

**Advising Individual Trustees:
A Review of the Powers, Duties, and Risks of Serving as Trustee**

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1. What State Law Applies

SECTION 107. GOVERNING LAW. The meaning and effect of the terms of a trust are determined by:

(1) the law of the jurisdiction designated in the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue; or

(2) in the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue.

Comment to Section 108

Designating the principal place of administration should be distinguished from designating the law to determine the meaning and effect of the trust's terms, as authorized by Section 107. A settlor is free to designate one jurisdiction as the principal place of administration and another to govern the meaning and effect of the trust's provisions.

Comment to Section 107

Usually, the law of the trust's principal place of administration will govern administrative matters and the law of the place having the most significant relationship to the trust's creation will govern the dispositive provisions.

Comment to Section 108.

The Uniform Trust Code codifies those portions of the law of express trusts that are most amenable to codification. The Code is supplemented by the common law of trusts, including principles of equity. To determine the common law and principles of equity in a particular state, a court should look first to prior case law in the state and then to more general sources, such as the Restatement of Trusts, Restatement (Third) of Property: Wills and Other Donative Transfers, and the Restatement of Restitution.

Restatement of the Law 2d, Conflict of Law, Section 271

§ 271 Administration of Trust of Movables Created by Will

The administration of a trust of interests in movables created by will is governed as to matters which can be controlled by the terms of the trust

(a) by the local law of the state designated by the testator to govern the administration of the trust, or

(b) if there is no such designation, by the local law of the state of the testator's domicile at death, unless the trust is to be administered in some other state, in which case the local law of the latter state will govern.

Comment a. What are matters of administration. The term "administration of a trust," as it is used in the Restatement of this Subject, includes those matters which relate to the management of the trust. Matters of administration include those relating to the duties owed by the trustee to the beneficiaries. See Restatement of Trusts (Second), §§ 169-185. They include the powers of a trustee, such as the power to lease, to sell and to pledge, the exercise of discretionary powers, the requirement of unanimity of the trustees in the exercise of powers, and the survival of powers. See id. §§ 186-196. They include the liabilities which may be incurred by the trustee for breach of trust. See id. §§ 197-226. They include questions as to what are proper trust investments. See id. §§ 227-231. They include the trustee's right to compensation. See id. §§ 242-243. They include the trustee's right to indemnity for expenses incurred by him in the administration of the trust. See id. §§ 244-249. They include the removal of the trustee and the appointment of successor trustees. See id. §§ 107-108. They include the terminability of the trust. See id. §§ 334-347.

As to these matters, the rule stated in this Section is applicable. They are matters relating to the business of administering the trust.

On the other hand, where the question is as to who are beneficiaries of the trust and as to the extent of their interests, the question is one of construction rather than of administration and is governed by the rule stated in § 268.

Restatement of the Law 2d, Conflict of Law, Section 272

§ 272 Administration of Trust of Movables Created Inter Vivos

The administration of an inter vivos trust of interests in movables is governed as to matters which can be controlled by the terms of the trust

(a) by the local law of the state designated by the settlor to govern the administration of the trust, or

(b) if there is no such designation, by the local law of the state to which the administration of the trust is most substantially related.

Restatement of the Law 2d, Conflict of Law, Section 279

§ 279 Administration of Trust of Land

The administration of a trust of an interest in land is determined by the law that would be applied by the courts of the situs as long as the land remains subject to the trust.

SECTION 108. PRINCIPAL PLACE OF ADMINISTRATION.

(a) 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 principal place of business is located in or a trustee is a resident of the designated jurisdiction; or

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

(b) A trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries.

(c) Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee, in furtherance of the duty prescribed by subsection (b), may transfer the trust's principal place of administration to another State or to a jurisdiction outside of the United States.

(d) The trustee shall notify the qualified beneficiaries of a proposed transfer of a trust's principal place of administration not less than 60 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 telephone number at 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 60 days after the giving of the notice, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.

(e) The authority of a trustee under this section to transfer a trust's principal place of administration terminates if a qualified beneficiary notifies the trustee of an objection to the proposed transfer on or before the date specified in the notice.

(f) 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 704.

2. **Powers of Trustee**

SECTION 815. GENERAL POWERS OF TRUSTEE.

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

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

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

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

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

(C) any other powers conferred by this [Code].

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

SECTION 1012. PROTECTION OF PERSON DEALING WITH TRUSTEE.

(a) 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 delivers assets to a trustee need not ensure their proper application.

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

(e) Comparable protective provisions of other laws relating to commercial transactions or transfer of securities by fiduciaries prevail over the protection provided by this section.

3. Compensation of Trustee

SECTION 708. COMPENSATION OF TRUSTEE.

(a) If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances.

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

(1) the duties of the trustee are substantially different from those contemplated when the trust was created; or

(2) the compensation specified by the terms of the trust would be unreasonably low or high.

4. Trustee Expenses

SECTION 709. REIMBURSEMENT OF EXPENSES.

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

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

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

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

5. Trustee Duties

A. Prudently Administer

SECTION 801. DUTY TO ADMINISTER TRUST. Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this [Code].

SECTION 804. PRUDENT ADMINISTRATION. A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

SECTION 806. TRUSTEE'S SKILLS. A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise.

B. Duty of Loyalty

SECTION 802. DUTY OF LOYALTY.

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

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

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

(2) the transaction was approved by the court;

(3) the beneficiary did not commence a judicial proceeding within the time allowed by Section 1005;

(4) the beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with Section 1009; or

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

(c) A sale, encumbrance, or other transaction involving the investment or management of

trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:

(1) the trustee's spouse;

(2) the trustee's descendants, siblings, parents, or their spouses;

(3) an agent or attorney of the trustee; or

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

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

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

(f) An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the prudent investor rule of [Article] 9. In addition to its compensation for acting as trustee, the trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust. If the trustee receives compensation from the investment company or investment trust for providing investment advisory or investment management services, the trustee must at least annually notify the persons entitled under Section 813 to receive a copy of the trustee's annual report of the rate and method by which that compensation was determined.

(g) 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.

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

(1) an agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;

(2) payment of reasonable compensation to the trustee;

(3) a transaction between a trust and another trust, decedent's estate, or [conservatorship] of which the trustee is a fiduciary or in which a beneficiary has an interest;

(4) a deposit of trust money in a regulated financial-service institution operated by the trustee; or

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

(i) 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.

C. Duty of Impartiality

SECTION 803. IMPARTIALITY. If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.

Missouri - Determination of unitrust amount--definitions--exclusions to average net fair market value of assets--applicability of section to certain trusts--net income of trust to be unitrust amount, when.

469.411. 1. (1) If the provisions of this section apply to a trust, the unitrust amount determined for each accounting year of the trust shall be a percentage between three and five percent of the average net fair market value of the trust, as of the first day of the trust's current accounting year. The percentage applicable to a trust shall be that percentage specified by the terms of the governing instrument or by the election made in accordance with subdivision (2) of subsection 5 of this section.

(2) The unitrust amount for the current accounting year computed pursuant to this section shall be proportionately reduced for any distributions, in whole or in part, other than distributions of the unitrust amount, and for any payments of expenses, including debts, disbursements and taxes, from the trust within a current accounting year that the trustee determines to be material and substantial, and shall be proportionately increased for the receipt, other than a receipt that represents a return on investment, of any additional property into the trust within a current accounting year.

(3) For purposes of this section, the net fair market values of the assets held in the trust on the first business day of a prior accounting quarter shall be adjusted to reflect any reduction, in the case of a distribution or payment, or increase, in the case of a receipt, for

the prior accounting year pursuant to subdivision (1) of this subsection, as if the distribution, payment or receipt had occurred on the first day of the prior accounting year.

(4) In the case of a short accounting period, the trustee shall prorate the unitrust amount on a daily basis.

(5) In the case where the net fair market value of an asset held in the trust has been incorrectly determined in any quarter, the unitrust amount shall be increased in the case of an undervaluation, or be decreased in the case of an overvaluation, by an amount equal to the difference between the unitrust amount determined based on the correct valuation of the asset and the unitrust amount originally determined.

2. As used in this section, the following terms mean:

(1) "Average net fair market value", a rolling average of the fair market value of the assets held in the trust on the first business day of the lessor of the number of accounting quarters of the trust from the date of inception of the trust to the determination of the trust's average net fair market value, or twelve accounting quarters of the trust, regardless of whether this section applied to the ascertainment of net income for all valuation quarters;

(2) "Current accounting year", the accounting period of the trust for which the unitrust amount is being determined.

3. In determining the average net fair market value of the assets held in the trust, there shall not be included the value of:

(1) Any residential property or any tangible personal property that, as of the first business day of the current valuation year, one or more income beneficiaries of the trust have or had the right to occupy, or have or had the right to possess or control, other than in a capacity as trustee, and instead the right of occupancy or the right to possession or control shall be deemed to be the unitrust amount with respect to the residential property or the tangible personal property; or

(2) Any asset specifically given to a beneficiary under the terms of the trust and the return on investment on that asset, which return on investment shall be distributable to the beneficiary.

4. In determining the average net fair market value of the assets held in the trust pursuant to subsection I of this section, the trustee shall, not less often than annually, determine the fair market value of each asset of the trust that consists primarily of real property or other property that is not traded on a regular basis in an active market by appraisal or other reasonable method or estimate, and that determination, if made reasonably and in good faith, shall be conclusive as to all persons interested in the trust. Any claim based on a determination made pursuant to this subsection shall be barred if not asserted in a judicial proceeding brought by any beneficiary with any interest whatsoever in the trust

within two years after the trustee has sent a report to all qualified beneficiaries that adequately discloses the facts constituting the claim. The rules set forth in subsection 2 of section 469.409 shall apply to the barring of claims pursuant to this subsection.

