y. Misc. LEXIS 2978 (N.Y. Sur. Ct. 1986).

Guardian, who was on notice that her compensation would be determined under CLS SCPA §§ 2307 and 2309, improperly reimbursed herself from incapacitated person's estate for disbursements for routine, incidental expenses incurred as guardian (fax transmissions, photocopies, clerical service to perform court filings, local telephone charges, and transportation costs for travel to and from court, court examiner's office and nursing home where incapacitated person resided) without court order. In re Bomba, 180 Misc. 2d 977, 694 N.Y.S.2d 567, 1999 N.Y. Misc. LEXIS 236 (N.Y. Sup. Ct. 1999).

Surrogate properly determined that N.Y. Surr. Ct. Proc. Act § 2308, not N.Y. Surr. Ct. Proc. Act § 2309, prescribed the proper rate of commissions payable to a co-trustee; the former statute applied to lifetime trusts created on or before August 31, 1956, and here the trust was created on December 28, 1938. Matter of Manufacturers & Traders Trust Co., 66 A.D.3d 1377, 886 N.Y.S.2d 529, 2009 N.Y. App. Div. LEXIS 7127 (N.Y. App. Div. 4th Dep't 2009).

#### 4. Calculating and allocating annual commissions

Testator's direction (that trustee accumulate income and, after paying taxes, charges and trust expenses, pay net income remaining to testator's wife) did not constitute requisite clear and unmistakable direction that payment of trustee's annual commissions be allocated differently than permitted by statute in effect when will was executed

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(CLS SCPA § 2309 former (3)), which provided that annual commissions were to be paid ½ from income and ½ from principal unless will “explicitly” provided otherwise. In re Estate of Saxton, 219 A.D.2d 85, 640 N.Y.S.2d 287, 1996 N.Y. App. Div. LEXIS 2790 (N.Y. App. Div. 3d Dep’t 1996), app. dismissed, 245 A.D.2d 733, 665 N.Y.S.2d 742, 1997 N.Y. App. Div. LEXIS 12951 (N.Y. App. Div. 3d Dep’t 1997).

Where trustee charged all annual commissions to trust income from 1985 until death of life income beneficiary in 1993 in contravention of applicable statutory scheme which provided that annual commissions were to be paid ½ from income and ½ from principal unless will “explicitly” stated otherwise, trustee was properly ordered to immediately pay all accumulated income earned through last quarter of 1992 to estate of life income beneficiary absent showing that income withheld by trustee was done to meet present or anticipated expenses. In re Estate of Saxton, 219 A.D.2d 85, 640 N.Y.S.2d 287, 1996 N.Y. App. Div. LEXIS 2790 (N.Y. App. Div. 3d Dep’t 1996), app. dismissed, 245 A.D.2d 733, 665 N.Y.S.2d 742, 1997 N.Y. App. Div. LEXIS 12951 (N.Y. App. Div. 3d Dep’t 1997).

Supreme Court erred in applying CLS SCPA § 2309 for purpose of calculating single “annual commission” to compensate guardian for “customary” services he performed over 3 ½ -year period where all of guardianship services related to incapacitated person’s extremely complicated healthcare arrangements, including placement and facilities in New York, as well as in Connecticut and Massachusetts, guardian was exposed to excessive and inappropriate harassing contacts by incapacitated person’s brother and mother, and evidence supported guardian’s contention that his guardianship position required “virtual daily” involvement during relevant time period. In re Arnold “O”, 256 A.D.2d 764, 681 N.Y.S.2d 627, 1998 N.Y. App. Div. LEXIS 13299 (N.Y. App. Div. 3d Dep’t 1998).

In proceeding to determine trustees’ commissions for 21-year period, court would apply all presumptions as to value of trust assets for years in question against trustees and in favor of beneficiaries, where trustees failed to compute commission annually as envisioned by CLS SCPA § 2309; accordingly, value of principal assets for each year was deemed to be lowest known actual value for years in question (except for final year, for which actual value was known), and principal commissions were computed using actual annual commission rates. In re Estate of Picker, 137 Misc. 2d 187, 520 N.Y.S.2d 137, 1987 N.Y. Misc. LEXIS 2667 (N.Y. Sur. Ct. 1987).

Orders confirming the reports of a court examiner were amended because N.Y. Surr. Ct. Proc. Act § 2309 provided that, in the event of three or more trustees, two full commissions would be apportioned among the trustees, and the co-trustees agreed that two of them would split one full commission and the other would receive a full commission; however, the co-trustees were restrained from collecting additional compensation that would be realized through such amendments. Matter of Martin, 957 N.Y.S.2d 608, 38 Misc. 3d 895, 2012 N.Y. Misc. LEXIS 5845 (N.Y. Sup. Ct. 2012).

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such amendments. Matter of Martin, 957 N.Y.S.2d 608, 38 Misc. 3d 895, 2012 N.Y. Misc. LEXIS 5845 (N.Y. Sup. Ct. 2012).

### 5. Particular types of commissions

Trustee was not entitled to commissions on unsold real property. In re Estate of Saphir, 73 Misc. 2d 907, 343 N.Y.S.2d 20, 1973 N.Y. Misc. LEXIS 1999 (N.Y. Sur. Ct. 1973).

Examination of tenant's monthly report of sales and collection of additional rent are not services constituting management of real property within meaning of SCPA 2309, subd 7 relating to entitlement of trustee to additional commissions. In re Will of Hall, 74 Misc. 2d 996, 346 N.Y.S.2d 686, 1973 N.Y. Misc. LEXIS 1749 (N.Y. Sur. Ct. 1973).

Where will provided that if testatrix's daughter, who was to be beneficiary of trust, died prior to liquidation of specified assets, trust was to continue for period not to exceed 5 years during which trust property was to be liquidated and trustee was to distribute proceeds directly to charities and daughter predeceased testatrix, only trust created was solely for charitable uses, and trustee was entitled to commissions as calculated for charitable trust pursuant to SCPA 2309, subd 5. In re Will of Hall, 74 Misc. 2d 996, 346 N.Y.S.2d 686, 1973 N.Y. Misc. LEXIS 1749 (N.Y. Sur. Ct. 1973).

Where testatrix' husband's will granted testatrix general testamentary power of appointment over principal of trust and testatrix exercised power by appointing property in further trust for grandchildren with great grandchildren as remaindermen, and appointed same trustees, trustees were entitled to commissions for paying out property from original trust into that created by testatrix. In re Will of Smith, 79 Misc. 2d 105, 359 N.Y.S.2d 209, 1974 N.Y. Misc. LEXIS 1594 (N.Y. Sur. Ct. 1974).

Trustees of donor of power of appointment are invariably entitled to pay-out commissions whenever donee has exercised power whether general or special to appoint in further trust, notwithstanding contention that "relation back" doctrine would bar such commissions. In re Will of Smith, 79 Misc. 2d 105, 359 N.Y.S.2d 209, 1974 N.Y. Misc. LEXIS 1594 (N.Y. Sur. Ct. 1974).

Where decedent's wife, income beneficiary under marital trust, although she purported to exercise power of appointment given her under such trust, created no new trust but merely reaffirmed provisions of donor's will and residuary trust, trustees of marital trust were not entitled to payout commission. In re Cox, 85 Misc. 2d 686, 380 N.Y.S.2d 564, 1976 N.Y. Misc. LEXIS 2042 (N.Y. Sur. Ct. 1976).

Surviving trustee of estate of donor of special power of appointment was entitled to commissions for "paying out" appointive property to itself and cotrustee, who had been appointed by donor's son, as trustees under will of son, the donee of such power who, after certain bequests, directed that balance of testamentary trust property be

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continued in further trust for benefit of his wife and daughter. Estate of Wing, 86 Misc. 2d 922, 383 N.Y.S.2d 154, 1976 N.Y. Misc. LEXIS 2544 (N.Y. Sur. Ct. 1976).

## 6. Denial of commissions

Surrogate properly denied any commission to testamentary trustees given abundant evidence of their gross negligence and bad faith in stewardship of trust, including failure to keep accurate records, making of excess and unwarranted expenditure of funds, delay in winding up estate, and failure to timely turn over trust assets to successor trustee. In re Estate of Acker, 128 A.D.2d 867, 513 N.Y.S.2d 786, 1987 N.Y. App. Div. LEXIS 44545 (N.Y. App. Div. 2d Dep't 1987).

Supreme Court has no discretion to deny trustee commissions under CLS SCPA § 2309. In re Arnold "O", 279 A.D.2d 774, 719 N.Y.S.2d 174, 2001 N.Y. App. Div. LEXIS 277 (N.Y. App. Div. 3d Dep't 2001).

Executor was not entitled to trustee commissions under N.Y. Surr. Ct. Proc. Act § 2309 because the trust at issue terminated with the death of the decedent's widow. Matter of Rubinstein, 72 A.D.3d 692, 901 N.Y.S.2d 63, 2010 N.Y. App. Div. LEXIS 2885 (N.Y. App. Div. 2d Dep't 2010).

Surrogate court abused its discretion by directing a trustee to forfeit its commissions and by awarding prejudgment interest on those commissions because the surrogate court rejected the claim of the settlor's surviving sons that the trustee acted in its own self-interest or was disloyal to the beneficiaries; because there was no evidence of malfeasance or significant misfeasance, the award to the sons of the trustee's commissions constituted an additional penalty to the trustee. Matter of JP Morgan Chase Bank, N.A., 133 A.D.3d 1292, 20 N.Y.S.3d 499, 2015 N.Y. App. Div. LEXIS 8689 (N.Y. App. Div. 4th Dep't 2015), app. denied, 27 N.Y.3d 901, 51 N.E.3d 563, 32 N.Y.S.3d 52, 2016 N.Y. LEXIS 413 (N.Y. 2016).

Neither of the executors were allowed commissions where their conduct in administering the estate was characterized as poor apparently not having the best interests of the estate or the decedent in mind. In re Israel's Estate, 64 Misc. 2d 1035, 315 N.Y.S.2d 453, 1970 N.Y. Misc. LEXIS 1222 (N.Y. Sur. Ct. 1970).

