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**THE MOST DISCUSSED ISSUES UNDER THE
UNIFORM TRUST CODE**

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The Uniform Trust Code (“UTC”) is the first effort by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) to provide the states with a comprehensive model for codifying their law on trusts. Completed in 2000, the Uniform Trust Code has since been enacted in nineteen states and the District of Columbia. The twenty jurisdictions are listed on Appendix 1.

Uniformity vs. Change

NCCUSL was formed in the 1890s when the prevailing view was that law could be systematically studied and uniform principles discovered. Hence the emphasis on “uniform” in its title. While the Commissioners’ ideal is still uniform enactment, the Commissioners have long recognized that a uniform act will rarely be enacted without at least some change. Following are some of the factors that will determine the extent to which a uniform act will achieve truly uniform enactment:

1. *Familiarity Breeds Respect.* No matter how much a state’s particular legal rule may differ from that of its neighbor, there is a strong preference for the known over the new. The result is often resistance to the enactment of a particular uniform law in general and, if enacted, a tendency to modify it to carryover existing legal rules on certain key points;
2. *The Narrower the Better.* The narrower the topic the better the prospects for uniform enactment;
3. *Consensus for Change.* The greater the consensus for change, the more likely a uniform law will be enacted. The greater the consensus on the direction the change should take, the more likely it is that the Act will be enacted with little modification;
4. *The Less Ingrained the Prior Law the Better.* If the uniform law touches on topics deeply ingrained in the local legal culture, the less likely it is that the change will be accepted by the particular state;
5. *If the Commissioners Couldn’t Agree, Why Will the States.* While most uniform acts are drafted by consensus, issues do arise on which there are disagreements that are resolved by majority vote. When these same issues reach the states, the votes will often go the other way;
6. *If the Act Hasn’t Been Completed Yet, Why Should We Read the Drafts.* Vital to the success of any uniform act is input from interested groups. Obtaining such input is often difficult. More often than it should occur, constituent groups will review the act for the first time only after it has been approved and even enacted in several states. This can then result in

considerable variation as states respond to new issues raised in non-uniform ways.

7. *Remember That Political Contributions Aren't Made Without Expectations.* State legislators hate controversy, particularly on topics in which they have little interest, which includes the subject matter of almost all uniform acts. Given this apathy, lobbying groups usually can easily kill bills or force changes on key issues.

8. *New Issues Arise After Approval.* If new issues arise after a uniform act has been approved by the Commissioners, a decision must be made as to whether the uniform act should be amended. But getting states to enact amendments to uniform laws is often more difficult than obtaining an original enactment, particularly if the amendment does not concern a vital issue. On the other hand, if the Commissioners fail to amend the uniform act, many states will proceed to amend their version of the uniform law in any event, almost always in nonuniform ways.

Given this gauntlet of challenges to uniformity, it is not surprising that all of the jurisdictions enacting the UTC have made a variety of modifications. Despite the variations, the UTC states have on average adopted over 80% of the UTC provisions without significant changes.

Certain provisions of the UTC have done quite well. Among the success stories are the provisions on:

- _ representation (Article 3);
- _ trust creation (Sections 401-409);
- _ the authority of the court to modify or terminate a trust (Sections 412-417);
- _ the duties and powers of the trustee (Article 8);
- _ trustee liability and relationships with third parties (Article 10).

The result for certain other UTC provisions is more mixed, enacted without change in most states but with significant modifications in others. An example is Section 108 on principal place of administration.¹

But four of the provisions of the UTC have received much more discussion than the others, which has led to considerable variation among the state enactments, and, for two of the issues, subsequent amendment of the UTC itself. The four most discussed topics are:

- _ the power of the settlor to consent to the beneficiaries' request to terminate an irrevocable trust (Section 411(a));
- _ spendthrift provisions and the rights of a beneficiary's creditors to reach the beneficiary's interest (Article 5);
- _ the power of the court to remove the trustee (Section 706);
- _ the duty to keep the beneficiaries informed of administration and the ability of the

¹ See David M. English, *Transferring the Principal Place of Administration Under the Uniform Trust Code*, Fall 2006 ACTEC Symposium Materials.

settlor to waive such requirements (Sections 105, 813).