5. This section shall apply to the following trusts:

(1) Any trust created after August 28, 2001, with respect to which the terms of the trust clearly manifest an intent that this section apply;

(2) Any trust created under an instrument that became irrevocable on, before, or after August 28, 2001, if the trustee, in the trustee's discretion, elects to have this section apply unless the instrument creating the trust specifically prohibits an election under this subdivision. The trustee shall deliver notice to all qualified beneficiaries and the settlor of the trust, if he or she is then living, of the trustee's intent to make such an election at least sixty days before making that election. The trustee shall have sole authority to make the election. Section 469.402 shall apply for all purposes of this subdivision. An action or order by any court shall not be required. The election shall be made by a signed writing delivered to the settlor of the trust, if he or she is then living, and to all qualified beneficiaries. The election is irrevocable, unless revoked by order of the court having jurisdiction of the trust. The election may specify the percentage used to determine the unitrust amount pursuant to this section, provided that such percentage is between three and five percent, or if no percentage is specified, then that percentage shall be three percent. In making an election pursuant to this subsection, the trustee shall be subject to the same limitations and conditions as apply to an adjustment between income and principal pursuant to subsections 3 and 4 of section 469.405; and

(3) No action of any kind based on an election made by a trustee pursuant to subdivision (2) of this subsection shall be brought against the trustee by any beneficiary of that trust three years from the effective date of that election.

6. (1) Once the provisions of this section become applicable to a trust, the net income of the trust shall be the unitrust amount.

(2) Unless otherwise provided by the governing instrument, the unitrust amount distributed each year shall be paid from the following sources for that year up to the full value of the unitrust amount in the following order:

(a) Net income as determined if the trust were not a unitrust;

(b) Other ordinary income as determined for federal income tax purposes;

(c) Assets of the trust principal for which there is a readily available market value; and

(d) Other trust principal.

(3) Additionally, the trustee may allocate to trust income for each taxable year of the trust, or portion thereof:

(a) Net short-term capital gain described in the Internal Revenue Code, 26 U.S.C. Section 1222(5), for such year, or portion thereof, but only to the extent that the amount so allocated together with all other amounts to trust income, as determined under the provisions of this chapter without regard to this section, for such year, or portion thereof, does not exceed the unitrust amount for such year, or portion thereof;

(b) Net long-term capital gain described in the Internal Revenue Code, 26 U.S.C. Section 1222(7), for such year, or portion thereof, but only to the extent that the amount so allocated together with all other amounts, including amounts described in paragraph (a) of this subdivision, allocated to trust income for such year, or portion thereof, does not exceed the unitrust amount for such year, or portion thereof.

7. A trust with respect to which this section applies on August 28, 2011, may calculate the unitrust amount in accordance with the provisions of this section, as it existed either before or after such date, as the trustee of such trust shall determine in a writing kept with the records of the trust in the trustee's discretion.

(L. 2001 H.B. 241, A.L. 2002 H.B. 1151 merged with S.B. 742, A.L. 2004 H.B. 1511, A.L. 2009 H.B. 239, A.L. 2011 S.B. 59)

Missouri - Adjustments between principal and income permitted by trustee, factors to be considered--no adjustment permitted, when.

469.405. 1. A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or shall be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying subsection 1 of section 469.403, that the trustee is unable to comply with subsection 2 of section 469.403.

2. In deciding whether and to what extent to exercise the power conferred by subsection 1 of this section, a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent relevant:

(1) The nature, purpose and expected duration of the trust;

(2) The intent of the settlor;

(3) The identity and circumstances of the beneficiaries;

(4) The needs for liquidity, regularity of income, and preservation and appreciation of capital;

- (5) The assets held in the trust, including the extent to which such assets consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property, and the extent to which such assets are used by a beneficiary, and whether such assets were purchased by the trustee or received from the settlor;
- (6) The net amount allocated to income pursuant to sections 469.401 to 469.467, other than this section, and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;
- (7) Whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income, or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;
- (8) The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and
- (9) The anticipated tax consequences of an adjustment.

3. A trustee may not make an adjustment:

- (1) That diminishes the income interest in a trust which requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;
- (2) That reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;
- (3) That changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;
- (4) From any amount that is permanently set aside for charitable purposes under a will or the terms of a trust to the extent that the existence of the power to adjust would change the character of the amount set aside for federal income, gift or estate tax purposes;
- (5) If possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;
- (6) If possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;

(7) If the trustee is a beneficiary of the trust; or

(8) If the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly.

4. If subdivision (5), (6), (7) or (8) of subsection 3 of this section applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

5. A trustee may release the entire power conferred by subsection 1 of this section, or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in subdivisions (1) to (6) or subdivision (8) of subsection 3 of this section, or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection 3 of this section. The release may be permanent or for a specified period, including a period measured by the life of an individual.

6. Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by subsection 1 of this section.

(L. 2001 H.B. 241)

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- **Kansas 58-9-105: Conversion of trust into unitrust.** (a) Unless expressly prohibited by the governing instrument, a trustee may release the power under K.S.A. 58-9-104, and amendments thereto, and convert a trust into a unitrust as described in this section if all of the following apply:

(1) The trustee determines that the conversion will enable the trustee to better carry out the intent of the settlor or testator and the purposes of the trust;

(2) the trustee gives to each qualified beneficiary of the trust, as defined by K.S.A. 58a-103, and amendments thereto, written notice of (A) the trustee's intention to release the power to adjust and to convert the trust into a unitrust and (B) how the unitrust will operate, including what initial decisions the trustee will make under this section; and

(3) no qualified beneficiary objects to the conversion to a unitrust in a writing delivered to the trustee within 60 days of the mailing of the notice under subsection (a)(2).

(b) (1) If a qualified beneficiary timely objects to the conversion to a unitrust, the trustee may petition the appropriate district court to approve the conversion to a unitrust.

(2) A qualified beneficiary may request a trustee to convert to a unitrust. If the trustee does not convert, the qualified beneficiary may petition the appropriate district court to order the conversion.

(3) The district court shall approve the conversion or direct the requested conversion if the court concludes that the conversion will enable the trustee to better carry out the intent of the settlor or testator and the purposes of the trust, after considering the factors enumerated under subsection (c) deemed by the court to be relevant.

(c) In deciding whether to exercise the power conferred by subsection (a), the trustee shall consider all factors relevant to the trust and its beneficiaries, including the following to the extent they are relevant:

(1) The nature, purpose, and expected duration of the trust;

(2) the intent of the settlor;

(3) the identity and circumstances of the beneficiaries;

(4) the needs for liquidity, regularity of income and preservation and appreciation of capital;

(5) the assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a qualified beneficiary; and whether an asset was purchased by the trustee or received from the settlor;

(6) the net amount allocated to income under the other sections of this act and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;

(7) the actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and

(8) the anticipated tax consequences of conversion.

(d) After a trust is converted to a unitrust, all of the following apply:

(1) The trustee shall follow an investment policy seeking a total return for the investments held by the trust, whether the return is to be derived:

(A) from appreciation of capital;

(B) from earnings and distributions from capital; or

(C) from both.

(2) The trustee shall make regular distributions in accordance with the governing instrument construed in accordance with the provisions of this section.

(3) The term "income" in the governing instrument shall mean an annual distribution--the unitrust distribution--equal to between 3% and 5%--the payout percentage--of the net fair market value of the trust's assets, whether such assets would be considered income or principal under other provisions of this act, averaged over a period of up to the three preceding years.

(e) The trustee may, in the trustee's discretion from time to time, determine all of the following:

(1) The effective date of a conversion to a unitrust;

(2) the provisions for prorating a unitrust distribution for a short year in which a qualified beneficiary's right to payments commences or ceases;

(3) the frequency of unitrust distributions during the year;

(4) the effect of other payments from or contributions to the trust on the trust's valuation;

(5) whether to value the trust's assets annually or more frequently;

(6) what valuation dates to use;

(7) how frequently to value nonliquid assets and whether to estimate their value;

(8) whether to omit from the calculations trust property occupied or possessed by a qualified beneficiary; and

(9) any other matters necessary for the proper functioning of the unitrust.

(f) (1) Expenses which would be deducted from income if the trust were not a unitrust may not be deducted from the unitrust distribution.

(2) Unless otherwise provided by the governing instrument, the unitrust distribution shall be paid from the following sources in the following order: Net

income, net realized short-term capital gains, net realized long-term capital gains and the principal of the trust.

(g) The trustee or, if the trustee declines to do so, a qualified beneficiary may petition the appropriate district court to:

(1) Authorize a payout percentage of less than 3% or more than 5%;

(2) provide for a distribution of net income, as would be determined if the trust were not a unitrust, in excess of the unitrust distribution if such distribution is necessary to preserve a tax benefit;

(3) average the valuation of the trust's net assets over a period other than three years; and

(4) reconvert from a unitrust. Upon a reconversion, the power to adjust under K.S.A. 58-9-104, and amendments thereto, shall be revived.

(h) A conversion to a unitrust does not affect a provision in the governing instrument directing or authorizing the trustee to distribute principal or authorizing a qualified beneficiary to withdraw a portion or all of the principal.

(i) Except as provided in subsection (j), a trust may not be converted into a unitrust in any of the following circumstances:

(1) If payment of the unitrust distribution would change the amount payable to a qualified beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets.

(2) If the unitrust distribution would be made from any amount which is permanently set aside for charitable purposes under the governing instrument and for which a federal estate or gift tax deduction has been taken, unless both income and principal are so set aside.

(3) If:

(A) Possessing or exercising the power to convert would cause an individual to be treated as the owner of all or part of the trust for federal income tax purposes; and

(B) the individual would not be treated as the owner if the trustee did not possess the power to convert.

(4) If:

(A) Possessing or exercising the power to convert would cause all or part of the trust assets to be subject to federal estate or gift tax with respect to an individual; and

(B) the assets would not be subject to federal estate or gift tax with respect to the individual if the trustee did not possess the power to convert.