Pursuant to the court's authority under N.Y. Surr. Ct. Proc. Act §§ 2205, 2309, and 2312, the trustees' commissions would be denied or reduced for the period of their inaction because the trust beneficiary was a person under a disability, and the trustees left him to languish for several years with inadequate care despite the trustor's intent and the trust's abundant assets. Matter of JP Morgan Chase Bank N.A. (Marie H.), 956 N.Y.S.2d 856, 38 Misc. 3d 363, 2012 N.Y. Misc. LEXIS 5843 (N.Y. Sur. Ct. 2012).

## 7. Double commissions to trustee-executor



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No double commissions were payable to trustee-executor where will which set up a gross and undivided fund consisting mainly of one parcel of real estate to be held in trust for two separate individuals, the income to be paid during administration and the principal to be divided in the future, contemplated no separation of functions in time or purpose. *In re Estate of Saphir, 73 Misc. 2d 907, 343 N.Y.S.2d 20, 1973 N.Y. Misc. LEXIS 1999 (N.Y. Sur. Ct. 1973).*

While 20% fee based upon net recovery in difficult collection matter is not excessive standing alone, court will reduce fee from \$4,100 to \$2,500 since there are limits to total burden of administrative costs estate should bear and collection attorney is also receiving fees as executor and estate attorney in addition to collection fee. *In re Wilkinson's Estate, 75 Misc. 2d 831, 348 N.Y.S.2d 734, 1973 N.Y. Misc. LEXIS 1381 (N.Y. Sur. Ct. 1973).*

Testatrix did not intend to expose estate to payment of double commissions to the same person on the same money, once for paying out as trustee and again for receiving and paying as executor, where inter vivos trust provided that the trustee could make payment of any or all administration expenses directly to the executor under settlor's will or "to the taxing authority or authorities or other person or persons to whom such taxes and/or administration expenses shall be due and owing," and thus executors, who acted as conduits in the payment of taxes and administration expenses, were not entitled to commissions, notwithstanding statements in memorandum of law that trustee's account would be amended to provide that no trustee's commissions would be requested on assets transferred to executors. *In re Estate of Mead, 90 Misc. 2d 144, 394 N.Y.S.2d 123, 1977 N.Y. Misc. LEXIS 2008 (N.Y. Sur. Ct. 1977).*

#### 8. Under former Surrogate's Court Act § 285-b

Estate of trustee, who died before trust under will of decedent dying in 1960 was fully executed, granted compensation for his services under Surr Ct A § 257, although § 285-b is silent on this subject. *In re Barnett's Will, 36 Misc. 2d 164, 231 N.Y.S.2d 471, 1962 N.Y. Misc. LEXIS 2814 (N.Y. Sur. Ct. 1962).*

Where a trustee upon life beneficiary's death settles his final account and turns over the principal to himself and another to be continued in further trust (the principal having been directed to be added to the trust for a daughter), such turning over is not a distribution or paying out of principal to the ultimate beneficiaries thereof so as to entitle him to the statutory paying out of commissions. *In re Estate of Faroll, 39 Misc. 2d 309, 240 N.Y.S.2d 526, 1963 N.Y. Misc. LEXIS 1992 (N.Y. Sur. Ct. 1963).*

Accounting trustee held not entitled to principal paying commission upon payment over of the principal of the trust to an individual trustee and itself as co-trustees of the trust under the will. *In re Burnham's Will, 58 Misc. 2d 777, 296 N.Y.S.2d 401, 1968 N.Y. Misc. LEXIS 1414 (N.Y. Sur. Ct. 1968).*

#### Notes to Unpublished Decisions

##### 1. Calculating and allocating annual commissions

## NY CLS SCPA § 2309

**1. Calculating and allocating annual commissions**

*Unpublished decision:* Guardian appointed under N.Y. Mental Hyg. Law art. 81 for an incapacitated elderly person was not entitled to compensation on an hourly basis totaling nearly \$100,000, but was awarded commissions of \$18,139.95 pursuant to *N.Y. Surr. Ct. Proc. Act § 2309*. She had not cared for the ward personally and was not entitled to “pile up” time by duplicating tasks others performed. *In re Stratton, 225 N.Y.L.J. 119, 2001 N.Y. Misc. LEXIS 1348 (N.Y. Sup. Ct. June 21, 2001)*.

**Research References & Practice Aids**

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**Cross References:**

This section referred to in §§ 717., 718., 2207., 2306., 2312.; CLS *CPLR § 8005*; CLS *EPTL § 7-2.5*.

Commissions of fiduciaries other than trustees, § 2307.

Commissions of trustees under wills of persons dying, or under lifetime trusts created, on or before August 31, 1956 § 2308.

**Jurisprudences:**

106 NY Jur 2d Trusts §§ 286., 287., 289., 293., 381.

**Law Reviews:**

Laurino, Investment responsibility of professional trustees, 51 St. Johns L Rev 717.

**Treatises****Matthew Bender's New York Civil Practice:**

6 Cox, Arenson, Medina, *New York Civil Practice: SCPA ¶2309.01* et seq.

4 Rohan New York Civil Practice: EPTL ¶¶ 7-2.3, 7-2.8, 7-3.1, 7-4.5; 5 Rohan, New York Civil Practice: EPTL ¶¶ 10-4.4, 10-6.6.

**Matthew Bender's New York Practice Guides:**

*New York Practice Guide: Probate and Estate Administration § 11.01*. Who May Object.

*New York Practice Guide: Probate and Estate Administration § 40.01*. Why the Fiduciary Accounts .

NY CLS SCPA § 2309

New York Practice Guide: Probate and Estate Administration § 41.02. Account Schedules.

**Matthew Bender's New York AnswerGuides:**

LexisNexis AnswerGuide New York Surrogate's Court § 20.22. Reimbursing Trustee for Reasonable Expenses and Fees Actually Paid If Decedent Died or Lifetime Trust Was Created After August 31, 1956.

**Warren's Heaton on Surrogate's Court Practice:**

Warren's Heaton on Surrogates' Court § 50.04. Compensation of Guardian.

Warren's Heaton on Surrogates' Court § 51.06. Compensation and Expenses of Custodian.

Warren's Heaton on Surrogates' Court Ch. 103. Compensation of Fiduciaries.

**Annotations:**

Resignation or removal of executor, administrator, guardian, or trustee, before final administration or before termination of trust, as affecting his compensation. 96 ALR3d 1102.

**Matthew Bender's New York Checklists:**

Checklist for Calculating Trustee's Commissions If Decedent Died or Lifetime Trust Was Created After August 31, 1956 LexisNexis AnswerGuide New York Surrogate's Court § 20.20.

**Forms:**

37-2309 Bender's Forms for the Civil Practice Form No. SCPA 2309:1 et seq.

**Hierarchy Notes:**

NY CLS SCPA, Art. 23

**Forms**

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**Forms**

**Waiver of Trustee's Commissions**

SURROGATE'S COURT OF THE STATE OF NEW YORK

COUNTY OF \_\_\_\_\_

NY CLS SCPA § 2309

Probate Proceeding, Will of

\_\_\_\_\_

Deceased.

WAIVER OF STATUTORY  
TRUSTEE'S COMMISSIONS

FILE NO. \_\_\_\_\_

I, \_\_\_\_\_ hereby waive the commissions allowed to me by law and accept as full compensation for my services as Trustee under the Will of \_\_\_\_\_, deceased, such commissions and/or other compensation as may be agreed upon between \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_ and me, pursuant to paragraph \_\_\_\_\_ of Article \_\_\_\_\_ of the Will.

\_\_\_\_\_

[[Signature, with name printed

below]

[Acknowledgment]

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**SSHHH! Should Trustees Speak Up About Quiet Trusts?**  
**By Jennifer F. Hillman and Joseph T. La Ferlita**

While some clients flaunt their wealth, others like to keep things quiet. Sometimes, such “financial modesty” is motivated by a concern that knowledge of family wealth could result in disincentivized children or grandchildren. Although some may question whether such financial modesty is a virtue, there is no requirement that parents disclose their net worth to their children. However, the analysis changes when wealth is transferred to a so-called “Quiet Trust”—an irrevocable trust that purports to limit or prohibit the trustee from disclosing the assets of the trust, or even the trust’s very existence, to some of the beneficiaries. New York trusts and estates practitioners will undoubtedly encounter a Quiet Trust at some point, either because a client would like to create one, or needs guidance as a beneficiary or trustee of one, and they must understand the challenges posed by Quiet Trusts in New York.

**Challenges Faced by Trustees of New York Quiet Trusts**

The crux of the challenge is reconciling trustees’ fiduciary duty, which generally leans in favor of disclosure of trust information to beneficiaries, with explicit provisions of a trust that limits or prohibit disclosure. Depending on how stringent the trust’s limitations on disclosure are, trustees might find it challenging to carry out the trust’s terms while also fulfilling their fiduciary duty and limiting their potential liability.

Under the common law, trustees have had a long-recognized duty to inform the beneficiaries in certain situations and focus on a trustee’s duty to timely and appropriately respond to a beneficiary’s inquiry into the trust’s terms, its assets, and the trustee’s actions. The underlying principle is that such disclosure keeps trustees honest. Absent this policing ability of the beneficiaries, trustees may neglect their fiduciary duties.

While to date, New York statutory law does not deal explicitly with the concept of Quiet Trusts, the basic principle of disclosure nevertheless is enshrined in various New York trust statutes. For example, SCPA 2205 provides an extensive list of individuals and entities, including income and remainder beneficiaries, that have standing to petition the court to compel judicial settlement of a trustee’s account including income and remainder beneficiaries of the trust. Another example is found in the commissions statute for individual trustees which require a trustee to provide annual statements to beneficiaries pursuant to SCPA 2308 and 2309. Even a trustee who has not retained annual commissions is still required under SCPA 2306 to furnish the annual statements to a beneficiary who requests annual statements.