Discussed below are the portions of these provisions which have received the most attention. Those looking for a more complete summary of the cited UTC sections will find that elsewhere.²

Settlor Consent to Trust Termination and Modification (Sections 411(a))

Section 411(a) follows traditional doctrine in allowing for termination or modification of an irrevocable trust by unanimous agreement of the settlor and beneficiaries. Unlike termination or modification by the beneficiaries alone under Section 411(b), termination or modification with the concurrence of the settlor does not require a finding that the trust or the provision to be modified no longer serve a material purpose. No finding of failure of material purpose is required because all parties with a possible interest in the trust's continuation, both the settlor and beneficiaries, agree there is no further need for the trust. Although other aspects of Section 411 received widespread comment during the drafting process, no comments were received concerning the settlor's veto power under Section 411(a).

All remained quiet until early 2004 when the listservs began buzzing with a concern that Section 411(a) created an estate tax problem, in particular a concern that the power of the settlor to veto a beneficiary request was a retained power under Section 2036 of the Internal Revenue Code. The buzz reached its height at the 2004 ACTEC Annual Meeting. Concerned that the controversy could derail further enactment of the UTC, the Commissioners requested that the ACTEC Estate and Gift Tax Committee determine whether there was in fact an estate tax issue, and if so, to suggest a solution. The ACTEC Estate and Gift Tax Committee discussed the Section 411(a) issue at its Summer 2004 meeting and a variety of not necessarily consistent views were expressed. The most prevalent view, however, was that a state, in enacting the UTC, should not change its prior law concerning the settlor's authority to consent to a trust termination or modification, particularly with respect to already existing trusts. This, of course, raised the issue as to exactly what the state's prior existing law was on this topic, on which the biggest difference among the states appeared to be whether a court was required to bless the beneficiaries' and settlor's decision.

To resolve the controversy, the Commissioners agreed to accept the recommendations of the ACTEC Estate and Gift Tax Committee. Based on this ACTEC input, the decision was made to amend Section 411(a) to add an option to make the subsection prospective only and an option requiring court approval of the settlor and beneficiaries' decision. The amendment appears to have worked. Following the amendment, the controversy over Section 411(a) abated.

Currently, the UTC jurisdictions are about evenly split between states enacting Section

² See David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 Mo. L. Rev. 143 (2002).

411(a) in its original form and states adding the requirement that the settlor and beneficiaries' decision be approved by the court. Requiring court approval are Alabama, Maine, Nebraska, New Hampshire, Ohio, South Carolina, Virginia and Wyoming. Florida avoided the issue altogether by carrying over its prior trust termination statute. The other states enacted Section 411(a) as originally drafted.

Section 411, as amended, is attached as Exhibit 2.

Spendthrift Provisions and Rights of Beneficiary's Creditors (Article 5)

Spendthrift provisions are not recognized in England, where trust law originated, but are an American invention. Perhaps because of this lack of a common base, there is great diversity in the law of the states on almost every spendthrift and creditor rights issue other than the simple statement that a state recognizes spendthrift protection. Case law and practice on the issue of creditor rights also is deeply ingrained in many states. Given the ingrained nature of prior law, it is not surprising that portions of Article 5 have been significantly modified in many states. The tendency in a great number of UTC states has been to carry over the particular state's prior law on spendthrift and creditor rights while using the organizational scheme of the UTC as a framework.