(5) If the conversion would result in the disallowance of a federal estate tax or gift tax marital deduction which would be allowed if the trustee did not have the power to convert.

(6) If the trustee is a qualified beneficiary of the trust.

(j) (1) If subsection (i)(3), (4) or (6) applies to a trustee and there is more than one trustee, a co-trustee to whom the provision does not apply may convert the trust, unless the exercise of the power by the remaining trustee or trustees is prohibited by the governing instrument.

(2) If subsection (i)(3), (4) or (6) applies to all the trustees, the trustees may petition the appropriate district court to direct a conversion.

(k) (1) A trustee may release the power conferred by subsection (a) to convert to a unitrust if any of the following apply:

(A) The trustee is uncertain about whether possessing or exercising the power will cause a result described in subsection (i)(3), (4) or (5).

(B) The trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection (i).

(2) The release may be permanent or for a specified period, including a period measured by the life of an individual.

(l) This section shall be part of and supplemental to the uniform principal and income act (1997).

History: L. 2009, ch. 57, § 1; July 1.

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- **Kansas 58-9-104: Trustee's power to adjust.** (a) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, pursuant to K.S.A. 58-24a02, and amendments thereto, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in subsection (a) of K.S.A. 58-9-

103, and amendments thereto, that the trustee is unable to comply with subsection (b) of K.S.A. 58-9-103, and amendments thereto.

(b) In deciding whether and to what extent to exercise the power conferred by subsection (a), a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant:

- (1) The nature, purpose, and expected duration of the trust;
- (2) the intent of the settlor;
- (3) the identity and circumstances of the beneficiaries;
- (4) the needs for liquidity, regularity of income, and preservation and appreciation of capital;
- (5) the assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor;
- (6) the net amount allocated to income under the other sections of this act and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;
- (7) whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;
- (8) the actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and
- (9) the anticipated tax consequences of an adjustment.

(c) A trustee may not make an adjustment:

- (1) That diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;
- (2) that reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;

(3) that changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(4) from any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;

(5) if possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(6) if possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;

(7) if the trustee is a beneficiary of the trust; or

(8) if the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly.

(d) If subsection (c)(5), (6), (7), or (8) applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

(e) A trustee may release the entire power conferred by subsection (a) or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in subsection (c)(1) through (6) or (c)(8) or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection (c). The release may be permanent or for a specified period, including a period measured by the life of an individual.

(f) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by subsection (a).

History: L. 2000, ch. 61, § 4; L. 2001, ch. 75, § 7; July 1.

D. Duty to Keep Adequate Records

E. Duty to Keep Trust Property Separate

SECTION 810. RECORDKEEPING AND IDENTIFICATION OF TRUST PROPERTY.

(a) A trustee shall keep adequate records of the administration of the trust.

(b) A trustee shall keep trust property separate from the trustee's own property.

(c) Except as otherwise provided in subsection (d), a trustee shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.

(d) If the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of two or more separate trusts.

F. Duty to Protect Trust Property

SECTION 809. CONTROL AND PROTECTION OF TRUST PROPERTY. A trustee shall take reasonable steps to take control of and protect the trust property.

G. Duty to Enforce and Defend

SECTION 811. ENFORCEMENT AND DEFENSE OF CLAIMS. A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.

H. Duty to Inform and Report

SECTION 813. DUTY TO INFORM AND REPORT.

(a) A trustee shall 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. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust.

(b) A trustee:

(1) upon request of a beneficiary, shall promptly furnish to the beneficiary a copy of the trust instrument;

(2) within 60 days after accepting a trusteeship, shall 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, shall 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 subsection (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 shall send to the distributees or permissible distributees 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 cotrustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative, [conservator], 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) Subsections (b)(2) and (3) do not apply to a trustee who accepts a trusteeship before [the effective date of this [Code]], to an irrevocable trust created before [the effective date of this [Code]], or to a revocable trust that becomes irrevocable before [the effective date of this [Code]].

Missouri - Duty to inform and report--inapplicable, when.

RSMo Section 456.8-813. 1. (1) A trustee shall 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. A trustee shall be presumed to have fulfilled this duty if the trustee complies with the notice and information requirements prescribed in subsections 2 to 7 of this section.

(2) Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust.

2. A trustee:

- (1) upon request of a beneficiary, shall promptly furnish to the beneficiary a copy of the trust instrument;
- (2) within one hundred * twenty days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number;
- (3) within one hundred * twenty 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, shall 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 subsection 3 of this section; and
- (4) shall notify the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation.

3. A trustee shall send to the permissible distributees of trust income or principal, and to other 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 cotrustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative, conservator, or guardian may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.

4. 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.

5. A trustee may charge a reasonable fee to a beneficiary for providing information under this section.

6. The request of any beneficiary for information under any provision of this section shall be with respect to a single trust that is sufficiently identified to enable the trustee to locate the records of the trust.

7. If the trustee is bound by any confidentiality restrictions with respect to an asset of a trust, any beneficiary who is eligible to receive information pursuant to this section about such asset shall agree to be bound by the confidentiality restrictions that bind the trustee before receiving such information from the trustee.

8. This section does not apply to a trust created under a trust instrument that became irrevocable before January 1, 2005, and the law in effect prior to January 1, 2005, regarding the subject matter of this section shall continue to apply to those trusts.

(L. 2004 H.B. 1511, A.L. 2006 S.B. 892, A.L. 2011 S.B. 59)

Missouri - Default and mandatory rules.

RSMo 456.1-105. 1. Except as otherwise provided in the terms of the trust, sections 456.1-101 to 456.11-1106 govern 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 sections 456.1-101 to 456.11-1106 except:

...

(8) subject to subsection 3 of this section, the duty of a trustee of an irrevocable trust to notify each permissible distributee who has attained the age of twenty-one years of the existence of the trust and of that permissible distributee's rights 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 qualified beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of the trust;

3. For purposes of subdivision (8) of subsection 2 of this section, the settlor may designate by the terms of the trust one or more permissible distributees to receive notification of the existence of the trust and of the right to request trustee's reports and other information reasonably related to the administration of the trust in lieu of providing the notice, information or reports to any other permissible distributee who is an ancestor or lineal descendant of the designated permissible distributee.

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- **Kansas 58a-813: Duty to inform and report.** (a) As provided in this section, a trustee shall keep the qualified beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a qualified beneficiary's request for information related to the administration of the trust.

(b) Except as otherwise provided under the terms of the trust, a trustee shall:

(1) Upon request of a qualified beneficiary, promptly furnish to the qualified beneficiary a copy of the portions of the trust instrument relating to the interest of the qualified beneficiary, or a copy of the trust instrument if specifically so requested by the qualified beneficiary;

(2) within 60 days after accepting a trusteeship, 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, 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 relevant portions of the trust instrument and of the right to a trustee's report as provided in subsection (c);

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

(5) At least annually, send a trust report for the trust's most recent fiscal year to each qualified beneficiary who actually received a distribution during such fiscal year, except a beneficiary who received a specific bequest. The trustee shall also send a trust report to any additional qualified beneficiary who would have been eligible to receive a distribution during the fiscal year and who requests a copy of the trust report. The trust report shall include a list of the trust assets, and, if feasible, their market values; liabilities, receipts and disbursements; the source and amount of the trustee's compensation; and if requested, the trust's investment rate of return and whether the method for calculating the rate complies with standards established by the association of investment management and research (AIMR). Upon a vacancy in a trusteeship, unless a cotrustee remains in office, a trust report must be sent to the qualified beneficiaries by the former trustee. A personal representative, conservator, or guardian may send the qualified beneficiaries a trust report on behalf of a deceased or incapacitated trustee.

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

(d) The provisions of this section are inapplicable to qualified beneficiaries other than a surviving spouse so long as the surviving spouse is a qualified beneficiary of the trust, or holds any power of appointment over the entire trust estate, and where all other qualified beneficiaries are the issue of the surviving spouse.

(e) At the termination of a trust, the trustee shall send a trust report to each qualified beneficiary who is entitled to receive a distribution from the trust, except a beneficiary who received a specific bequest. Such trust report shall include the information required by subsection (b)(5), except information relating to receipts and disbursements need only be prepared for the period from the date of the event that caused the termination of the trust.

History: L. 2002, ch. 133, § 70; L. 2004, ch. 158, § 13; L. 2006, ch. 23, § 12; July 1.

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- **Kansas 58a-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 administer the trust in accordance with K.S.A. 58a-801, and amendments thereto;
- (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 K.S.A. 58a-410 through 58a-416, and amendments thereto;
- (5) the effect of the rights of creditors to reach a trust as provided in article 5 of chapter 58a of the Kansas Statutes Annotated, and amendments thereto;
- (6) the power of the court under K.S.A. 58a-702, and amendments thereto, to require, dispense with, or modify or terminate a bond;
- (7) the power of the court under subsection (b) of K.S.A. 58a-708, and amendments thereto, to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;
- (8) the effect of an exculpatory term under K.S.A. 58a-1008, and amendments thereto;
- (9) the rights under K.S.A. 58a-1010 through 58a-1013, and amendments thereto, of a person other than a trustee or beneficiary;
- (10) periods of limitation for commencing a judicial proceeding under K.S.A. 58a-604, and amendments thereto;
- (11) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice; and
- (12) the barring of claims against trusts and trustees under K.S.A. 58a-818, and amendments thereto.

(c) Notwithstanding any provisions of the Kansas uniform trust code to the contrary, any trust created by will and admitted to probate shall be subject to the requirements of chapter 59 of the Kansas Statutes Annotated.

History: L. 2002, ch. 133, § 5; L. 2004, ch. 158, § 3; L. 2006, ch. 23, § 2; July 1.

I. Duty to Prudently Invest the Trust Assets

See Exhibit A.