Perhaps the most significant issue for trustees of a New York Quiet Trust concerns whether they can be released from liability through the settlement of their account as trustee either formally or informally. A judicial settlement is very detailed and predicated on the Surrogate’s Court first having obtained personal jurisdiction over all necessary parties, perhaps including the very beneficiaries from whom the trustees are prohibited to disclose trust information. A non-judicial, informal settlement, while not requiring any particular level of asset disclosure, at a minimum requires disclosing the existence of the trust. However, if the information provided to the beneficiary is limited, the beneficiary may be able to later set aside such release on the basis of

fraud or misrepresentation. Moreover, the statute of limitations on compelling trustees to account and seeking to hold them liable for breach of fiduciary duty may not begin to run until after the trustee accounts and/or discloses their actions. Thus, from a liability perspective, a New York Quiet Trust may be viewed as somewhat unfriendly to trustees.

### **The Proposed New York Trust Code**

While New York law is not currently hospitable to Quiet Trusts, there may be changes pursuant to the proposed New York Trust Code (NYTC) which borrows concepts from the Uniform Trust Code (UTC), while still retaining and codifying New York-specific common law concepts. (The NYTC is an Office of Court Administration program bill which does not currently have a sponsor in the New York State Senate or Assembly.)

Both the UTC and the NYTC include laws authorizing settlors to direct the nondisclosure of the existence of a trust at least for some time period, unless a trust document states otherwise, to solely the “qualified beneficiaries” of the trust (see NYTC 7-A-1.3(18); 7-A-1.5(15)) (Proposed New York Trust Code: Surrogate’s Court Advisory Committee to the Chief Administrative Judge of the Courts of the State of New York dated Sept. 4, 2019), which is a class of beneficiaries who are current beneficiaries or presumptive remainder beneficiaries of the trust. These are beneficiaries who, under current New York Law, would be entitled to notice of proceedings involving the trust, but not beneficiaries whose rights would be deemed represented under the concept of virtual representation in SCPA 315.

The NYTC requires the trustee to inform and furnish requested information about an irrevocable trust to these qualified beneficiaries who are over the age of 25 after the death of the survivor of the settlor and the settlor’s spouse (or 21 years if the settlor was an entity and not an individual). Thus, it appears that if the settlor and the settlor’s spouse are alive, there is no age at which a beneficiary must receive information. In many cases, this delayed disclosure may be enough to accomplish a client’s goal.

However, pursuant to NYTC §7-A-8.13, a trustee must send annual statements to any beneficiary who requests them—regardless of whether they are a qualified beneficiary or not. If the beneficiary becomes aware of the Quiet Trust and makes a request, the trustee must comply. While the NYTC remains a proposal, practitioners should be aware that it exists.

### **What To Do When Confronted With a Quiet Trust?**

If a client requests that you draft a Quiet Trust, it is prudent to discuss with the client whether disclosure through annual statements or other trustee communication might promote a more open and trusting relationship between trustee and beneficiary. Discuss with the client whether an open discourse about family wealth would instill fiscal responsibility.

If the client still decides that a Quiet Trust is appropriate, careful consideration should be given to the practicality and enforceability of the particular desired restrictions on disclosure. For example, a provision that forbids a trustee from ever disclosing a trust’s existence even when asked is contrary to New York public policy and unenforceable even under the more permissive

proposal of the NYTC. See NYTC §7-A-8.13. But see *Friedrich v. Klaristenfel*, 195 A.D.3d 597 (2d Dept. 2021); *Matter of Kassover*, 124 Misc.2d 630 (Surr. Ct. Nassau Co. 1984).

Virtual representation pursuant to SCPA 315 can help limit disclosure to some beneficiaries (and arguably mirrors the limitation of disclosure to solely “qualified beneficiaries” under the proposed NYTC). Practitioners should consider including provisions in trust documents that authorize “horizontal” virtual representation of beneficiaries under a disability (SCPA 315(5)). “Vertical” virtual representation already exists under New York law. Virtual representation can be especially helpful if there is an infant beneficiary because it might allow the trustee to avoid the appointment of a guardian ad litem in a court proceeding (although there may be an advantage to having a guardian ad litem recommend approval of an account on behalf of their ward).

Practitioners can also consider setting forth in the trust document a specific commission schedule which is not linked to the default statutory rules under SCPA 2309 which require furnishing annual statements. See SCPA 2309(10). However, SCPA 2306 would still require the trustee to furnish the annual statements to a beneficiary upon request.

Another consideration is a trust protector, which may indirectly protect a beneficiary during a delayed notification period by allowing someone other than such beneficiaries to perform certain designated actions such as removing and replacing the trustee. There is no statutory authority for a trust protector under New York law, but it is a generally accepted concept particularly concerning inter vivos trusts which are largely governed by contract law.

Notwithstanding these aspects of existing New York law, the state (at least until the NYTC is adopted) is not among the Quiet Trust-friendliest jurisdictions. To serve the client’s best interests, you should consider creating the Quiet Trust in another jurisdiction (with local counsel) that has adopted Quiet Trust legislation. Some states have enacted versions of the UTC or their own statutes which may allow settlors to waive or modify all notice and disclosure requirements by not mandating disclosure. These include Arkansas (A.C.A. 28-73-105), North Carolina (N.C. Gen. Stat. §36C-1-105) and North Dakota (N.D. Cent. Code, §59-09-05) to name a few.

Some states have adopted the concept of the “designated representative,” who is authorized to bind a beneficiary in any judicial proceedings or for non-judicial matters including consents, releases and ratification of a trustee’s acts. See e.g., Delaware (12 Del. C. §3339); Florida (Fla. Stat. §736.0306) and Illinois (760 ILCS 3/307). In Delaware, for example, the designated representative is deemed to be a fiduciary and owes a fiduciary duty to the beneficiary and may be accountable for their actions taken on a beneficiary’s behalf.

If the New York practitioner confronts a New York Quiet Trust after it has been created, either during its administration or litigation, the practitioner should undertake a fact-specific analysis of the particular Quiet Trust provision under current law to determine the provision’s enforceability and practicality.

In sum, New York trusts and estates practitioners should be cognizant of the challenges presented by New York Quiet Trusts.



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# Silent Trusts Are Trending: Will They Hold Trustees to Account?

*Kent D. Schenkel\**

## I. INTRODUCTION

A common intuition, perhaps amply supported by anecdotal evidence, is that easy money creates a disincentive to efforts for personal success. Many trust settlors seem to embrace this view but still wish to provide generously for their families. Enter the so-called “silent trust,” which seeks to moderate the disincentive effect by way of trust provisions that limit or waive notice and disclosure requirements to beneficiaries.<sup>1</sup>

But a fundamental tension plagues these trusts. Beneficiaries need basic information about a trust in order to hold trustees to account. Consequently, traditional trust law provides limits on the degree to which trustees can be silent as respects a beneficiary’s right to know.<sup>2</sup> The Uniform Trust Code (“UTC”) broadly adopts the traditional view, while (perhaps grudgingly) conceding adopting states’ preferences for allowing trust settlors to opt out of certain information and accounting provisions.<sup>3</sup> So the outer boundaries of silent trusts remain unsettled, even across those jurisdictions that have adopted the UTC.

This short article first summarizes the status of the mandatory information and reporting rules under the UTC, and then takes a peek at the legal principles on which cases interpreting silent trust provisions stand. In so doing, it situates the silent trust in the context of the larger academic debate about mandatory versus default provisions in trust law. It finds that mandatory UTC provisions requiring a trustee to act in good faith and giving courts the power to act in the interest of justice can serve as sufficient safeguards to beneficiaries of silent trusts. None-

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<sup>1</sup> See, e.g., Jay A. Soled et al., *Quiet Trusts: When Mum’s the Word to Trust Beneficiaries*, EST. PLAN., July 2013, at 13, 13-14; David A. Diamond et al., *The Silent Trust: Using State Statutes to Delay Notification of a Trust*, TSWBO3 A.L.I. 1 (2014) [hereinafter Diamond et al., *The Silent Trust*]; William R. Burford, *What the Kids Don’t Know – Deconstructing the ‘Silent’ Trust*, SV024 A.L.I.-A.B.A 1, 4 (2014) [hereinafter Burford, *What the Kids Don’t Know*].

<sup>2</sup> ALAN NEWMAN ET AL., *BOGERT’S THE LAW OF TRUSTS AND TRUSTEES* § 965 (2021) [hereinafter *BOGERT’S THE LAW OF TRUSTS AND TRUSTEES*].

<sup>3</sup> See *infra* Part II.

theless, courts must interpret these provisions to permit beneficiaries, upon request, to obtain from the trustee any information reasonably required to determine whether trustee wrongdoing has occurred.

## II. INFORMATION AND REPORTING UNDER THE UTC

According to one of the leading treatises on trust law, “[a]ccountability of the trustee to the beneficiary” is “at the heart of their fiduciary relationship.”<sup>4</sup> It follows that, without accountability, no trust relationship is formed. For this reason, it would seem that a trust settlor would be unable to completely eliminate a trustee’s obligation to keep the trust beneficiary reasonably informed. To do so would in effect strike a blow against trustee accountability and risk removing the trust relationship from the purview of a court.<sup>5</sup> But this does not mean that a settlor cannot modify the extent to which a trustee must adhere to default rules mandating the provision of information to the beneficiaries. If legislative moves by UTC adopting jurisdictions are any indication, the settlor’s ability to modify or waive information and reporting requirements is generally increasing.<sup>6</sup>

The UTC’s provisions requiring trustees to inform and report to beneficiaries appear in section 813.<sup>7</sup> Not all of the trustee’s duties here are affirmative; some can depend on whether a beneficiary has requested information concerning the trust.<sup>8</sup> The duties can also vary depending upon whether the beneficiary in question enjoys the status of a “qualified beneficiary,” as defined by the code.<sup>9</sup> While the UTC’s rules are comprehensive, they do not uniformly settle the question across en-

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<sup>4</sup> BOGERT’S THE LAW OF TRUSTS AND TRUSTEES, *supra* note 2, § 965.