There has been a vigorous attack on Article 5 of the UTC spearheaded by Denver attorney Marc Merric, who has published largely duplicative articles in a variety of publications.³ There have also been numerous articles generally approving of Article 5 of the UTC.⁴ Although the critics wished to stop enactment of the UTC in its tracks, this has not occurred. In the final analysis, the intense scrutiny of the UTC has been helpful. Several sections of Article 5 have been revised primarily for purposes of clarity but also to address important substantive issues such as to create a safe harbor for trusts in which a beneficiary is also a trustee.⁵ But in the wider scheme of things, the debate over Article 5 is minor compared to the tendency of the enacting jurisdictions to simply carryforward their prior law.

³ See, e.g., Marc Merric & Steven J. Oshins, *How Will Asset Protection of Spendthrift Provisions be Affected by UTC*, 31 Est. Plan. 478 (2004); Marc Merric & Steven J. Oshins, *UTC May Reduce the Asset Protection of Non-Self Settled Trusts*, 31 Est. Plan. 411 (2004); Marc Merric & Steven J. Oshins, *Effect of the UTC on the Asset Protection of Spendthrift Trusts*, 31 Est. Plan. 375 (2004).

⁴ See John K. Eason, *Policy, Logic, and Persuasion in the Evolving Realm of Trust Asset Protection*, 27 Cardozo L. Rev. 2621 (2006); Robert T. Danforth, *Article Five of the UTC and the Future of Creditor's Rights in Trusts*, 17 Cardozo L. Rev. 2551 (2006); Alan Newman, *Spendthrift and Discretionary Trusts Alive and Well Under the Uniform Trust Code*, 40 Real Prop. Prob. & Tr. J. 567 (2005); Suzanne Brown Walsh, et al., *What is the Status of Creditors Under the Uniform Trust Code*, 32 Est. Plan. 29 (2005).

⁵ See UTC §504.

*Trustee Removal (Section 706)*⁶

Trustees in many states may be removed only for breach of trust or other untoward act. This standard gives great weight to the settlor's particular selection of trustee. Because trust instruments typically place weight on a trustee's judgment and exercise of discretion, the particular trustee selected becomes an important term of the trust, a term that should not easily be changed.⁷ The UTC follows traditional doctrine by authorizing a trustee to be removed for acts of misconduct or other disqualification.⁸ Acts of misconduct or other disqualification justifying removal of the trustee include serious breach of trust,⁹ unfitness, and unwillingness or persistent failure to perform the function effectively.¹⁰ A trustee also may be removed if lack of cooperation substantially impairs the trust's administration.¹¹ Removal for serious breach of trust or lack of cooperation among the cotrustees requires no additional findings. Removal for unfitness, unwillingness, or persistent failure to administer the trust effectively requires that the court also find that removal would best serve the interests of the beneficiaries.¹² "Interests of the beneficiaries," a defined term, means the beneficial interests provided in the terms of the trust.¹³

But the drafters of the UTC also concluded that in situations where the personal link between the settlor and trustee has been broken, the emphasis should turn to whether the particular trustee is appropriate to the trust, not whether the trustee has committed particular acts of misconduct or is totally unfit. Consequently, in deciding whether to remove the trustee, the court may consider whether there has been a substantial change of circumstances¹⁴ or if removal is unanimously requested by the qualified beneficiaries.¹⁵ Nonetheless, in neither case may the court remove the trustee unless it also concludes that the selection of the particular trustee was

⁶ For an analysis of this provision from a contractual perspective, see Ronald Chester & Sarah Reid Ziomek, *Removal of Corporate Trustees Under the Uniform Trust Code and Other Current Law: Does a Contractual Lense Help Clarify the Rights of Beneficiaries?*, 67 Mo. L. Rev. 243 (2002).

⁷ It traditionally has been more difficult to remove a trustee named by the settlor than a trustee named by the court, particularly if the settlor at the time of the appointment was aware of the trustee's failings. See Restatement (Third) of Trusts § 37 cmt. f (Tentative Draft No. 2, 1999); Restatement (Second) of Trusts § 107 cmts. f-g (1959).

⁸ UTC § 706(b)(1)-(4).

⁹ UTC § 706(b)(1).

¹⁰ UTC § 706(b)(3).