6. Delegating

SECTION 807. DELEGATION BY TRUSTEE.

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

(1) selecting an agent;

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

(3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

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

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

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

Prudent Investor Act - SECTION 9. DELEGATION OF INVESTMENT AND MANAGEMENT FUNCTIONS.

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

(1) selecting an agent;

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

(3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

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

(c) A trustee who complies with the requirements of subsection (a) is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated.

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

7. Beneficiary as Trustee

SECTION 814. DISCRETIONARY POWERS; TAX SAVINGS.

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

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

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

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

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

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

(1) a power held by the settlor’s spouse who is the trustee of a trust for which a marital deduction, as defined in Section 2056(b)(5) or 2523(e) of the Internal Revenue Code of 1986, as in effect on [the effective date of this [Code]] [, or as later amended], was previously allowed;

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

(3) a trust if contributions to the trust qualify for the annual exclusion under Section 2503(c) of the Internal Revenue Code of 1986, as in effect on [the effective date of this [Code]] [, or as later amended].

SECTION 103. DEFINITIONS. In this [Code]:

(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 of 1986, as in effect on [the effective date of this [Code] [amendment] [, or as later amended].

Missouri - Discretionary powers--tax savings.

456.8-814. 1. Notwithstanding the use of such terms as "absolute," "sole," or "uncontrolled," in the exercise of discretion under an ascertainable standard, the trustee shall exercise such discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

2. Subject to subsection 4 of this section, and unless the terms of the trust expressly indicate that a rule in this subsection does not apply:

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

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

(3) for purposes of this subsection 2 of this section, the term "trustee" shall include a person who is deemed to have any power of a trustee, whether because such person has the right to remove or replace any trustee, because a reciprocal trust or power doctrine applies, or for any other reason.

3. A power whose exercise is limited or prohibited by subsection 2 may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.

4. Subsection 2 of this section does not apply to:

(1) a power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined in Section 2056(b)(5) or 2523(b)(5) of the Internal Revenue Code was previously allowed;

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

(3) a trust if contributions to the trust qualify for the annual exclusion under Section 2503(c) of the Internal Revenue Code.

(L. 2004 H.B. 1511, A.L. 2006 S.B. 892)

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- **Kansas 58a-814: Discretionary powers.** Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as "absolute," "sole," or "uncontrolled," the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

History: L. 2002, ch. 133, § 71; Jan. 1, 2003.

8. Remedies Against a Trustee

SECTION 1001. REMEDIES FOR BREACH OF TRUST.

(a) A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.

(b) To remedy a breach of trust that has occurred or may occur, the court may:

(1) compel the trustee to perform the trustee's duties;

(2) enjoin the trustee from committing a breach of trust;

(3) compel the trustee to redress a breach of trust by paying money, restoring property, or other means;

(4) order a trustee to account;

(5) appoint a special fiduciary to take possession of the trust property and administer the trust;

(6) suspend the trustee;

(7) remove the trustee as provided in Section 706;

(8) reduce or deny compensation to the trustee;

(9) subject to Section 1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or

(10) order any other appropriate relief.

SECTION 1002. DAMAGES FOR BREACH OF TRUST.

(a) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of:

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

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

(b) Except as otherwise provided in this subsection, if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad

faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

SECTION 1003. 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.

SECTION 1010. LIMITATION ON PERSONAL LIABILITY OF TRUSTEE.

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

(b) A trustee is personally liable for torts committed in the course of administering a trust, or for obligations arising from ownership or control of trust property, including liability for violation of environmental law, only if the trustee is personally at fault.

(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.

9. Statute of Limitations

SECTION 1005. LIMITATION OF ACTION AGAINST TRUSTEE.

(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 five years after the first to occur of:

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

Comment

The one-year and five-year limitations periods under this section are not the only means for barring an action by a beneficiary. A beneficiary may be foreclosed by consent, release, or ratification as provided in Section 1009. Claims may also be barred by principles such as estoppel and laches arising in equity under the common law of trusts. *See* Section 106. The representative referred to in subsection (a) is the person who may represent and bind a beneficiary as provided in Article 3. During the time that a trust is revocable and the settlor has capacity, the person holding the power to revoke is the one who must receive the report. *See* Section 603(a) (rights of settlor of revocable trust). This section addresses only the issue of when the clock will start to run for purposes of the statute of limitations. If the trustee wishes to foreclose possible claims immediately, a consent to the report or other information may be obtained pursuant to Section 1009. For the provisions relating to the duty to report to beneficiaries, see Section 813. Subsection (a) applies only if the trustee has furnished a report. The one-year statute of limitations does not begin to run against a beneficiary who has waived the furnishing of a report as provided in Section 813(d). Subsection (c) is intended to provide some ultimate repose for actions against a trustee. It applies to cases in which the trustee has failed to report to the beneficiaries or the report did not meet the disclosure requirements of subsection (b). It also applies to beneficiaries who did not receive notice of the report, whether personally or through representation. While the five-year limitations period will normally begin to run on termination of the trust, it can also begin earlier. If a trustee leaves office prior to the termination of the trust, the limitations period for actions against that particular trustee begins to run on the date the trustee leaves office. If a beneficiary

receives a final distribution prior to the date the trust terminates, the limitations period for actions by that particular beneficiary begins to run on the date of final distribution. If a trusteeship terminates by reason of death, a claim against the trustee's estate for breach of fiduciary duty would, like other claims against the trustee's estate, be barred by a probate creditor's claim statute even though the statutory period prescribed by this section has not yet expired. This section does not specifically provide that the statutes of limitations under this section are tolled for fraud or other misdeeds, the drafters preferring to leave the resolution of this question to other law of the State.

10. Minimizing Risk

SECTION 1009. BENEFICIARY'S CONSENT, RELEASE, OR RATIFICATION.

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

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

SECTION 705. RESIGNATION OF TRUSTEE.

(a) A trustee may resign:

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

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

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

SECTION 111. 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.

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

(c) A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this [Code] or other applicable law.

(d) Matters that may be resolved by a nonjudicial settlement agreement include:

- (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 a trust's principal place of administration; and

(6) liability of a trustee for an action relating to the trust.

(e) Any interested person may request the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in [Article] 3 was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.

Comment

While the Uniform Trust Code recognizes that a court may intervene in the administration of a trust to the extent its jurisdiction is invoked by interested persons or otherwise provided by law (*see* Section 201(a)), resolution of disputes by nonjudicial means is encouraged. This section facilitates the making of such agreements by giving them the same effect as if approved by the court. To achieve such certainty, however, subsection (c) requires that the nonjudicial settlement must contain terms and conditions that a court could properly approve. Under this section, a nonjudicial settlement cannot be used to produce a result not authorized by law, such as to terminate a trust in an impermissible manner. Trusts ordinarily have beneficiaries who are minors, incapacitated, unborn or unascertained. Because such beneficiaries cannot signify their consent to an agreement, binding settlements can ordinarily be achieved only through the application of doctrines such as virtual representation or appointment of a guardian ad litem, doctrines traditionally available only in the case of judicial settlements. The effect of this section and the Uniform Trust Code more generally is to allow for such binding representation even if the agreement is not submitted for approval to a court. For the rules on representation, including appointments of representatives by the court to approve particular settlements, see Article 3. Subsection (d) is a nonexclusive list of matters to which a nonjudicial settlement may pertain. Other matters which may be made the subject of a nonjudicial settlement are listed in the Article 3 General Comment. The fact that the trustee and beneficiaries may resolve a matter nonjudicially does not mean that beneficiary approval is required. For example, a trustee may resign pursuant to Section 705 solely by giving notice to the qualified beneficiaries and any cotrustees. But a nonjudicial settlement between the trustee and beneficiaries will frequently prove helpful in working out the terms of the resignation. Because of the great variety of matters to which a nonjudicial settlement may be applied, this section does not attempt to precisely define the "interested persons" whose consent is required to obtain a binding settlement as provided in subsection (a). However, the consent of the trustee would ordinarily be required to obtain a binding settlement with respect to matters involving a trustee's administration, such as approval of a trustee's report or resignation.

SECTION 201. ROLE OF COURT IN ADMINISTRATION OF TRUST.

(a) The court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law.

(b) A trust is not subject to continuing judicial supervision unless ordered by the court.

(c) A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights.

Exhibit A
Prudent Investor Act
Selected Provisions

SECTION 1. PRUDENT INVESTOR RULE.

(a) Except as otherwise provided in subsection (b), a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this [Act].

(b) The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

SECTION 2. STANDARD OF CARE; PORTFOLIO STRATEGY; RISK AND RETURN OBJECTIVES.

(a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

(b) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(c) Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:

- (1) general economic conditions;
- (2) the possible effect of inflation or deflation;
- (3) the expected tax consequences of investment decisions or strategies;
- (4) the role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;
- (5) the expected total return from income and the appreciation of capital;
- (6) other resources of the beneficiaries;
- (7) needs for liquidity, regularity of income, and preservation or appreciation of capital; and
- (8) an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

(d) A trustee shall make a reasonable effort to verify facts relevant to the

investment and management of trust assets.

(e) A trustee may invest in any kind of property or type of investment consistent with the standards of this [Act].

(f) A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.

SECTION 3. DIVERSIFICATION. A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

SECTION 4. DUTIES AT INCEPTION OF TRUSTEESHIP. Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this [Act].

SECTION 7. INVESTMENT COSTS. In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee.

SECTION 8. REVIEWING COMPLIANCE. Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

SECTION 9. DELEGATION OF INVESTMENT AND MANAGEMENT FUNCTIONS.

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

(1) selecting an agent;

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

(3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

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

(c) A trustee who complies with the requirements of subsection (a) is not

liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated.

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

Exhibit B
Sample Annual Accounting

TO: _____ (beneficiary)

FROM: _____, Trustee of the _____ Trust ("Trust")

DATED: _____, 2013

In order to keep you informed about the administration of the Trust and your interest in the Trust, below is an accounting for calendar year 2012. Also enclosed is a complete copy of the Trust. Please let me know if there is any other information concerning the Trust that you would like to have.