<sup>5</sup> In cases where no allegations of wrongdoing have been made and the settlor has chosen to waive the duty to account, some courts have declined to impose such a duty on the trustee. *See id.* California has a statute that permits courts to enforce accountings where settlors have waived them where there is “a showing that it is reasonably likely that a material breach of the trust has occurred . . .” CAL. PROB. CODE § 16064(a) (West 2021).

<sup>6</sup> For current treatment of information and reporting requirements in UTC jurisdictions, see *infra* Appendix.

<sup>7</sup> *See* UNIF. TR. CODE § 813(a) (UNIF. L. COMM’N amended 2010).

<sup>8</sup> *Id.* § 813(c).

<sup>9</sup> *See id.* § 813(a)-(c). *See also* UNIF. TR. CODE § 103(3) (defining “beneficiary”). A “qualified beneficiary” is defined as a beneficiary who, on the date at issue:

(A) is a distributee or permissible distributee of trust income or principal; (B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (A) terminated on that date without causing the trust to terminate; or (C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

*Id.* § 103(13).

acting jurisdictions as to a trustee's information reporting requirements. This is because jurisdictions have not enacted section 105, relating to mandatory and default rules, in the form presented by the UTC's Drafting Committee.<sup>10</sup>

Given the fundamental nature of the trustee's accountability to the beneficiary, one might surmise that trust law provisions requiring trustees to account and report to beneficiaries cannot be completely waived by the settlor. But the UTC gives the settlor substantial control over the scope of these obligations, and, depending upon whether or in what modified form certain "bracketed" provisions of section 105 were adopted by the state in question, a settlor may be at least theoretically able to waive all information and reporting requirements.<sup>11</sup> These provisions regarding a trustee's information and reporting requirements are referenced in sections 105(b)(8) and (9).<sup>12</sup> Essentially, they provide that a settlor cannot waive two types of duties contained in section 813. First is the duty "to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports."<sup>13</sup> Second is the duty "to respond to the request of a [qualified] beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust."<sup>14</sup>

According to the comments, these provisions, which were placed in brackets in 2004,<sup>15</sup> "have generated more discussion in jurisdictions considering enactment of the UTC than have any other provisions of the Code."<sup>16</sup> Despite that the UTC's Drafting Committee takes the position that the provisions should be enacted as presented, most enacting jurisdictions have modified or deleted them.<sup>17</sup> Thus, even a general sense of state law, which varies widely, cannot be discerned solely by reference to the UTC.

Why have adopting states either deleted or modified the provisions making certain information and disclosure requirements mandatory? It would seem that trust settlors wish to retain the option to keep their beneficiaries—perhaps fully but maybe only partially—in the dark. Many settlors are doubtless concerned about the incentive-dampening

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<sup>10</sup> See *infra* Appendix.

<sup>11</sup> See UNIF. TR. CODE § 105(b)(8)-(9) (placed in brackets to indicate their optional status).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* § 105(b)(8).

<sup>14</sup> *Id.* § 105(b)(9). The provision places the term "qualified" in brackets.

<sup>15</sup> See *id.* § 105 cmt.

<sup>16</sup> *Id.*

<sup>17</sup> See *infra* Appendix; see also BOGERT'S THE LAW OF TRUSTS AND TRUSTEES, *supra* note 2, § 965.

effects of gifts in trust. Other concerns might be keeping information about the trust from the beneficiaries' parents or relatives, and perhaps that third parties who gain knowledge of the trust will impose on the trust beneficiaries.<sup>18</sup> A couple of comprehensive outlines prepared for continuing legal education courses indicate that the call for these trusts is strong, and that practitioners and trust departments are clearly responding.<sup>19</sup>

### III. ARE SILENT TRUSTS FUNDAMENTALLY INCOMPATIBLE WITH THE LAW OF TRUSTS?

Considerations of public policy have always been a hard brake on trusts' terms. Cases implicating public policy might involve trust provisions creating restraints on marriage or investment decisions.<sup>20</sup> But silent trusts also raise fundamental issues. In the context of silent trusts, the question is whether a settlor's seemingly paradoxical attempts to benefit the beneficiary by restricting access to information is fundamentally incompatible with the very nature of the trust relationship. The UTC has attempted to walk the fine line between yielding to the freedom of disposition of settlors and ensuring that beneficiaries have sufficient information to enforce the trustee's obligation. On the one hand is the UTC's official view that section 105 should be enacted as presented, which has been soundly rejected by enacting states.<sup>21</sup> On the other hand, placing sections 105(8) and (9) in brackets is essentially a concession that at least some silent trust provisions are compatible with the UTC's overall scheme.<sup>22</sup>

But must the specific duties of a trustee under sections 813(a), (b)(2) and (3) be deemed mandatory in order to maintain the integrity

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<sup>18</sup> See Robert M. Brucken, *Can Trusts Really be Secret?*, PROB. L.J. OHIO, Sept./Oct. 2015, at 22, 22.

<sup>19</sup> See, e.g., Burford, *What the Kids Don't Know*, *supra* note 1, at 4; Diamond et al., *The Silent Trust*, *supra* note 1, at 1; Nicole K. Mann & Jane Zhao, *Silent Trusts: "Three Can Keep a Secret, if Two of Them are Dead"*, 1065 A.L.I. 1, 31 (2018) (stating that many states have adopted statutes permitting silent trusts).

<sup>20</sup> See John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U.L. REV. 1105, 1109 (2004).

<sup>21</sup> See *infra* Appendix.

<sup>22</sup> The comments to the 2004 amendments make clear that "[t]he placing of these provisions in brackets does not mean that the Drafting Committee recommends that an enacting jurisdiction delete" the sections. To the contrary, the Drafting Committee "continues to believe that" enacting the sections "as is, represent[s] the best balance of competing policy considerations. Rather, the provisions were placed in brackets out of a recognition that there is a lack of consensus on the extent to which a settlor ought to be able to waive reporting to beneficiaries, and that there is little chance that the states will enact sections 105(b)(8) and (b)(9) with any uniformity." UNIF. TR. CODE § 105 cmt. (UNIF. L. COMM'N 2010).

of trusts? The answer seems to be no. After all, a trust created under the UTC, even where those provisions have been made default, still maintains the accountability of the trustee to the beneficiary—the true heart of the trust relationship. The mandatory rules of section 105 still include “the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries,”<sup>23</sup> and “the power of a court to take such action and exercise such jurisdiction as may be necessary in the interests of justice.”<sup>24</sup> Further, courts have been issuing rulings consistent with these principles for many years,<sup>25</sup> and have stepped in to limit the extent to which settlors can restrict the rights of beneficiaries to access information about trusts.<sup>26</sup> There seems to be general recognition among courts that if the withholding of information from the beneficiary creates an unacceptably high risk of a breakdown in the enforcement of the trustee’s fiduciary obligations, then it threatens the efficacy of the trust.<sup>27</sup>

A potential problem, however (and this was presumably a concern of the UTC’s Drafting Committee), is that courts in many of these cases require evidence or some showing of fraud or other wrongdoing on the part of the trustee in order for the beneficiaries to be entitled to the very information that evidences that malfeasance.<sup>28</sup> One of the older cases on this rule is *Keller’s Estate*,<sup>29</sup> decided in 1909 by the Supreme Court of Pennsylvania. Here, no trust was involved, but the decedent in his will left his estate for life to his wife, with remainder to his son, and named both beneficiaries executors. Some years later, the surviving widow died, followed several days later by the son. The widow’s executors filed suit against the son’s estate, maintaining that the son had “converted all the assets of [his father’s] estate”<sup>30</sup> and demanded an accounting. But the father’s will had provided that “no inventory nor appraisal nor account” was to be filed by the executors.<sup>31</sup>

Despite that the plaintiffs alleged wrongdoing, the court upheld the waiver of accounting in the father’s will. It held that where “fraud” is

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<sup>23</sup> *Id.* § 105(b)(2).

<sup>24</sup> *Id.* § 105(b)(13).

<sup>25</sup> See *infra* text accompanying notes 28-35.

<sup>26</sup> See *infra* Part IV.

<sup>27</sup> The Restatement (Third) of Trusts (comments on Clause (c) of § 29) gets at this point when it praises the “flexibility” of the trust in permitting settlors to create interests “individually tailored as the particular property owner deems best,” but points out that these “advantages” need to be “balanced against . . . the burdens a former owner’s unrestrained dispositions might place on courts to interpret and enforce individualized interests and conditions.” RESTATEMENT (THIRD) OF TRUSTS § 29(c) cmt. (AM. L. INST. 2003).

<sup>28</sup> See BOGERT’S THE LAW OF TRUSTS AND TRUSTEES, *supra* note 2, § 965.

<sup>29</sup> 73 A. 926, 926 (Pa. 1909).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 926-27.

complained of, the court will order an accounting even where the will waives it, “if ground be shown.”<sup>32</sup> Here, the court said there was “not a suggestion of fraud” even though the plaintiffs had alleged conversion.<sup>33</sup> The court seemed to think that to hold otherwise would have defeated the intent of the testator to shield the estate from accountability to persons who weren’t beneficiaries of the estate.

Another influential older case is *Wood v. Honeyman*,<sup>34</sup> an Oregon decision involving a number of trusts, extensive facts, and a settlor’s misplaced faith in his son-in-law, who served as successor trustee of the two trusts at issue. The trust beneficiaries were able to amass considerable evidence of malfeasance by the trustee and filed suit to remove him from office and for an accounting, among other relief. In the trustee’s appeal of the trial court’s judgment against him a major issue was whether he should be required to account, despite that in at least one of the trusts at issue, the settlor had waived that obligation in the trust instrument. The Oregon Supreme court held that a settlor can relieve a trustee of providing “formal accounts” to the beneficiary, but, when called upon, must “show that he faithfully performed his duty” and account to “a court of equity.”<sup>35</sup>

#### IV. CAN THE LAW OF TRUSTS PREVENT A BENEFICIARY FROM OBTAINING EVIDENCE OF A TRUSTEE’S WRONGDOING?

How does a trust beneficiary who is concerned about possible wrongdoing on the part of the trustee obtain evidence of same when the trust provisions shield the trustee from providing trust accountings or other information? The most interesting and compelling contemporary case on this issue, and one that arose in the context of the UTC, is the North Carolina decision of *Wilson v. Wilson*.<sup>36</sup> North Carolina had adopted the UTC in 2006 but was one of the jurisdictions that completely left out sections 105(b)(8) and (9), making the accounting and reporting requirements of section 813 default-only.<sup>37</sup> In this case, the settlor created trusts for his two children in 1992 containing language relieving the trustee of any obligation “to prepare or file for approval any inventory, appraisal or regular or periodic accounts or reports with

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<sup>32</sup> *Id.* at 927.