¹¹ UTC § 706(b)(2).

¹² UTC § 706(b)(3).

¹³ UTC § 103(7).

¹⁴ UTC § 706(b)(4). Changed circumstances justifying removal of a trustee might include a substantial change in the character of the service or location of the trustee. A corporate reorganization of an institutional trustee is not itself a change of circumstances if it does not affect the service provided the individual trust account. See UTC § 706 cmt.

¹⁵ UTC § 706(b)(4).

not a material purpose of the trust, that removal of the trustee would best serve the interests of the beneficiaries, and that a suitable cotrustee or successor trustee is available.¹⁶

The UTC jurisdictions have enacted the traditional grounds for trustee removal largely without significant change. More controversial have been the newer grounds for removing a trustee; substantial change of circumstances or request of the qualified beneficiaries. But despite intense discussion in most states, the newer grounds have done well. Fourteen of the nineteen UTC jurisdictions enacted Section 706 largely without change. Kansas, Missouri, North Carolina, and Pennsylvania deleted a request by the qualified beneficiaries as a basis for removal. Missouri also substituted substantial and material reduction of services for substantial change of circumstances. Only Ohio totally deleted both of the newer grounds.

Section 706 of the UTC is attached as Exhibit 3.

Duty to Keep the Beneficiaries Informed (Sections 105, 813)

By far the most controversial provisions of the UTC are the provisions relating to keeping the beneficiaries informed, particularly the extent to which a settlor may waive the duty that would otherwise apply. Similar to the provisions in Article 5 on creditor rights, the controversy could be predicted in advance. The drafting committee and advisors were not in total agreement. Also, the area of law was undeveloped. Case law was sparse, and there was little in the way of legal commentary.¹⁷ There was a great variety of opinions concerning the trustee's obligation and appropriate trust practice.

Typical of much of legislative drafting and of life generally, the provisions on beneficiary information a compromise among competing views. Other provisions of the UTC such as Section 706 on trustee removal were also compromises. But Section 706 was a success, enacted by a majority of the UTC jurisdictions without significant change. Section 813, which describes the trustee's default obligation to keep the beneficiaries informed, has also been enacted by most states without significant change. The problem provision has been Section 105, not in its entirety, but subsections (b)(8) and (b)(9), which prescribe limits on the ability of the settlor to waive the information requirements specified in Section 813. There is simply no consensus on the issue of waiver. Concluding that the effort to reach consensus was ineffective and that Section 105(b)(8) and (b)(9) in its then form was seriously impeding enactment, the Commissioners in 2004 abandoned the quest for consensus and placed subsections (b)(8) and (b)(9) in brackets, thereby making their enactment optional.

¹⁶UTC § 706(b)(4).

¹⁷This gap is starting to be filled. See Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 Ariz. St. L.J. 713 (2006); Kevin D. Millard, *The Trustee's Duty to Inform and Report Under the Uniform Trust Code*, 40 Real Prop. Prob. & Tr. J. 373 (2005).

Perhaps a new consensus will emerge in time. But for now, the states are all over the map on the issue of waiver although several trends are emerging. The first is to enact Section 105(b)(8) and (b)(9) in its original form or with minor tweaks.¹⁸ The second is to retain (b)(8) and (b)(9) but to then add language providing that a settlor may designate a surrogate to receive notice or request information on behalf of a beneficiary.¹⁹ A third is to allow a settlor to totally waive notice but not the obligation to respond to a beneficiary's request for information.²⁰ A fourth, which has gained the adherence of half of the UTC states, is to delete both (b)(8) and (b)(9), thereby presumably allowing a settlor to dispense with all information reporting to beneficiaries, whether mandatory or in response to a beneficiary request.²¹

Sections 105 of the UTC, as amended, is attached as Exhibit 4.

¹⁸ Florida, Maine, Nebraska, New Mexico.

¹⁹ District of Columbia, Missouri, Ohio, Oregon.