Your Interest in the Trust. You are entitled to all of the "net income" of the Trust. As Trustee, I am also entitled to encroach upon the principal of the Trust to provide for your support, maintenance, and education, in the manner to which you have become accustomed during your lifetime, and such encroachments may be made from time to time and in such amounts as I may consider reasonable under the circumstances.

Trust Assets. As of December 31, 2012, the assets of the trust consisted of:

\$ _____ of securities held in brokerage account # _____ at _____ (See attached account statement)

\$ _____ of cash held in the Trust's checking account # _____ at _____ (See attached account statement)

Total value of the Trust assets as of 12-31-12: \$ _____

Trust Liabilities. As of December 31, 2012, the Trust had no liabilities or debt.

Receipts. During calendar 2012, the Trust receipts consisted of the following interest, dividends, and proceeds of sales:

Disbursements. The following disbursements were made from the Trust during calendar year 2012:

\$ _____ on _____, 2012 for attorneys' fees

\$ _____ on _____, 2012 for accounting fees

\$ _____ on _____, 2012 for investment advisory fees

\$ _____ on _____, 2012 for Trustee fees

\$ _____ on _____, 2012 for federal income taxes
\$ _____ on _____, 2012 for Missouri income taxes
\$ _____ on _____, 2012 to you as an income distribution from the Trust
\$ _____ on _____, 2012 to you as a principal distribution from the Trust

Trustee Compensation. As Trustee, I am entitled to “_____”. My compensation during calendar year 2012 was calculated as follows: _____.

Calculation of Net Trust Accounting Income. For calendar year 2012, the “net income” of the Trust was \$ _____, calculated as follows:

Uniform Principal and Income Act - SECTION 501. DISBURSEMENTS FROM INCOME. A trustee shall make the following disbursements from income to the extent that they are not disbursements to which Section 201(2)(B) or (C) applies:

- (1) one-half of the regular compensation of the trustee and of any person providing investment advisory or custodial services to the trustee;
- (2) one-half of all expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests;
- (3) all of the other ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal, and expenses of a proceeding or other matter that concerns primarily the income interest; and
- (4) recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset.

See Mo. Rev. Stat. Section 469.451 and Kansas Statutes Section 58-9-501

Pursuant to Sections 111 and 1009 of the _____, I hereby approve, consent to, and ratify, all of the actions by the Trustee and Trustee’s agents during calendar year 2012, including but not limited to, the asset allocation of the Trust investments, all assets retained, sold and purchased, all distributions made to the beneficiaries, all expenses paid, the filing of all tax returns, and the compensation paid to the Trustee (“2012 Trustee Actions”), and I hereby release, indemnify, and hold harmless the Trustee, from any and all liability, claims, demands, or costs (including attorney’s fees and costs of litigation) related to the 2012 Trustee Actions.

Beneficiary

Exhibit C
Sample Notice Of Principal Distribution

TO: _____ (beneficiary)
FROM: _____, Trustee of the _____ Trust ("Trust")
DATED: _____, 2013

Pursuant to Section _____ of the Trust, the Trustee is entitled to encroach upon the principal of the Trust to provide for your support, maintenance, and education, in the manner to which you have become accustomed during your lifetime, and such encroachments may be made from time to time and in such amounts as the Trustee, in the Trustee's discretion, may consider reasonable under the circumstances.

The Trustee has determined that a principal distribution to you of \$_____ is necessary for your support to maintain your accustomed manner of living. This principal distribution will be made to you on or around the date of this Notice.

Exhibit D
Trustee Preliminary Checklist

Before accepting your role as Trustee, we should discuss the following:

- The attached chart and outline of the trust.
- The purposes of the trust and the benefits to the beneficiaries.
- The benefits of being a trustee (compensation and knowing that you are helping the beneficiaries).
- The risks of serving as a Trustee (you can be sued).
- [Discuss special considerations if Trustee is a beneficiary.]
- Why you specifically were named as Trustee and your special skills.
- The terms of the trust and any apparent ambiguities or issues that could increase your risk of being sued.
- The beneficiaries and whether there are any known issues that could be a problem.
- The Trust assets and whether there are any known issues (real estate contamination, missing assets, business interests, lack of diversification, tax issues, keeping artwork safe) with these assets.
- Reasons you can be sued:
 - Beneficiary is unhappy with how much he/she is receiving from the trust.
 - Not treating the current and remainder beneficiaries impartially.
 - Unnecessary taxes were triggered.
 - Using the trust assets for your own benefit or engaged in self-dealing.
 - The trust assets were not invested in a prudent manner.
 - Tax returns were not filed properly.
 - Not keeping adequate records of everything you do as Trustee.
- What you must do as a Trustee:
 - Provide certain information to the beneficiaries upon accepting your trusteeship.
 - Make distributions to the beneficiaries according to the terms of the trust.
 - Invest and protect the trust assets.
 - File tax returns.
 - Prepare and send annual accountings to the beneficiaries showing the assets, liabilities, income, receipts, and disbursements of the trust during the year.

- How much you will be compensated as Trustee.
- Who will prepare the trust tax returns and how much they will charge.
- Who will you hire as the financial advisor to invest the trust assets in a prudent manner and how much they will charge.
- Working with the financial advisor on a written investment policy for the trust.
- Who will prepare the trust accountings.
- What written information will you request from the beneficiaries if they request a discretionary distribution.
- How will you document your decisions to make distributions to the beneficiaries.
- The tax (income, gift, estate, and GST), creditor, and marital property aspects of the trust and distributions.
- Ways you can minimize your risk of being sued:
 - Obtaining the written consent of the beneficiaries to your actions
 - Nonjudicial settlement agreements.
 - Maintaining good communication with the beneficiaries.
 - Properly fulfilling your duties as Trustee.
 - Obtaining court approval of your actions.
 - Obtaining insurance.

Exhibit E
Trustee Annual Checklist

During calendar year 2012, did you:

- Reread the trust; are you following the terms?
- Ensure the trust is being administered pursuant to the proper state laws?
- Sign all trust paperwork in your capacity as Trustee?
- Ensure all trust assets are titled in the name of the trust?
- Provide a report to the beneficiaries showing the assets, liabilities, income, receipts, and disbursements of the trust during 2012, along with a copy of the trust instrument?
- Communicate with the beneficiaries as to why you are making or not making a discretionary distribution?
- Avoid any conflicts of interest that could violate your duty of loyalty to the trust?
- Treat the beneficiaries impartially and take into account the current and remainder beneficiaries in your investment and distribution decisions?
- Adequately document your decision to make or not make a distribution?
- Follow consistent procedures in making discretionary distribution decisions?
- Take into account the divorce and creditor protection aspects of the trust in making the distributions?
- Consider the federal and state income tax, estate tax, gift tax, generation-skipping transfer (GST) tax, and other tax implications of the distributions and trust investments?
- Determine whether any distributions were subject to GST tax?
- File a federal and state income tax return for the trust?
- Keep records of all trust activity and tax returns in a safe place?
- Enforce any claims the trust has against any persons or entities?
- Determine whether there were any other tax returns that were required to be filed?

- Consider whether you can avoid state income taxes by changing the situs of the trust?
- Pay yourself the proper compensation and clearly illustrate this on the beneficiary's report?
- Review the trust investment policy statement with the financial advisor for the trust to determine whether all investments were prudent?
- Send the investment policy statement to the beneficiaries with the Trustee's report?
- Ask the beneficiaries to consent in writing to your investment asset allocation?
- Ask the beneficiaries to consent in writing to your distributions and the annual report you provided them?
- Ask the beneficiaries whether they have any questions or problems?

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What It Means to Be a Trustee: A Guide for Clients

*by the Fiduciary Matters Subcommittee
of the ACTEC Practice Committee**

Editor's Note: The following is a guide for clients on the duties and responsibilities of a trustee. It should be of great benefit to clients in deciding whether to act as a trustee and to Fellows in advising clients on what it means to be a trustee. It was prepared by the Fiduciary Matters Subcommittee of the ACTEC Practice Committee.

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FOREWORD

Your attorney, as a Fellow of the American College of Trust and Estate Counsel ("ACTEC"), has commended this Guide to you because you are interested in what it means to be a trustee. Perhaps you are considering naming a trustee for your family, or perhaps someone has suggested that you serve as a trustee yourself.

With that in mind, a committee within the College has prepared this Guide for the use of its Fellows and their clients. The text is a consensus of suggestions and considerations. Reading the text will not equip you to be a trustee, but, instead, the authors intend to offer you an appreciation of what it means to be a trustee. For those considering accepting a trusteeship, the goal is not to encourage or discourage but rather to insure that any such decision is made with sufficient information to understand the basic ramifications.

The accuracy and applicability of issues raised in this Guide, and the possibility that there may be other relevant issues not raised here, should be addressed by your attorney in the context of the laws and practice in the jurisdictions whose laws govern particular trusts.

For information about the American College of Trust and Estate Counsel, and its Practice Committee which authored this *Guide*, please see Appendix C.

GENERAL STATEMENT

While there are many types of trusts, and trusts are used to accomplish a wide variety of objectives, as exemplified in Appendix A here, the essence of a trust is a legally binding arrangement under which

* Copyright 2005. The American College of Trust and Estate Counsel. All rights reserved. Members of the Fiduciary Matters Subcommittee are Donna G. Barwick, John H. Clymer, Edward M. Condit, David J. Estes, Allen D. Evans, Martin A. Heckscher, Virginia A. McArthur, Philip F. Spalding, William C. Weinsheimer

and Norris P. Wright. *Editor's note:* Sources close to the subcommittee indicate that special mention is due to Ed Condit, who carried the laboring oar on this project for several years, and to Bill Weinsheimer, who got the project completed and across the finish line.

a person, as “grantor”¹ appoints another person, as trustee, to hold property in a fiduciary² relationship for a third person, the beneficiary.