<sup>33</sup> *Id.*

<sup>34</sup> 169 P.2d 131 (Or. 1946).

<sup>35</sup> *Id.* at 166.

<sup>36</sup> 690 S.E.2d 710 (N.C. Ct. App. 2010).

<sup>37</sup> N.C. GEN. STAT. § 36C-1-105 (2021).



any beneficiary . . .”<sup>38</sup> The beneficiaries filed suit against the trustee for breach of fiduciary duty in 2007.<sup>39</sup>

The beneficiaries made a couple of fairly specific allegations. First they alleged that the trustee had permitted the settlor to “take control” of trust assets and invest those assets in “highly speculative” business ventures resulting in their “substantial depreciation.”<sup>40</sup> Second, they maintained that the trustee “breached his statutory duty by failing to distribute income to Plaintiffs as required by the terms of the Trust Instruments.”<sup>41</sup> The trustees refused to respond to discovery requests, citing the silent trust provisions referred to above, and went so far as to file a motion for a protective order, stating that “by reason of the provisions of the Trust Instrument, the discovery sought herein may not be had.”<sup>42</sup> The trial court granted the motion and also entered a partial declaratory judgment, citing legislative commentary with respect to North Carolina’s version of UTC section 813, and stating that a trustee “may override, or negate the requirement of disclosure” to beneficiaries by a provision in the trust instrument.<sup>43</sup> The beneficiaries appealed both issues.<sup>44</sup>

In its review, the appeals court emphasized up front that non-waivable provisions of the UTC require a trustee to act in good faith and in the interests of the beneficiaries and recognize the court’s power to take action in the interest of justice.<sup>45</sup> This despite that the North Carolina statute “omitted those portions of the Uniform Trust Code that would require the trustee to keep qualified beneficiaries reasonably informed about the trust administration.”<sup>46</sup> The case turned on the court’s view that the mandatory good faith requirement, coupled with the court’s power to act in the interest of justice, means that beneficiaries are always entitled to information “reasonably necessary to enforce their rights under the trust,” and that such information “could not be legally withheld, notwithstanding the terms of the trust instrument.”<sup>47</sup>

The decision in *Wilson* seems right, even though it dilutes the settlor’s right to limit information shared with the beneficiaries. Any alternative would seem to prevent beneficiaries from holding the trustee accountable in any case except that in which sufficient evidence of mal-

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<sup>38</sup> *Wilson*, 690 S.E.2d at 711.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 712.

<sup>43</sup> *Id.*

<sup>44</sup> *See id.*

<sup>45</sup> *See id.* at 714.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 716.

feasance could be gathered without a trustee accounting. And to so hold would be to ignore the principles of good faith and trustee accountability to the courts—principles necessarily baked into the law of trusts.<sup>48</sup> But the dissent in *Wilson*, written by Judge Elmore, seemed unconcerned about this dilemma.<sup>49</sup> It noted that the beneficiaries could not prove their case without information the settlor legally chose to withhold from them and that therefore summary judgment in favor of the trustees should be granted.<sup>50</sup>

Quite a number of jurisdictions seem to have case law that, at least pre-UTC, is in accord with the decision in *Wilson*, at least where fraud or wrongdoing is evident.<sup>51</sup> But a potential problem remains where evidence of any alleged wrongdoing cannot be obtained because silent trust provisions prevent the beneficiaries from gathering basic information about the trust. For example, a relatively recent Mississippi case interprets the effect of a direction in a trust document to waive an accounting where the jurisdiction's version of the UTC permits waiver.<sup>52</sup> Mississippi adopted the UTC in 2014.<sup>53</sup> The jurisdiction retained sections 105(b)(8) and (9),<sup>54</sup> but added a provision that gives the settlor a great deal of flexibility in, for example, specifying a different age for mandatory notification of a beneficiary under section 813(b) or designating a surrogate to receive notice to the beneficiary.<sup>55</sup> In the case of *Estate of Fuller v. Kelly*, a trust instrument provided that the trustee was not "required to account to any court."<sup>56</sup> Citing Mississippi's version of UTC section 105(a), the court held that the provision waiving accounting was "enforceable under Mississippi law" absent "some evidence of mismanagement or fraud."<sup>57</sup> In so ruling, the court followed the Mississippi Supreme Court case of *In re Estate of Baumgardner*,<sup>58</sup> a case decided in 2012 (before the state's adoption of the UTC), indicating that the Mississippi UTC's provisions did not really change the law in the state as to whether a waiver of accounting was effective.<sup>59</sup> It is,

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<sup>48</sup> See BOGERT'S THE LAW OF TRUSTS AND TRUSTEES, *supra* note 2, § 965.

<sup>49</sup> See *Wilson v. Wilson*, 690 S.E.2d 710, 716 (N.C. Ct. App. 2010) (Elmore, J., dissenting).

<sup>50</sup> *Id.* at 719 (Elmore, J., dissenting).

<sup>51</sup> See, e.g., *Briggs v. Crowley*, 224 N.E.2d 417, 421 (Mass. 1967); *In re Childress Trust*, 486 N.W.2d 141, 146 (Mich. Ct. App. 1992); *Killeen v. Chico*, 328 S.E.2d 184, 186 (W. Va. 1985).

<sup>52</sup> *Estate of Fuller v. Kelly*, 203 So. 3d 1147, 1149 (Miss. Ct. App. 2016).

<sup>53</sup> S.B. 2727, 2014 Leg., Reg. Sess. (Miss. 2014).

<sup>54</sup> MISS. CODE ANN. § 91-8-105(b)(8)-(9) (2021.).

<sup>55</sup> *Id.* § 91-8-105(d)(2)-(3).

<sup>56</sup> *Estate of Fuller*, 203 So. 3d at 1148.

<sup>57</sup> *Id.* at 1149.

<sup>58</sup> 82 So. 3d 592 (Miss. 2012).

<sup>59</sup> See *id.* at 604-05.

and the court will enforce it, except that “evidence of mismanagement or fraud in the record could warrant an accounting even in the presence of an explicit waiver.”<sup>60</sup> But as stated above, acquiring such evidence can be a problem where silent trust provisions restrict access to it. So it remains to be seen whether other courts will pick up on the sound reasoning of North Carolina’s *Wilson* case—the UPC’s mandatory good faith requirement, coupled with the court’s power to act in the interest of justice, means that beneficiaries are always entitled to information “reasonably necessary to enforce their rights under the trust.”<sup>61</sup>

#### V. THE MANDATORY VERSUS DEFAULT DEBATE

Restrictions in the UTC on the withholding of information from trust beneficiaries are not anti-dead hand rules in that they do not attempt to defeat a settlor’s intent.<sup>62</sup> Instead, they have as their purpose the preservation of the very vehicle by which the settlor has chosen to make the gift in question. This is not a paternalistic or condescending move—these rules are not protecting the settlor from an inability to “understand” the consequences of the actions taken.<sup>63</sup> In any given instance it may well be more likely that the settlor, rather than any legislature or court, is in the best position to assess the potential benefit or detriment to the beneficiary of withholding information. Further, only the settlor can determine his own individual tolerance level for the risk that a more lightly-monitored trustee will fall short of its obligations. But, in order for the trust relationship to reliably function, there must be an unimpeachable protection mechanism, and the core ingredient in that relationship—the “without which not”—is the accountability of the trustee to the trust beneficiary. Eliminating the beneficiary’s access to information puts this essential element of a trust at risk, and the courts must determine trust law’s tolerance for the appropriate level of that risk. The consequence to the donor is that a failure to follow trust law rules means that trust law protections will not follow.

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<sup>60</sup> *Id.* at 605 (quoting *In re Stubbs-Kelley Trust*, 573 So. 2d 734, 736 (Miss. 1990)).

<sup>61</sup> *Wilson v. Wilson*, 690 S.E.2d 710, 716 (N.C. Ct. App. 2010).

<sup>62</sup> See Langbein, *supra* note 20, at 1119-20.

<sup>63</sup> The situation may be different in the event a settlor attempts to eliminate all fiduciary duties. Langbein puts it thus:

The concern is I may not understand that, by eliminating all fiduciary duties, I am effectively making *T*, rather than *B*, the donee. By forbidding me from eliminating all fiduciary duties, the rule protects me and my intended beneficiary (whether *T* or *B*) by requiring me to make my transfer in a forthright manner.

*Id.* at 1123.

## VI. CONCLUSION

Donors do not gift property in trust to enrich trustees, or to limit the consequences to the trustee of either the mismanagement of trust property or the failure to respond to the legitimate needs of trust beneficiaries. Even where silent trust provisions are used, settlors gift property in trust to maximize the benefit to the beneficiaries of those gifts. Restrictions settlors may place on the use of trust property (limiting access until certain ages, inserting spendthrift provisions, conditioning distributions on educational incentives, and reducing trustee information and reporting requirements) are almost always meant, in the eye of the settlor, to increase the property's benefit to the beneficiaries. The genius of a trust lies in the settlor's almost unlimited freedom to craft the beneficial interest in ways the settlor deems will achieve this goal. And American trust law gives extraordinarily wide latitude in the calibration of this interest.