²⁰ Alabama.

²¹ Arkansas, Kansas, New Hampshire, North Carolina, North Dakota, South Carolina, Tennessee, Utah, Virginia, Wyoming.

APPENDIX 1

JURISDICTIONS ENACTING UNIFORM TRUST CODE

Alabama	Ala. Code §19-3B-101 et seq., effective Jan. 1, 2007
Arkansas	Ark. Code Ann. §28-73-101 et seq., effective Sept. 1, 2005
District of Columbia	D.C. Code §19-1301.01 et seq., effective Mar. 10, 2004
Florida	Fla. Stat. Ann. §736.0101 et seq., effective July 1, 2007
Kansas	Kan. Stat. Ann. §58a-101 et seq., effective Jan. 1, 2003
Maine	Me. Rev. Stat. Ann. tit. 18B, §101 et seq., effective July 1, 2005
Missouri	Mo. Rev. Stat. §456:1-101 et seq., effective Jan. 1, 2005
Nebraska	Neb. Stat. §30-3801 et seq., effective Jan. 1, 2005
New Hampshire	N. H. Stat. ch. 564B:1-101 et seq., effective Oct. 1, 2004
New Mexico	N. M. Stat. §46A-1-101 et seq., effective July 1, 2003
North Carolina	N.C.G.S. §36C-1-101 et seq., effective Jan. 1, 2006
North Dakota	N.D. Cent. Code ch. 59-09 et seq., effective Aug. 1, 2007
Ohio	Ohio Rev. Code §5801.01 et seq., effective Jan. 1, 2007
Oregon	Or. Rev. Stat. §130.001 et seq., effective Jan. 1, 2006
Pennsylvania	Pa. Cons. Stat. tit. 20, §7701 et seq., effective Nov. 4, 2006
South Carolina	S.C. Code §62-7-101 et seq., effective Jan. 1, 2006
Tennessee	Tenn. Code Ann. tit. 35, §2 et. seq., effective July 1, 2004
Utah	Utah Code Ann. §75-7-101 et seq., effective July 1, 2004
Virginia	Va. Code Ann. §55-541.01 et seq., effective July 1, 2006
Wyoming	Wyo. Stat. §4-10-101 et seq., effective July 1, 2003

APPENDIX 2

UTC SECTION 411(a)

SECTION 411. MODIFICATION OR TERMINATION OF NONCHARITABLE IRREVOCABLE TRUST BY CONSENT.

[(a) [A noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust.] [If, upon petition, the court finds that the settlor and all beneficiaries consent to the modification or termination of a noncharitable irrevocable trust, the court shall approve the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust.] A settlor's power to consent to a trust's modification or termination may be exercised by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust; by the settlor's [conservator] with the approval of the court supervising the [conservatorship] if an agent is not so authorized; or by the settlor's [guardian] with the approval of the court supervising the [guardianship] if an agent is not so authorized and a conservator has not been appointed. [This subsection does not apply to irrevocable trusts created before or to revocable trusts that become irrevocable before [the effective date of this [Code] [amendment].]]

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

[(c) A spendthrift provision in the terms of the trust is not presumed to constitute a material purpose of the trust.]

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

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

- (1) if all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and
- (2) the interests of a beneficiary who does not consent will be adequately protected.

Comment

This section describes the circumstances in which termination or modification of a noncharitable irrevocable trust may be compelled by the beneficiaries, with or without the concurrence of the settlor. For provisions governing modification or termination of trusts without the need to seek beneficiary consent, see Sections 412 (modification or termination due to unanticipated circumstances or inability to administer trust effectively), 414 (termination or modification of uneconomic noncharitable trust), and 416 (modification to achieve settlor's tax objectives). If the trust is revocable by the settlor, the method of revocation specified in Section 602 applies.

Subsection (a), which was placed in brackets pursuant to a 2004 amendment, states the test for termination or modification by the beneficiaries with the concurrence of the settlor. For an explanation of why subsection (a) has been placed in brackets, see the 2004 comment at the end of this section.