That is the essential structure, but frequently the arrangement may be for multiple beneficiaries, and sometimes with multiple trustees, and occasionally multiple grantors. The obligations of a trustee are defined by law and by the trust instrument, which may be the Will of someone who has died, or an agreement or other lifetime document, and which spells out the uses to which the property is to be applied. Appointing someone to be trustee implies a confidence in that person and an expectation that he or she will apply the property faithfully and according to the grantor’s objectives for the benefit of the beneficiaries and not for the personal benefit of the trustee.

The administration of a trust is governed primarily by state laws, although Federal tax laws and other regulatory provisions also are part of the picture. State trust laws differ from state to state, so the discussion in this Guide will necessarily be general in nature. The required amount of court involvement in the administration, for example, can vary widely and may determine how burdensome the job of trustee can be. For a more detailed description of the duties of a trustee, you should consult your attorney who specializes in trust law.

We will begin with an overview of a trustee’s *duties*, some of which may be specified in the governing instrument and some of which may be explicit or implicit in applicable state and federal law. To perform those duties, trustees are given *powers*, and some of those as well are specified in the governing instrument while others are explicit or implicit in applicable state or federal law. Following overviews of those subjects, this Guide will offer practical and administrative points to consider when addressing what it means to be a trustee and points to think of in choosing a trustee or deciding whether to become a trustee.

GENERAL DUTIES OF A TRUSTEE

A trustee stands in a special relationship of fiduciary responsibility to the grantor of the trust and to the beneficiaries. In carrying out his or her fiduciary duties, the trustee must be mindful of that unique relationship. The starting point is the trust instrument and its specification of what the trustee is to do to accom-

plish the purposes for which the trust has been established. For example in the case of the simplest trust disposition, the instrument might state that the trustee is to hold and invest the assets, to pay net income to beneficiary #1 for life and then to distribute the remainder to beneficiary #2. Beyond that, certain duties are imposed on trustees by state law. The emphasis on a particular duty may depend on the purpose for which the trust was created. In the rest of this section are general descriptions of basic categories of a trustee’s typical duties, prescribed by the trust instrument and governing law.

Duty to Administer Trust by Its Terms. The trustee is obligated to administer the trust strictly by its terms. The trustee must be guided in all acts by the trust instrument, including any amendments, and, unless there is an absence of direction or ambiguity, must be limited by the intent apparent from the face of the trust instrument. Therefore it is critical that the trustee read and understand the entire trust instrument. To the extent the trustee needs guidance in interpreting the terms of the trust, he or she should seek advice from a qualified attorney.

Duty of Skill and Care. The laws of most states require that a trustee administer the trust with the care, skill, prudence and diligence that a person familiar with the job of serving as a trustee would use in the conduct of the trust’s activities to accomplish the purposes of the trust. Thus, even if a trustee has never previously served in such a capacity, he or she will be held to a high standard of performance.

Duty to Give Notices. The trustee must read the trust provisions carefully to determine the circumstances in which he or she is required to give notice to beneficiaries, co-trustees and successor trustees. For example, trusts typically require notice if a trustee wishes to resign, delegate powers to another trustee, or designate a successor trustee. Some trusts give beneficiaries rights of withdrawal out of new contributions to the trust, or upon attaining a particular age, and the trustee must be careful to give notices to the beneficiaries of their withdrawal rights in those situations. In trusts which authorize the trustee to name a professional investment advisor, there is often a requirement that the beneficiaries be given written notice of such action. Similarly, notice of delegation of investment functions may be required by statute in states which have adopted the Prudent Investor Rule.

Duty to Furnish Information and to Communicate. The trustee has the duty to keep the beneficiaries

¹ The authors have used the term, “grantor” throughout, to refer to the person creating a trust. “Grantor” is the relevant term used in the U. S. Internal Revenue Code. The terms “settlor,” “donor” and “trustor” are synonymous with “grantor.” “Settlor” is

a term inherited from trust practice in Great Britain, where trusts have been known as “settlements.”

² “Fiduciary” is both a noun and an adjective, signifying a relationship of mutual reliance and faithfulness.

informed regarding the trust and its administration. The trustee should provide the beneficiaries with information about the assets of the trust and the trust's investment performance, and should provide each beneficiary with other information about the trustee's acts and the administration of the trust which is relevant to the beneficiary's interest. The trustee also should provide any additional information reasonably requested by the beneficiary.

Duty to Account. The laws of most states require that the trustee periodically provide the current trust beneficiaries with a written accounting of the assets, liabilities, receipts, and disbursements of the trust. The form and frequency of the accounting will vary from state to state, and may depend on the value of the trust and the number and sophistication of the beneficiaries. Generally, the trustee is required to provide an accounting to each beneficiary to whom income or principal is required or authorized in the trustee's discretion to be currently distributed. It may also be appropriate to furnish remainder beneficiaries³ with an accounting.

Duty Not to Delegate. Generally, the trustee has a duty not to delegate to others the performance of any acts the trustee can reasonably be expected to perform personally, particularly acts involving the exercise of judgment and discretion. The trustee should keep records documenting the basis for any significant decision. The trustee may employ agents, such as attorneys, accountants and investment advisors, to advise or assist in the performance of administrative duties. The trustee may not, however, blindly follow their advice. Although some states specifically authorize the trustee to delegate investment functions to a professional investment advisor, the trustee must still maintain supervisory responsibility. The trust instrument may authorize a trustee to delegate some or all of his or her powers to a co-trustee.

Duty of Loyalty. The trustee is obligated to administer the trust solely in the interests of the trust beneficiaries. The trustee may not engage in any act that puts his or her personal interests in conflict with those of any of the trust beneficiaries.

Duty to Avoid Conflict of Interest. The trustee has a duty not to use trust property for his or her personal gain or for any other purpose unconnected with the trust, nor to take part in any transaction in which the trustee has an interest adverse to a beneficiary. In general, the trustee may not use trust assets in any manner that benefits the trustee personally, even if there is no loss to the trust. The trustee should consult with an attorney regarding any proposed transactions

which the trustee suspects might violate this rule. Note, however, that the trust instrument may authorize the trustee to engage in a transaction which would normally constitute a prohibited conflict of interest; for example, if the trustee is a beneficiary, or is related to a beneficiary, the trust instrument may authorize the trustee to buy designated assets from the trust.

Duty to Segregate Trust Property. The trustee has a strict duty not to commingle personal funds or other non-trust assets with the property of the trust. Trust property must be separate at all times from the trustee's personal funds. For example, trust accounts at banks and other financial institutions must be segregated from personal accounts, and held in separate accounts which are designated as property of the trust.

Duty of Impartiality. The trustee has a primary duty to treat the beneficiaries impartially, unless otherwise specifically provided in the trust instrument. That means that the trustee must show impartiality in balancing the interests of lifetime beneficiaries with those of remainder beneficiaries, and in balancing the interests of members of the same class. For example, as a part of the duty of impartiality, the trustee may not allow one beneficiary to use trust property, such as a vacation home, to the exclusion of the others without charging market rent or obtaining the consent of the other beneficiaries. The trustee must also balance the interests of lifetime and remainder beneficiaries when making investment and discretionary distribution decisions.

Duty to Invest. The trustee has the duty to invest trust assets in a manner which is appropriate for the particular trust. Exercise of that duty is what probably comes to mind initially when one thinks about what it means to be a trustee. Unless otherwise required by the trust instrument, the trustee will generally have a duty to diversify investments and determine an appropriate asset allocation program. That duty begins as soon as the initial assets are received by the trustee. The trustee should become familiar with the specific investment directions given in the trust instrument, and also must know the investment directions and restrictions under governing state law. In those states which have adopted the Prudent Investor Rule, a trustee who is not a professional investor would be well advised to delegate investment functions to a professional investment advisor. An overall concept to keep in mind is that a trustee must be prudent in his or her handling of trust investments. This requires that the trustee determine the financial needs and risk tolerance of the beneficiaries in establishing the investment objectives and program for the trust.

Duty to Enforce and Defend Claims. The trustee has a duty to take reasonable steps to enforce claims on

³ The terms "remainder beneficiaries" and "remaindermen" mean those beneficiaries to whom the trust property is to be dis-

tributed, pursuant to the trust instrument, when the trust terminates.

behalf of the trust and to defend the trust against adverse claims. In deciding whether to enforce a claim, or defend the trust against a claim, the trustee should consider the economic realities of the situation. If the costs of enforcing or defending a claim outweigh the potential benefit to the trust, the trustee may be well advised to settle or abandon the claim. A successor trustee may be obliged to examine the acts of a prior trustee to determine if a possible claim exists in favor of the trust.

Duty of Confidentiality. The trustee should keep the affairs of the trust confidential, unless otherwise required by law. For example, the trustee should not disclose the terms of the trust, the identity and interests of the beneficiaries or the nature of the trust assets to anyone who is not a beneficiary of the trust or who does not need this information to assist in the administration of the trust. In addition, the trustee should keep confidential any personal information he or she has learned about the beneficiaries through serving as trustee.

POWERS OF A TRUSTEE

On becoming a trustee one enters a relationship which is governed by rules and bounded by limits. A trustee who thinks of himself or herself as controlling the relationship is far more likely to encounter serious trouble than a trustee who recognizes that the more practical characterization is that of a faithful partner with the grantor and the beneficiaries, in fulfilling the trust's objectives.