Silent trusts offer one of the latest challenges in holding together the fundamentals of the trust relationship while ensuring that the device can change in response to demands of trust settlors and their advisors. There is an ongoing academic debate about mandatory versus default provisions in trust law.<sup>64</sup> While most arguments in favor of mandatory rules focus on the property rights of trust beneficiaries, default-only rules generally favor rights of settlors. Silent trusts sit squarely in the center of this debate, and their trajectory provides insight into the direction trust law is taking. Settlors are increasing their control over trusts, and yet the UPC and many courts have thus far maintained certain important checks on that control. Trustees are obligated to act in good faith in the interests of trust beneficiaries and courts have the power to act in the interest of justice.<sup>65</sup> An essential open question in many jurisdictions is whether courts will enforce silent trust provisions in cases where they threaten to prevent beneficiaries from obtaining evidence of fraud or other wrongdoing on the part of trustees.

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<sup>64</sup> Compare Langbein, *supra* note 20, at 1105 (stating that mandatory trust rules include some "intent-defeating rules" that "serve an anti-dead-hand policy" and are necessary to ensure that trusts "benefit the beneficiaries"), with Jeffrey A. Cooper, *Shades of Gray: Applying the Benefit-the-Beneficiaries Rule to Trust Investment Directives*, 90 B.U. L. REV. 2383, 2384 (2010) (disagreeing with Professor Langbein's view on the "benefit-the-beneficiaries" rule).

<sup>65</sup> UNIF. TR. CODE § 105(b)(2) (UNIF. L. COMM'N amended 2010).

## APPENDIX

Jurisdiction	Citation	Notes
1. Alabama	ALA. CODE § 19-3B-105(b)(8) (2021)	In Alabama only “the duty . . . to respond to the request of a qualified beneficiary of an irrevocable trust for trustee’s reports and other information reasonably related to the administration of a trust” is mandatory.
2. Arizona	ARIZ. REV. STAT. ANN. § 14-10105(B)(8) (2021)	In Arizona only “[t]he duty to respond to the request of a qualified beneficiary of an irrevocable trust for trustee’s reports and other information reasonably related to the administration of a trust” is mandatory.
3. Arkansas	ARK. CODE ANN. § 28-73-105 (2021)	In Arkansas both provisions were omitted.
4. Colorado	COLO. REV. STAT. § 15-5-105(2)(h)-(i) (2021)	Colorado mandates the duty “to provide notice of the existence of an irrevocable trust, of the identity of the trustee, and of the right to request trustee’s reports to current distributees or permissible distributees of such trust at any age, or to other qualified beneficiaries of such trust who have attained twenty-five years of age,” and the duty “to respond to the request of a qualified beneficiary of an irrevocable trust for trustee’s reports and other information reasonably related to the administration of a trust.”
5. Connecticut	CONN. GEN. STAT. § 45a-499e(b)(7) (2021)	Connecticut’s statute permits notification to a “designated representative of [a] qualified beneficiary” in lieu of notice to the qualified beneficiary.

Jurisdiction	Citation	Notes
6. The District of Columbia	D.C. CODE § 19-1301.05(c)(1) (2021)	The District of Columbia has added provisions to the statute that give the settlor the power to “waive or modify” notice, information and reporting requirements under certain circumstances.
7. Florida	FLA. STAT. § 736.0105(r)-(t) (2021)	Florida has modified the UTC provisions but generally mandates comprehensive duties of notice and reports to qualified beneficiaries.
8. Hawaii	S.B. 385, 31st Leg. (Haw. 2021), HAW. REV. STAT. § -105 (effective Jan. 1, 2022)	Hawaii largely retains the mandatory UTC language but does not restrict notification to qualified beneficiaries over age 25.
9. Illinois	760 ILL. COMP. STAT. 3/105 (2021)	Illinois modifies the mandatory provisions and makes them prospective only.
10. Kansas	KAN. STAT. ANN. § 58a-105 (2021)	Kansas omits both subsections.
11. Kentucky	KY. REV. STAT. ANN. § 386B.1-030(j) (West 2021)	Kentucky permits the designation of a surrogate to receive reports.
12. Maine	ME. STAT. tit. 18, § 105(3)(B) (2021)	Maine permits the designation of surrogates to receive information and reports.
13. Maryland	MD. CODE ANN., EST. & TRUSTS § 14.5-105 (West 2021)	Maryland largely retains the UPC language.
14. Massachusetts	MASS. GEN. LAWS ch. 203E, § 105 (2021)	Massachusetts omits the provisions.

Jurisdiction	Citation	Notes
15. Michigan	MICH. COMP. LAWS ANN. § 700.7105(2)(i) (West 2021)	Michigan reduces the mandatory requirements to a duty “to provide beneficiaries with the terms of the trust and information about the trust’s property, and to notify qualified trust beneficiaries of an irrevocable trust of the existence of the trust and the identity of the trustee.”
16. Minnesota	MINN. STAT. § 501C.0105 (2021)	Minnesota omits the provisions.
17. Mississippi	MISS. CODE ANN. § 91-8-105(d)(2)-(3) (2021)	Mississippi modifies the provisions by permitting a different age to be designated and permitting surrogates to receive information and reports.
18. Missouri	MO. REV. STAT. § 456.1-105(3) (2021)	Missouri permits a settlor to limit information and reporting requirements to certain “permissible distributees.”
19. Montana	MONT. CODE ANN. § 72-38-105 (2021)	Montana omits the provisions.
20. Nebraska	NEB. REV. STAT. § 30-3805(b)(8) (2021)	Nebraska mandates a requirement “to keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests, and to respond to the request of a qualified beneficiary of an irrevocable trust for trustee’s reports and other information reasonably related to the administration of a trust.”
21. New Hampshire	N.H. REV. STAT. ANN. § 564-B:1-105 (2021)	New Hampshire omits the provisions.
22. New Jersey	N.J. STAT. ANN. § 3B:31-5(b)(7) (2021)	New Jersey only provides mandatory rights to qualified beneficiaries 35 years of age or older.

Jurisdiction	Citation	Notes
23. New Mexico	N.M. STAT. ANN. § 46A-1-105 (2021)	New Mexico mandates the UTC provisions except with respect to a trustee that is a “regulated financial service institution” and also mandates that the settlor “[be] informed of the risks and consequences of the waiver.” N.M. STAT. ANN. § 46A-8-813(F).
24. North Carolina	N.C. GEN. STAT. § 36C-1-105 (2021)	North Carolina omits the provisions.
25. North Dakota	N.D. CENT. CODE § 59-09-05 (2021)	North Dakota omits the provisions.
26. Ohio	OHIO REV. CODE ANN. § 5801.04 (B)(14)(C) (West 2021)	Ohio permits surrogates to receive “notices, information, or reports otherwise required” under the UTC’s provisions.
27. Oregon	OR. REV. STAT. § 130.020(4)(b) (2021)	Oregon permits surrogates to receive “notice, information or reports” to qualified beneficiaries.
28. Pennsylvania	20 PA. CONS. STAT. § 7705 (2021)	Pennsylvania currently omits UTC § 105(b)(9).
29. South Carolina	S.C. CODE ANN. § 62-7-105 (2021)	South Carolina omits the provisions.
30. Tennessee	TENN. CODE ANN. § 35-15-105 (2021)	Tennessee omits the provisions.
31. Utah	UTAH CODE ANN. § 75-7-105 (West 2021)	Utah omits the provisions.
32. Vermont	VT. STAT. ANN. tit. 14A, § 105 (2021)	Vermont omits the provisions.
33. Virginia	VA. CODE ANN. § 64.2-703 (2021)	Virginia omits the provisions.
34. West Virginia	W. VA. CODE § 44D-1-105 (2021)	West Virginia omits the provisions.
35. Wisconsin	WIS. STAT. § 701.0105 (2021)	Wisconsin omits the provisions.
36. Wyoming	WYO. STAT. ANN. § 4-10-105 (2021)	Wyoming omits the provisions.





## **Now, More Than Ever, New York Needs a Directed Trust Statute; TRUSTS AND ESTATES LAW**

**By C. Raymond Radigan and Jennifer F. Hillman**

In estate planning, this year has been one of uncertainty as we all wait to see if there will be the anticipated changes to income and estate tax rates. In this climate, practitioners have utilized some creative solutions, which also provide flexibility in the face of uncertainty.

While the creation of trusts may have significant tax savings, many clients remain concerned about giving up control to one trustee. Directed trusts have become increasingly popular with clients for precisely this reason. A settlor of a trust can scatter responsibilities (and liabilities) among several individuals or entities, without having multiple trustees. This can be particularly appealing when planning with closely-held businesses and succession planning.

In recent years, various organizations have proposed legislation to enact directed trust legislation. We have addressed directed trusts and New York's need to enact a directed trust statute in prior columns. C. Raymond Radigan, Jennifer F. Hillman, *New York Needs a Directed Trust Statute*, N.Y.L.J., Nov. 20, 2012; C. Raymond Radigan, *Time for a Second Look: Revisiting New York's Proposed Directed Trust Statute*, N.Y.L.J., Jan. 8, 2018. With this in mind, we felt it was appropriate to revisit what directed trusts are, and why they are so important for New York to hold on to trust business and the revenue it creates.

### **What Is a Directed Trust?**

In a typical trust, the trustee maintains full control over the way the trust assets were invested, administered and distributed to beneficiaries. Especially in the context of a family or closely held business, this can limit the control or influence of family members or others with institutional knowledge of an entity.

In a directed trust, there is a direction from the settlor about who will handle what roles and what responsibilities, while the "traditional" trustee continues to administer the trust itself. The value of this is twofold—a settlor can sprinkle and scatter responsibilities among individuals who are best suited to manage certain trust assets, and those individuals can limit their potential liability to solely the areas that they direct.

This is completely different from delegation regarding investments as provided for under New York's Prudent Investor Act. In delegation, a trustee is allowed to hire a professional to handle specific aspects of trust management that the trustee may not have the expertise or time to effectively handle personally. However, a trustee that delegates investment responsibility still has a fiduciary duty (and the corresponding liability) as if he or she directly managed the investments themselves. A trustee receives commissions to compensate them for taking on the control (and the liability). They have little incentive to delegate that authority if they remain liable for the actions of the delegee.