Subsection (b) states the test for termination or modification by unanimous consent of the beneficiaries without the concurrence of the settlor. The rules on trust termination in Subsections (a)-(b) carries forward the *Clafin* rule, first stated in the famous case of *Clafin v. Clafin*, 20 N.E. 454 (Mass. 1889). Subsection (c) addresses the effect of a spendthrift provision. Subsection (d) directs how the trust property is to be distributed following a termination under either subsection (a) or (b). Subsection (e) creates a procedure for judicial approval of a proposed termination or modification when the consent of less than all of the beneficiaries is available.

Under this section, a trust may be modified or terminated over a trustee's objection. However, pursuant to Section 410, the trustee has standing to object to a proposed termination or modification.

The settlor's right to join the beneficiaries in terminating or modifying a trust under this section does not rise to the level of a taxable power. *See* Treas. Reg. Section 20.2038-1(a)(2). No gift tax consequences result from a termination as long as the beneficiaries agree to distribute the trust property in accordance with the value of their proportionate interests.

The provisions of Article 3 on representation, virtual representation and the appointment and approval of representatives appointed by the court apply to the determination of whether all beneficiaries have signified consent under this section. The authority to consent on behalf of another person, however, does not include authority to consent over the other person's objection. *See* Section 301(b). Regarding the persons who may consent on behalf of a beneficiary, see Sections 302 through 305. A consent given by a representative is invalid to the extent there is a conflict of interest between the representative and the person represented. Given this limitation, virtual representation of a beneficiary's interest by another beneficiary pursuant to Section 304 will rarely be available in a trust termination case, although it should be routinely available in cases involving trust modification, such as a grant to the trustee of additional powers. If virtual or

other form of representation is unavailable, Section 305 of the Code permits the court to appoint a representative who may give the necessary consent to the proposed modification or termination on behalf of the minor, incapacitated, unborn, or unascertained beneficiary. The ability to use virtual and other forms of representation to consent on a beneficiary's behalf to a trust termination or modification has not traditionally been part of the law, although there are some notable exceptions. *Compare* Restatement (Second) Section 337(1) (1959) (beneficiary must not be under incapacity), *with Hatch v. Riggs National Bank*, 361 F.2d 559 (D.C. Cir. 1966) (guardian ad litem authorized to consent on beneficiary's behalf).

Subsection (a) also addresses the authority of an agent, conservator, or guardian to act on a settlor's behalf. Consistent with Section 602 on revocation or modification of a revocable trust, the section assumes that a settlor, in granting an agent general authority, did not intend for the agent to have authority to consent to the termination or modification of a trust, authority that could be exercised to radically alter the settlor's estate plan. In order for an agent to validly consent to a termination or modification of the settlor's revocable trust, such authority must be expressly conveyed either in the power or in the terms of the trust.

Subsection (a), however, does not impose restrictions on consent by a conservator or guardian, other than prohibiting such action if the settlor is represented by an agent. The section instead leaves the issue of a conservator's or guardian's authority to local law. Many conservatorship statutes recognize that termination or modification of the settlor's trust is a sufficiently important transaction that a conservator should first obtain the approval of the court supervising the conservatorship. *See, e.g.*, Unif. Probate Code Section 5-411(a)(4). Because the Uniform Trust Code uses the term "conservator" to refer to the person appointed by the court to manage an individual's property (*see* Section 103(5)), a guardian may act on behalf of a settlor under this section only if a conservator has not been appointed.

Subsection (a) is similar to Restatement (Third) of Trusts Section 65(2) (Tentative Draft No. 3, approved 2001), and Restatement (Second) of Trusts Section 338(2) (1959), both of which permit termination upon joint action of the settlor and beneficiaries. Unlike termination by the beneficiaries alone under subsection (b), termination with the concurrence of the settlor does not require a finding that the trust no longer serves a material purpose. No finding of failure of material purpose is required because all parties with a possible interest in the trust's continuation, both the settlor and beneficiaries, agree there is no further need for the trust. Restatement Third goes further than subsection (b) of this section and Restatement Second, however, in also allowing the beneficiaries to compel termination of a trust that still serves a material purpose if the reasons for termination outweigh the continuing material purpose.