Other sections of this *Guide* describe what must be done or achieved by the trustee, and to some extent what shall not be done. This section addresses "administrative powers," which generally enable the trustee to perform his or her duties and to achieve the assigned objectives. The governing instruments for most modern trust relationships contain lists of "powers and authorities," describing such things as types of permissible investments, the manner by which trust property may be bought, held and disposed of, and how discretionary elections and other decisions may be made. Beyond what is in the governing instrument lies a large body of trust law which the trustee must heed. The common law of trusts has grown over several centuries, largely originating in the English courts and Parliament, and subsequently selectively adopted and varied locally within courts and legislatures throughout North America. Since the middle of the Twentieth Century, "uniform acts" and "restatements" have brought some unity and innovation to harmonize diverse local rules.

With such a rich and sometimes confusing library of how a trustee can operate, it can be reassuring to know that lawyers with relevant experience are available to help set the course and to provide course corrections from time to time.

Although there are risks in generalization, the operating principle in most instances is as follows: (a) if the governing instrument clearly allows an action to be taken, it may be taken if the trustee believes it appropriate and fair to the beneficiary, or (b) if permitted by state law the action may be taken even if the trust instrument lacks sufficient specificity, but (c) if the instrument and state law are silent, the trustee may petition a local probate court or other court having appropriate venue and jurisdiction, for instructions as to the action to take.

INVESTING TRUST ASSETS

State law governs what investments are appropriate for trust assets. The trust instrument can also expand or reduce the limits of state law as to what are appropriate trust investments in a particular trust. The law of trust investments is undergoing dramatic change. The governing instrument should be reviewed with that in mind, by an attorney who specializes in trusts.

Historically, most trusts have been drafted to require that the trustee distribute income to one beneficiary or several beneficiaries and hold the principal for the remainder beneficiaries or ultimate beneficiaries. In deciding upon investments, then, the trustee owes a duty of impartiality to both sets of beneficiaries. Therefore, the job of investing trust assets has been viewed as requiring a balance between income and capital appreciation. For many years, state laws created lists of legal investments for trustees. A trustee was protected from liability for investing in the listed securities.

The late 1950's saw the birth of an approach to investing often called Modern Portfolio Theory. That Theory's premise is that risk can be quantified and that risk and return work together over time. Also, the theory holds that asset allocation, rather than market timing or security selection, is a primary determinant of portfolio performance. Maximizing current return might be inconsistent with maximizing "wealth." Investment professionals now typically concentrate on portfolio design to maximize "total return," without regard to whether particular assets are held for production of interest or dividends or capital gains. The laws governing trust investments have reflected a struggle to accommodate those modern investment theories. National organizations of trust lawyers and law school teachers have designed model laws, including "Prudent Investor Rule" and "total return" statutes, to enable trustees to employ Modern Portfolio Theory, but not all states have adopted those laws.

Investment strategy must also be guided by the purposes of the particular trust, and the nature of the assets held in the trust. In determining a strategy, the trustee must consider the expected duration of the trust, the needs of the beneficiaries and applicable tax consequences.

Trustees have always been under a duty to diversify trust investments, but the newer laws designed to accommodate Modern Portfolio Theory particularly emphasize the importance of diversification.

DISTRIBUTING TRUST ASSETS

One of the fundamental duties of a trustee is to make appropriate distributions to designated beneficiaries. While that obligation of the trustee may seem obvious, it is a matter of substantial importance and potential liability to the trustee. That is compounded by the fact that many trust instruments give the trustee broad discretion in the determination of beneficiary distributions, both as to timing and amount. The issues surrounding distributions to the beneficiary are relevant not only during the existence of the trust but also at the termination date when final distributions are required.

Required Distributions during the Existence of the Trust. Assuming the language of the trust instrument is clear and unambiguous, required distributions to a beneficiary during the existence of the trust are generally obvious to both the trustee and beneficiary, but if the wording of the trust instrument is not clear, or is ambiguous, the trustee may need to seek judicial interpretation. It is common for a trust to contain provisions requiring the distribution to a beneficiary of all net income earned from the trust assets. While the required income distribution may be clearly stated in the trust instrument, it does put considerable importance upon the trustee's proper allocation of receipts between the income and principal of the trust and also upon the selection of appropriate investments. Another common form of required distribution is a specific dollar amount payable on a regular basis to the beneficiary. That dollar amount may be calculated in many different ways such as a percentage of the current value of the trust assets, as a fixed dollar amount, or as a combination of the two.

Discretionary Distributions during the Existence of the Trust. It is also common for the terms of the trust instrument to give the trustee certain discretion in making distributions to the beneficiary during the existence of the trust. Those discretionary distributions may be coupled with other required distributions or may be the sole method of making distributions to the beneficiary. The provisions concerning discretionary distributions may vary widely among trust instruments. For example, the trust instrument may provide the trustee with discretion to make distributions to the beneficiary without any guidelines or without any limitations upon the trustee's authority. On the other hand, the terms of the trust instrument may provide the trustee with written guidelines within which to exercise the discretionary distribution powers. One typical approach is to provide the trustee with authori-

ty to make distributions to the beneficiary to provide for the beneficiary's "health, education, support and maintenance." Even so, such descriptive wording describing the grantor's intentions regarding discretionary distributions (often called "ascertainable standards") will require substantial judgment by the trustee in determining the needs of the beneficiary. The trustee may find it necessary to secure data from the beneficiary to justify the exercise of the discretionary distribution power. The trustee may also find it necessary or appropriate to consider the other resources of the beneficiary before making such discretionary distributions. All of those possibilities may be more specifically provided for in the trust instrument, or it may be that the trustee must rely upon the trustee's own independent judgment and evaluation.

Termination Distributions. The final distribution which the trustee is required to make is the allocation of assets among the appropriate recipients upon the termination of the trust. It is not unusual for the trustee to seek judicial authority for such termination distributions even though the trustee may have operated the trust independently of court supervision up to that time. Determining the appropriate beneficiaries and their respective distributive shares, and the powers for actual transfer of assets, are all important aspects of final distributions.

Total Return Trusts. With the acceptance of Modern Portfolio Theory it has become increasingly apparent that traditional principles of allocating receipts between income and principal may cause needless conflicts between the trustee and the beneficiaries. That conflict is most clearly demonstrated in the circumstance of a beneficiary receiving the income for a fixed period of time and the principal being distributed to another beneficiary at the termination of that fixed period. While the beneficiary whose interest relates solely to income distributions will seek to maximize the allocation of receipts to the income account, the beneficiary who is destined eventually to receive the principal will prefer to maximize the allocation of receipts to principal. That divergence of interests can become difficult for the trustee to resolve, because some assets may provide greater income and less principal appreciation while others may provide less income and greater principal appreciation. As a result, there is a developing approach to trust distributions encompassed under the umbrella description of "total return trust". Although that subject is beyond the scope of this *Guide*, it does justify a simple comment. Among the many developments under the "total return trust" approach are statutory changes allowing the trustee to modify the allocation of receipts between income and principal to more properly reflect the interests of the beneficiaries, rather than having to use tra-

ditional rules of allocation. Another version of "total return" legislation allows for the conversion of a mandatory payment of net income into an annuity or unitrust interest (typically in the range of 3% to 5% of the prevailing aggregate value of the trust assets). There also are other methods of distribution which are not tied to the traditional income and principal allocation concept. The form and language of those provisions are varied and sometimes complex, and require careful thought and reliance upon qualified legal counsel in their drafting and implementation.

RECORDS AND ACCOUNTINGS

Overview. To serve responsibly a trustee must keep clear trust records and provide accountings to beneficiaries. Records and accountings are management tools that are the basis for critical actions of the trustee including creation of a thoughtful investment policy, selection of asset managers, administration of illiquid assets such as a closely-held business or real estate, strategic income and wealth transfer tax planning, and, of course, beneficiary reporting. A trustee who is unable to account for the trust estate properly will likely have difficulty succeeding in a legal proceeding, and may even be removed or suffer a loss of compensation or be charged with personal financial liability.

General Records of the Trust. Virtually all trusts hold financial assets, and those assets occasion written records such as bank statements, cancelled checks, brokerage statements and security trade confirmations. Other asset classes such as real estate will also have a routine set of records. Copies of filed tax returns are also a standard part of trust records. All trust records are important for legal and tax purposes and need to be retained in an orderly fashion. Reasonable record keeping is an inherent part of all trustee duties, particularly the duty to account. Moreover, trust beneficiaries usually have a right to inspect trust records, subject to legal limitations in some cases. *Appendix B* contains a list of typical records that trustees keep.

Records of Trustee Actions. Trustees often are authorized by the trust instrument to make discretionary decisions. Those are nonrecurring events and need to be documented clearly. For example, a trust instrument may authorize the trustee to distribute trust principal for educational expenses. If the trustee exercises that discretion and makes a payment, the decision should be supported by memorandum or correspondence. Records of trustee actions can be highly formal (a vote of co-trustees on the sale of a business) or informal (the letter by which a beneficiary requested a payment which the trustee made), but some such written support is essential.

Trust Accountings. The beneficiaries of a trust have a legal right to receive sufficient information

about the trust to protect their beneficial interests in the trust. That legal principle is the foundation of the trustee's legal duty to account to the beneficiaries, and provides the basis for prudent trust management. In addition to requiring trustees to account to beneficiaries, the law offers mechanisms for trustees to have their decisions and actions approved, thereby defining the scope of their liability. For example, a trustee may seek to have the trust beneficiaries consent to a specific transaction or to all transactions and trustee decisions during a specified time period. Trustees who are subject to direct court jurisdiction may be required to submit accountings for formal judicial approval. Even absent such requirement, a trustee may seek protection and finality by asking a court for approval of specific matters or of all transactions during a particular period of time. Accountings for prior periods are also essential when there is a change of trustee, to ensure that the successor trustee begins his or her responsibilities with full knowledge and a clean slate.

Form of Accountings. While there is a trend towards uniformity in trust accountings, the proper form of a trust accounting varies depending upon applicable local law, local practice and the specific circumstances of the trust. Most accountings should be prepared on an annual basis and should show initial assets, income and principal transactions and assets on hand at the end of the year. Obviously, the accuracy and completeness of accountings, and the efficiency of their preparation, will depend upon the trustee maintaining accurate and orderly trust records. Indeed, if a trustee's actions are challenged in court the quality and accuracy of the accountings and records could have a material effect on the outcome of the case.