In a directed trust, a settlor could name one individual responsible for trust administration, another responsible for investment strategy and/or decisions, and yet a third individual to make distributions. The settlor can direct that the trustee maintain a concentrated stock position, even

though it may be prudent to diversify a portfolio. A settlor could also fund a trust with an interest in a closelyheld business, and then direct the settlor or a specifically-named individual to continue managing the business, or otherwise direct a specific succession plan for the business. The settlor could also give family members the power to buy, sell and/or have voting rights on company stock.

With a power to direct, the trustee usually has no responsibility other than to carry out the direction when made, as well as overall responsibility for seeing that the terms of the trust are honored. A trustee must act in accordance with the direction, unless the direction would be manifestly contrary to the terms of the trust or the trustee knows the attempted exercise of the direction would constitute a serious breach of a fiduciary duty owed by the holder of the power to the beneficiaries of the trust.

Obviously, this flexibility is beneficial to both the settlor and the trustee. The trust instrument could (and should) clearly define the roles and responsibilities of each individual, and clearly delineate and define the potential liability for each party's actions, as well as the potential compensation for each.

### **Current New York Law**

As discussed in prior columns, New York case law recognizes the ability of a trust settlor to have an advisor control the actions of the fiduciaries. See e.g., *In Re Rubin*, 143 Misc.2d 303 (Sur.Ct Nassau Cty. 1989) (Radigan, S.) (finding valid a will provision which granted specific advisors the power to direct the executors and noting "the earliest common law cases and texts recognize the right of a testator to limit, qualify, or condition the authority granted his fiduciary" which includes "limitations as to time (when the appointment shall begin or end), or place (different executors may be appointed in different geographic areas), or subject matter (one executor may be given exclusive authority over a particular asset or group of assets)."); see also *In re Rockefeller*, N.Y.L.J., Aug. 24, 1999, p. 28, col. 2 (Sur. Ct. N.Y. Cty.); *In re Winston*, N.Y.L.J., Dec. 24, 1990, p. 33, col. 3 (Sur. Ct. Westchester Cty.); *In re Langdon's Will*, 154 Misc. 252 (Sur. Ct. Westchester Cty. 1935).

However, while there is authority for a directed trust to be created under New York common law, these cases fail to address several important issues including: (1) trustee liability for losses resulting from improper investments; (2) whether the trustee will incur a reduced trustee fee based upon a limit to his or her role; and (3) issues concerning the submission of all parties to the jurisdiction of New York courts.

To remove this uncertainty from their planning, settlors have formed trusts in states with directed trust statutes and, as a consequence, New York loses business in legal services, accounting and banking related to trust to more "trust friendly" states.

While most of this lost revenue is anecdotal, a 2005 Report to the Lower Manhattan Development Corporation entitled "In re Trusts: Preserving Jobs and Taxes in New York's Personal Trust Business" was able to somewhat quantify the losses and found that while trust business continued to grow nationwide, New York's trust business has been declining, depriving

New York State of significant tax revenue and jobs. See Murphy, Natalia, Staying Competitive with a Directed Trust Statute: The Proposed Bill for New York, Trusts and Estates Law Section Newsletter, Fall 2010, Vol. 43. No. 3, pg. 27, and LaFerlita, Joseph, Moving Forward: Modernizing and Consolidating N.Y. Trust Law, N.Y.L.J., Jan. 28, 2013, both citing to Appleseed, A Matter of Trusts: Preserving Jobs and Taxes in New York's Personal Trust Business, A Report to the Lower Manhattan Development Corporation, February 2005.

These statements are further supported by a similar review of the impact of trust business on Delaware's economy (a "trust friendly" state). In 2011 Prof. Max Schanzenbach published an article entitled "Evaluating the Impact of Trust Business on Delaware's Economy" which analyzed IRS and FDIC data to determine that "out-of-state trusts have in recent years contributed between \$600 million and \$1.1 billion per year to Delaware's economy, which works out to \$1,700 to \$3,000 per Delaware household." Schanzenbach, Max, Evaluating the Impact of Trust Business on Delaware's Economy (last visited on April 26, 2021). The same article also reported that at least \$300 million per year in fiduciary fees are paid to Delaware institutions as a result of Delaware's non-domestic trust business. Id.

Clearly, it makes fiscal sense to continue to evolve New York's trust law. A directed trust statute would provide settlors with some measure of certainty that their intentions with respect to the administration of their trust will be followed by their fiduciaries, and enforced by the courts. The current uncertainty in New York law arising from a lack of legislation defining how directed trusteeships should function has led settlors to choose states other than New York to establish directed trusts.

The concept of a directed trust is a necessary statutory addition so that New York can stay competitive in the trust field.

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**Moving Forward: Modernizing and Consolidating N.Y. Trust Law**  
**By Joseph T. La Ferlita**

For better or worse, change does not come frequently or consistently to New York's body of trust law. While some trusts and estates practitioners take solace in this fact, it is the source of frustration for many others who find that it too often fails to serve the modern needs of trust settlors, beneficiaries, and trustees.

Practitioners think that New York trust law, which traditionally has been among the most developed and respected in the nation, now all too often frustrates, rather than safeguards, a settlor's intent, often forcing the trustee and beneficiaries to deal with problems, or incur expenses, that otherwise could have been avoided. Aggravating the situation is the fact that much of New York's trust law is found in case law, making it more challenging to locate the governing rule, and sometimes creating ambiguity. These problems affect more than just the persons interested in any particular trust. Rather, they have systemic, state-wide repercussions. The reality is many other states have modernized and consolidated their trust laws, and, in so doing, have lured away from New York a tremendous amount of business directly and indirectly related to the trust industry, depriving New York of significant tax revenue and jobs.<sup>1</sup>

Fortunately, New York now finds itself in the midst of a once-in-a-generation opportunity to systematically review, modernize, and consolidate its trust law. On May 22, 2012, the EPTL-SCPA Legislative Advisory Committee, led by former Surrogate C. Raymond Radigan (Radigan committee), submitted to the legislature its Sixth and Final report recommending the adoption of a modified version of the Uniform Trust Code (UTC).<sup>2</sup> That report contained requests that the legislature disband the Radigan committee after 20 years of dutiful service and that the Trusts and Estates Law Section of the New York State Bar Association (NYSBA) take over its independent legislative review function. It also explained that NYSBA and other organizations would undertake a full, independent review of the Radigan committee's UTC proposal.

Since then, NYSBA, the New York City Bar, and the Advisory Committee of the Office of Court Administration have joined forces to undertake an extensive review of the Radigan committee's UTC proposal in light of current New York law in order to make the appropriate recommendations to the legislature.<sup>3</sup> That process is far from over. At the end of the day, what each of NYSBA, the City Bar, and the OCA recommends to the legislature, and what law is actually enacted, could very well vary from the Radigan committee's proposal.

Nevertheless, as this review process unfolds, practitioners might be left wondering what the future holds for New York trust law. This article attempts to provide at least a glimpse of the direction in which some urge New York needs to move. It does so by focusing on just a few of the provisions of the Radigan committee's proposal, which are presented in no particular order.<sup>4</sup>

**Reform to Correct Mistakes**

Proposed UTC §4155 states:

The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and

the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

If enacted, this proposed rule would usher in a significant change from New York's traditional New York law on reformation, as it authorizes a reformation even in the absence of an ambiguous governing instrument. Traditionally, New York courts have been reluctant to exercise their reformation powers and would do so only to effectuate the creator's intent.<sup>6</sup> The underlying theory is that the best evidence of a creator's intent is found in the unambiguous words of the governing instrument.<sup>7</sup> Thus, courts would reform an unambiguous instrument only if the alleged mistake were evident on the face of the instrument.<sup>8</sup> If the instrument is devoid of ambiguity, courts would refuse to allow the reformation.<sup>9</sup> Extrinsic evidence is inadmissible absent ambiguity, even if it establishes that the facially unambiguous governing instrument contains a mistake.<sup>10</sup>

This traditional rule has been abandoned in many states and, even in New York, has been chipped away at by some courts and practitioners. The modern rule is based on the notion that the existence of clear and unambiguous language is not a bar to reformation.<sup>11</sup> Indeed, some New York courts have reformed unambiguous instruments because of mistakes established only through extrinsic evidence.<sup>12</sup> Other courts have done so only under limited circumstances, such as reforming in order to create a supplemental needs trust<sup>13</sup> or to address changes in the tax laws.<sup>14</sup> The proponents of the modern rule argue that it better equips courts to enforce the creator's intent, the ascertainment of which should not necessarily be limited to the four corners of the governing instrument. According to them, adherence to the ambiguity requirement in the face of clear and convincing extrinsic evidence of a mistake frustrates such intent. The high burden of clear and convincing evidence provides an adequate safeguard to deviations from the grantor's intent.

This more liberal approach was adopted by the Restatement (Third) of Property<sup>15</sup> and formed the basis of UTC §415, that latter of which, in turn, was adopted by the Radigan committee in its entirety. Proposed UTC §415 explicitly authorizes the reformation of an unambiguous trust if there is clear and convincing extrinsic evidence of a mistake.

### **Limitations on Trustee Actions**

Proposed UTC §1004 states:

- (a) A beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.
- (b) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.
- (c) If subsection (a) does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within six 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;
  - (3) the termination of the trust; or

- (4) the open repudiation by the trustee.

Current New York law prescribes a six-year statute of limitations applicable to enforcement of a trustee's obligations.<sup>16</sup> Under New York case law, the statute of limitations period does not begin to run until there is an open repudiation of the trustee's obligations to administer the trust estate that is clearly made known to the beneficiaries.<sup>17</sup>

It is not always obvious what acts trigger the running of the statute, which issue frequently is the subject of litigation. For example, several years ago, the Court of Appeals was called upon to decide when the statute of limitations governing a proceeding to compel the trustee to account commenced where a trustee had resigned and was replaced by a successor. There, the court upheld the reversal of the Surrogate and held that limitations period runs from the date the trusteeship is turned over to a successor.<sup>18</sup>

Some also question New York's rule from a policy perspective. For example, many trustees are surprised to learn that full disclosure to a beneficiary of an act or transaction performed in good faith during the course of the trustee's stewardship does not commence the running of the statute of limitations for a claim of breach of duty regarding such transaction, as it does not constitute an open repudiation of the trustee's obligations.<sup>19</sup> Thus, many practitioners think that the rule can discourage voluntary disclosure.