Subsection (b), similar to Restatement Third but not Restatement Second, allows modification by beneficiary action. The beneficiaries may modify any term of the trust if the modification is not inconsistent with a material purpose of the trust. Restatement Third, though, goes further than this Code in also allowing the beneficiaries to use trust modification as a basis for removing the trustee if removal would not be inconsistent with a material purpose of the

trust. Under the Code, however, Section 706 is the exclusive provision on removal of trustees. Section 706(b)(4) recognizes that a request for removal upon unanimous agreement of the qualified beneficiaries is a factor for the court to consider, but before removing the trustee the court must also find that such action best serves the interests of all the beneficiaries, that removal is not inconsistent with a material purpose of the trust, and that a suitable cotrustee or successor trustee is available. *Compare* Section 706(b)(4), *with* Restatement (Third) Section 65 cmt. f (Tentative Draft No. 3, approved 2001).

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

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

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

Subsection (c) of this section deals with the effect of a spendthrift provision on the right of a beneficiary to concur in a trust termination or modification. By a 2004 amendment, subsection (c) has been placed in brackets and thereby made optional. Spendthrift terms have sometimes been construed to constitute a material purpose without inquiry into the intention of the particular settlor. For examples, see Restatement (Second) of Trusts Section 337 (1959); George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* Section 1008 (Rev. 2d ed. 1983); and 4 Austin W. Scott & William F. Fratcher, *The Law of Trusts* Section 337 (4th ed. 1989). This result is troublesome because spendthrift provisions are often added to instruments with little thought. Subsection (c), similar to Restatement (Third) of Trusts Section 65 cmt. e (Tentative Draft No. 3, approved 2001), does not negate the possibility that continuation of a trust to assure spendthrift protection might have been a material purpose of the particular settlor. The question of whether that was the intent of a particular settlor is instead a matter of fact to be determined on the totality of the circumstances.

Subsection (d) recognizes that the beneficiaries' power to compel termination of the trust includes the right to direct how the trust property is to be distributed. While subsection (a) requires the settlor's consent to terminate an irrevocable trust, the settlor does not control the subsequent distribution of the trust property. Once termination has been approved, how the trust property is to be distributed is solely for the beneficiaries to decide.

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

2003 Amendment. The amendment, which adds the language “modification or” to subsection (a), fixes an inadvertent omission. It was the intent of the drafting committee that an agent with authority or a conservator or guardian with the approval of the court be able to participate not only in a decision to terminate a trust but also in a decision to modify it.

2004 Amendments.

Section 411(a), Section 301(d), and Conforming Changes to Sections 301(c) and 410(b).

Section 411(a) was amended in 2004 on the recommendation of the Estate and Gift Taxation Committee of the American College of Trust and Estate Counsel (ACTEC). Enacting jurisdictions now have several options all of which are indicated by brackets:

- delete subsection (a), meaning that the state’s prior law would control on this issue.
- require court approval of the modification or termination.
- make the provision prospective and applicable only to irrevocable trusts created on or after the effective date or to revocable trusts that become irrevocable on or after the effective date of the provision.
- enact subsection (a) in its original form.

Section 411(a), as originally drafted did not require that a court approve a joint decision of the settlor and beneficiaries to terminate or modify an irrevocable trust. The ACTEC Committee was concerned that:

- Section 411(a), without amendment, could potentially result in the taxation for federal estate tax purposes of irrevocable trusts created in states which previously required that a court approve a settlor/beneficiary termination or modification; and
- Because of the ability of a settlor under Section 301 to represent and bind a

beneficiary with respect to a termination or modification of an irrevocable trust, Section 411(a) might result in inclusion of the trust in the settlor's gross estate. New Section 301(d) eliminates the possibility of such representation.