The Radigan committee's proposal attempts to address these problems. First, it sets forth a detailed list of events that trigger the running of the limitations period. Second, it promotes voluntary disclosure by trustees by reducing the limitations period from six years to one year if certain requirements are met. In order to benefit from the reduced limitations period, the trustee must (1) disclose enough information so that a beneficiary either has knowledge of a potential claim for breach of duty or a reasonable basis to inquire into whether such a breach occurred, and (2) advise the beneficiary of the time period during which a proceeding must be commenced.<sup>20</sup> The thought is that even beneficiaries will benefit from this rule, as it will increase their knowledge of how a given trust is being administered and allow them to act before evidence gets stale and parties can no longer be found.

### **Trust Combination, Division**

UTC §417 states:

- (a) After notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trust.
- (b) Unless the terms of the trust provide otherwise, the commissions allowed to a trustee as determined under article twenty-three of the surrogate's court procedure act, as amended from time to time, shall not be increased by reason of the establishment of separate trusts pursuant to this section unless the court otherwise permits an increase, provided, however, that such trustee shall be entitled to charge the trust for any additional reasonable and necessary expenses incurred in the administration of such separate trusts.



In connection with this proposed statute, the Radigan committee's proposal recommended the repeal of EPTL 7-1.13, the latter of which codifies New York's current law on trust.

EPTL 7-1.13 contains an elaborate set of rules that determine a trustee's ability to divide a trust that vary according to different circumstances. The sum and substance of those rules are that (1) a trustee may divide a trust without court approval and the consent of those interested in the trust if the division is made for certain specified tax purposes (e.g., dividing a trust into two resulting trusts, one of which is exempt from GST tax, and the other of which is fully subject to GST tax),<sup>21</sup> (2) a trustee may divide a trust without court approval "for any reason not directly contrary to the primary purpose of the trust,"<sup>22</sup> and (3) the court, upon application by the trustee or any person interested in the trust, may order the division of the trust for any reason not contrary to the primary purpose of the trust.<sup>23</sup> The current statute also contains detailed provisions regarding administrative aspects of trust division.<sup>24</sup> Notable among such administrative rules is the requirement that each trust resulting from a division contain the same terms as the original, undivided trust.<sup>25</sup>

Some practitioners consider EPTL 7-1.13 to be too rigid because it allows trustees to divide trusts without court approval and beneficiary consent only in very limited, tax-related circumstances, and because it generally requires the resulting divided trusts to contain the same terms. Section 417 of the UTC would liberalize the current rule by allowing a trustee to divide a trust for any reason, including a non-tax reason, provided that the division does not adversely affect any of the beneficiaries or the achievement of the trust's primary purposes.<sup>26</sup> Also, the Radigan committee's commentary on §417 explicitly states that the dispositive terms of the divided trusts do not have to be identical. Thus, the divided trusts can be tailored to address the particular needs of different beneficiaries.

Section 417 of the UTC does more than liberalize trust division rules; it also authorizes trustees to combine trusts with different provisions. The Radigan committee's commentary states that, often, "the trusts to be combined will have been created by different members of the same family and will vary on only insignificant details.... Combining trusts may prompt more efficient trust administration and is sometimes an alternative to terminating an uneconomic trust as authorized by Section 414."<sup>27</sup>

### **Uneconomic Trusts**

UTC §414 states

- (a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value less than \$100,000 may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.
- (b) The court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.
- (c) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.
- (d) This section does not apply to an easement for conservation or preservation.

New York currently has a statute, EPTL 7-1.19, that deals with terminating uneconomical trusts. It permits the Surrogate's Court, upon a trustee's or beneficiary's application, to terminate a lifetime or testamentary trust (other than a wholly charitable trust and a supplemental needs trust) when the expense of administering it is uneconomical. The court's authority is predicated on findings that continuation of the trust is economically impracticable, that the trust's terms do not prohibit its early termination, and that such termination would not defeat the trust's specified purpose and would be in the beneficiaries' best interests. If it so finds, the court may direct distribution of the trust assets to and among those beneficiaries who at the time are entitled (or entitled in the discretion of the trustee) to the income and/or principal of the trust and those beneficiaries who would be entitled (or entitled in the discretion of the trustee) to the income and/or principal of the trust if it were to terminate immediately before such order or decree. The distribution of the trust assets are to be made in such manner, proportions, and shares as in the judgment of the court will effectuate the intention of the creator. The court is without power to terminate if doing so would reduce or eliminate a charitable deduction otherwise available to any person under the income tax, gift tax, estate tax or generation-skipping transfer tax regimes. Some practitioners consider EPTL 7-1.19 fundamentally flawed because it requires a court proceeding. Their reasoning is that trusts with relatively little assets, which presumably are the trusts that need to rely on the statute, are the very trusts that could least afford the expense of a court proceeding.

Proposed UTC §414 addresses this concern by eliminating the requirement for a court proceeding. It does so by instituting a bright line test: if the value of the trust's assets is less than \$100,000, the trustee may terminate the trust if he concludes that the costs of administration are uneconomical. The trustee is authorized to distribute the assets of the terminated trust in a manner consistent with the purposes of the trust. In order to safeguard the beneficiaries' interests, the trustee must notify the trust's beneficiaries prior to terminating the trust.

To the extent that some form of this statute is adopted, it will be interesting to see whether the \$100,000 threshold is utilized. The "actual" UTC uses a \$50,000 threshold, which the Radigan committee concluded was too low for New York. Regardless of the amount that ultimately be decided upon, the point is that the expense of delays often incident to a court proceeding may be avoided.

## **Conclusion**

New York's body of trust law traditionally has been among the most developed and well-respected in the nation. However, many argue that some portions of it now need to be modernized, clarified, and consolidated. The Radigan committee's proposal that New York adopt a modified version of the UTC has provided the spark that New York needed to consider these issues in a comprehensive, systematic manner.

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## **Endnotes:**

1. See, e.g., Appleseed, *A Matter of Trusts: Preserving Jobs and Taxes in New York's Personal Trust Business*, a Report to the Lower Manhattan Development Corporation, February 2005.
2. It should be noted that most of the Radigan committee's proposal merely codifies and consolidates current New York trust law. While there are some key changes from current New York law, the proposal does not constitute a wholesale abandonment current New York law.
3. For the sake of full disclosure, the author of this article is an active member of the NYSBA committee currently reviewing the Radigan committee's proposal.
4. Clearly, this selection is in no way exhaustive. For example, a noteworthy provision of the Radigan committee's proposal that would constitute a change from current New York law, the so-called "Quiet Trust" provision, is not discussed here, but was discussed in a previously-published article. See Jonathan J. Rikoon and Louise Ding, "Quiet Trusts and Great Expectations," *NYLJ*, Sept. 17, 2012. Another significant provision not discussed here is the directed trustee section (Powers to Direct, UTC §808), which adopts a bill drafted by NYSBA currently pending in the legislature, subject to certain recommendations of the Radigan committee.
5. All UTC references are to the Radigan committee's proposed version of the UTC, the numbering of which sometimes differs from the original UTC.
6. , 14 Misc.3d 1232A, 836 N.Y.S.2d 493 (Sur. Ct. Nassau County 2007).
7. *In re Estate of Stahle*, *NYLJ*, Jan. 23, 2001, at 32.
8. *In re Patrick*, *NYLJ*, July 9, 2001, at 28, col. 3 (Sur. Ct. Onondaga County 2001).
9. *In re Estate of Stahle*, *NYLJ*, Jan. 23, 2001, at 32.
10. See Decision by Surrogate John Czygier (case name not given), *NYLJ*, Dec. 26, 2007, at 39, col. 4 (Sur. Ct. Suffolk County).
11. *In re Estate of Longhine*, 15 Misc. 3d 1106A, 836 N.Y.S.2d 500 (Sur. Ct. Wyoming County 2007); see also Restatement (Third) of Property (Wills & Don. Trans.) §12.1 (2003); Ordovery & Gibbs, "Correcting Mistakes in Wills and Trusts," *NYLJ*, Aug. 6, 1998, at 3, col. 1.
12. *Id.*
13. See *In re Estate of Hyman*, 14 Misc.3d 1232(A) (Sur. Ct. Nassau County 2007).
14. See *In re Matter of Choate*, 141 Misc.2d 489, 533 N.Y.S.2d 272 (Sur. Ct. New York County 1988) (allowing reformation for tax reasons).
15. Restatement (Third) of Property (Wills & Don. Trans.) §12.1 (2003).
16. *CPLR 213(1)*, which applies a six-year limitations period to "an action for which no limitation is specifically prescribed by law."
17. *In re Barabash*, 31 N.Y.2d 76 (1972); see *In re Meyer*, 303 A.D.2d 682 (2d Dept. 2003).
18. *Matter of Tydings*, 11 N.Y.3d 195 (2008).
19. , 58 A.D.3d 958 (3d Dept. 2009). However, if the beneficiary with full knowledge of the transaction ratifies same, he may be estopped from later objecting to it. A beneficiary's mere silence does not constitute consent (, 48 A.D.3d 559 (2d Dept. 2008)).
20. See UTC §1004(a).
21. EPTL 7-1-13(a)(1).
22. EPTL 7-1-13(a)(2).
23. EPTL 7-1.13(a)(3).
24. See EPTL 7-1.13(b)-(k).
25. EPTL 7-1.13(c), which provides certain exceptions to this rule.
26. UTC §417(a).
27. Commentary of the Radigan committee on UTC §417. UTC §414 is discussed *infra*.

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