The Drafting Committee recommends that all jurisdictions enact the amendment to Section 301(d). The Drafting Committee recommends that jurisdictions conform Section 411(a) to prior law on whether or not court approval is necessary for the settlor and beneficiaries to jointly terminate or modify an irrevocable trust. If prior law is in doubt, the enacting jurisdiction may wish to make Section 411(a) prospective only. The enacting jurisdiction may also elect to delete Section 411(a).

States electing to delete Section 411(a) should also delete the cross-references to Section 411 found in Sections 301(c) and 410(b). These cross-references have therefore been placed in brackets. States electing to delete Section 411(a) should also not enact Section 301(d), which for this reason has similarly been placed in brackets.

Section 411(c)

Section 411(c), which by the 2004 amendment was placed in brackets and therefore made optional, provides that a spendthrift provision is not presumed to constitute a material purpose of the trust. Several states that have enacted the Code have not agreed with the provision and have either deleted it or have reversed the presumption. Given these developments, the Drafting Committee concluded that uniformity could not be achieved. The Joint Editorial Board for Uniform Trusts and Estates Acts, however, is of the view that the better approach is to enact subsection (c) in its original form for the reasons stated in the comment to this Section.

APPENDIX 3

UTC SECTION 706

SECTION 706. REMOVAL OF TRUSTEE.

(a) The settlor, a cotrustee, 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 cotrustees substantially impairs the administration of the trust;
- (3) because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or
- (4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

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

Comment

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

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

Subsection (b) lists the grounds for removal of the trustee. The grounds for removal are

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

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

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

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

Subsection (b)(3) authorizes removal for a variety of grounds, including unfitness, unwillingness, or persistent failure to administer the trust effectively. Removal in any of these cases is allowed only if it best serves the interests of the beneficiaries. For the definition of “interests of the beneficiaries,” see Section 103(8). “Unfitness” may include not only mental incapacity but also lack of basic ability to administer the trust. Before removing a trustee for unfitness the court should consider the extent to which the problem might be cured by a delegation of functions the trustee is personally incapable of performing. “Unwillingness”

includes not only cases where the trustee refuses to act but also a pattern of indifference to some or all of the beneficiaries. *See* Restatement (Third) of Trusts Section 37 cmt. e (Tentative Draft No. 2, approved 1999). A “persistent failure to administer the trust effectively” might include a long-term pattern of mediocre performance, such as consistently poor investment results when compared to comparable trusts.

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

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

Subsection (c) authorizes the court to intervene pending a final decision on a request to remove a trustee. Among the relief that the court may order under Section 1001(b) is an injunction prohibiting the trustee from performing certain acts and the appointment of a special fiduciary to perform some or all of the trustee’s functions. Pursuant to Section 1004, the court may also award attorney’s fees as justice and equity may require.

APPENDIX 4

UTC SECTION 105

SECTION 105. DEFAULT AND MANDATORY RULES.

(a) Except as otherwise provided in the terms of the trust, this [Code] 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 [Code] except:

- (1) the requirements for creating a trust;
- (2) 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;
- (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 Sections 410 through 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;
- (6) the power of the court under Section 702 to require, dispense with, or modify or terminate a bond;
- (7) the power of the court under Section 708(b) to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;
- [(8) the duty under Section 813(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 trustee's reports;]
- [(9) the duty under Section 813(a) 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;]
- (10) the effect of an exculpatory term under Section 1008;
- (11) the rights under Sections 1010 through 1013 of a person other than a trustee or beneficiary;
- (12) periods of limitation for commencing a judicial proceeding; [and]
- (13) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice [; and]
- (14) the subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in Sections 203 and 204].

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).

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 subject-matter 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 required in a particular case, however, if such information is requested by a beneficiary and is reasonably related to the trusts 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:

(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 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.