COMPLIANCE WITH TAX LAWS

A trust is normally a "taxpayer," with its own tax identification number and obligation to file income tax returns with the United States Treasury and probably with at least one state or other jurisdiction, and to pay taxes due including estimated taxes if required.

The trustee must comply with transfer tax laws such as the estate tax and generation-skipping tax and the rules for filing of relevant returns and payment of those taxes.

Income Taxes. Trusts generally are tax-paying entities, but many trusts do not pay income taxes. It is important for the trustee to understand the nature of the income taxation of trusts, or to retain an advisor who will provide assistance in this regard. State laws for taxation of trust income vary widely from state to state, and a trust may be subject to income tax in more than one state. A significant factor is that the federal marginal tax rates on trust income reach the highest rates at \$9,750 of trust income at the time this *Guide* is written.

For Federal income tax purposes, there are three types of trusts (other than those for charitable purposes). In the case of *simple trusts*, which are those required to distribute income currently, the recipient beneficiaries pay the tax on whatever income is taxable, which may include the value of non-cash assets actually distributed as well as certain income which may not have been distributed. In the case of *complex trusts*, which are those whose trustees have discretion over whether income is distributed to the beneficiaries, any income not distributed to the beneficiaries during the taxable year of the trust will be taxed to the trust, while income which is distributed is taxable to the beneficiary who has received it. Income of *grantor trusts* is taxed to the grantor, whether distributed or not. That third type includes revocable trusts, but it may also include certain irrevocable trusts due to special tax rules that may cause a person having certain powers over the trust to be treated as "grantor" of the trust for income tax purposes.

Generally, the trust pays tax on net capital gains realized by the trust, even if principal is distributed to beneficiaries in the same year, although there are some exceptions to that rule.

Other Income Tax Considerations. Assets included in the gross estate of a deceased trust grantor receive an adjustment in tax basis for Federal income tax purposes at the grantor's death, subject to special rules. That adjusted basis is a factor that a trustee needs to consider in deciding whether to distribute trust assets during the grantor's lifetime, rather than continuing to hold them until the grantor dies. A similar analysis would be required when a trustee considers whether to retain a power which would cause the inclusion of the trust assets in the trustee's estate, or to renounce that power in order to keep the trust assets out of his or her estate.

Charitable Trusts. Special provisions of the tax laws apply to trusts established entirely or partially for charitable purposes. Even if income is exempt from tax, the trustee will probably be required to file tax returns. Special assistance of qualified tax counsel should be obtained.

COMPLIANCE WITH OTHER GOVERNMENT REGULATION

A trustee should acquire at least a general idea of the impact of the securities laws as they apply to persons who invest other people's money. The applicable body of Federal law is the Investment Advisers Act of 1940, and there are complementary state statutes in effect in each of the fifty states. A person undertaking an occasional trusteeship, and not on a professional basis, may have no involvement with those laws, but every trustee is well advised to seek qualified legal

counsel for guidance as to the need to register or otherwise comply with those laws.

It is sometimes necessary for a trustee to comply with the requirements of other authorities, quite separate from those administering securities laws or tax laws.

Courts of probate jurisdiction exercise broad authority over many categories of trusts, particularly those provided under decedents' Wills. All practicing lawyers who are familiar with probate law practice will know the requirements for such procedures as the following: being appointed trustee, posting required bonds and, if required, sureties, obtaining judicial instructions when necessary, and submitting proper accountings to the court, the beneficiaries, and, when there are charitable interests, to the state attorney general or other legally designated overseer of charities.

In all types and areas of compliance with laws and regulations, and throughout the course of administering a trust, the trustee should seek qualified legal advice as to peculiarities of local law and any aspect which is not thoroughly within the knowledge of the trustee.

A TRUSTEE'S CHOICE, USE AND COMPENSATION OF ADVISORS AND SERVICE PROVIDERS

Upon undertaking a trusteeship an individual trustee must provide for a variety of services to implement the administration of the trust. Those services will be required to fulfill some or all of the following functions:

- (a) arranging for safekeeping of trust property;
- (b) maintaining an accurate and efficient system for processing and accounting for the receipts, disbursements, investments and distributions from the trust;
- (c) accurately reporting the accounting and other relevant trust information to the beneficiaries on a periodic basis;
- (d) arranging to make distributions and disbursements from the trust on a timely basis;
- (e) engaging competent counsel to advise on legal and compliance issues, including compliance with the requirements of any court which has jurisdiction of the trust;
- (f) obtaining competent fiduciary income tax return preparation services;
- (g) engaging competent advice for the continuing investment of the trust property; and
- (h) providing adequate liability and fidelity insurance.

Many of the foregoing services are available through a single provider, such as a suitably equipped bank, trust company or law firm. In other instances the services will be "unbundled," meaning that different aspects will be furnished by separate individuals or

organizations. Although the trustee may delegate some of those functions to outside providers, the trustee is ultimately responsible to the beneficiaries for the proper administration of the trust. In this regard the trustee may aptly be considered to be the "captain of the ship." Thus, the trustee must make sure that any service provider he or she engages for the trust is fully capable of handling the assigned task and has adequate information to do so on an ongoing basis.

While the trustee may delegate certain trust functions to an outside provider, he or she should recognize that some decisions or responsibilities are personal to the trustee and cannot be delegated to anyone. Most importantly, the trustee alone must determine how, when and to whom trust property will be distributed. The trust instrument will frequently describe those functions that the trustee is required to carry out "in his or her sole and absolute discretion," such as deciding whether to make a discretionary distribution of trust property or whether the trust should be terminated before the specified termination date.

For many years the laws of most states required a trustee to make all investment decisions and did not allow those decisions to be delegated to an investment advisor. However, "Prudent Investor Rule" statutes enacted recently in many states do permit the trustee to delegate investment decisions to an independent advisor provided he or she exercises reasonable care in selecting the advisor, establishes that the delegation is consistent with the terms of the trust, and monitors the investment performance on a regular basis.

Presumably the trustee will pay outside organizations or individuals for the services they provide to the trust, such as custody, accounting, tax and investment advice. While it is appropriate, depending on the terms of the governing instrument, for trust funds to be used to pay for these services, the trustee should review the costs of administering the trust (including the trustee's own compensation) to make sure that the total is reasonable and does not exceed the amount allowable under the governing instrument or the law of the state where the trust has its *situs* or "legal home."

A TRUSTEE'S COMPENSATION AND LIABILITY

A trustee who performs the prescribed duties, and who does not exceed the proper limits upon the trustee's powers, is entitled to financial compensation for his or her services. Conversely, a trustee who fails to perform duties properly, or who exceeds limits on powers, may have legal liability to the trust and its beneficiaries.

Trustee compensation is governed by laws of the state in which the trust is administered and also by the terms of the governing instrument. In some states a fee

schedule is set out by statute or court rules. Alternatively a fee schedule may be described in the governing instrument. Otherwise, trustee compensation is generally governed by accepted standards of reasonableness in the jurisdiction. Criteria for determining reasonable compensation may include (i) the degree of risk and responsibility assumed by the trustee, (ii) the time required of the trustee (as supported by detailed time records), (iii) the value of the trust estate and its income, (iv) customary fees charged in the community by other trustees, (v) whether or not extraordinary services were required of the trustee, (vi) the novelty and difficulty of the issues involved, and (vii) other relevant factors. Generally the trustee is entitled to draw fees whenever he or she believes appropriate after the services have been rendered. The trustee is also entitled to reimbursement for out-of-pocket costs that have been incurred. Generally trustee's fees are subject to review by a local court as to reasonableness; however, in some states prior court approval is required before a fee may be paid to the fiduciary. If there is more than one trustee, in some jurisdictions trustee's fees up to the statutory amount may be paid to several trustees (*i.e.*, in some states if a trust exceeds a certain size, up to three trustees can be paid the statutory amount). In other jurisdictions a reasonable fee is the total amount permitted to be paid for all trustees and must be divided between them as agreed upon. Fees paid to attorneys, accountants, investment managers, and the like may be separate and in addition to the trustee's fee; however, to the extent that those fees are for services normally provided by a trustee, they may reduce the compensation to which the trustee is entitled.

If an individual trustee is a member of the beneficiary family, particularly if not a trained or professional fiduciary, it should be made clear in the governing instrument whether or not the trustee is to be entitled to compensation.

Trustee Liability. A trustee can become personally liable for a breach of duty as trustee when the breach results in a loss to the trust; however, the trustee is not a guarantor of the principal and income of the trust and usually will not be liable for losses that occur despite faithful performance of his or her duties. Grantors commonly provide in trust instruments that a trustee may have some measure of exemption from liability. Different states have different provisions regarding accounting and whether such an accounting starts the statute of limitations running so that after the relevant period of time the trustee would no longer be liable for an act which had occurred in the past. The trustee may also be liable for the actions of agents such as an investment manager, unless there is specific authority for delegating responsibility to the agent and relying on the agent's advice. For example, some trust instru-

ments and some state laws provide that if an investment manager is selected with care, and the actions of the investment manager are reasonably monitored from time to time, the trustee is not personally liable for losses from investments chosen by the investment manager. In states which have enacted the Prudent Investor Rule, a trustee, with advice of legal counsel, may wish to look into possible options for delegation of investment decisions to a qualified investment advisor, and, at least in theory, to be relieved of liability if he or she performs the required degree of monitoring of the work of the investment advisor.

Removal. In addition to potential liability of a trustee, an additional remedy may exist for aggrieved beneficiaries. A court having jurisdiction over the trust generally will have power to remove a trustee in cases where there has been a breach of duty by the trustee or other misfeasance. Further, it is sometimes provided in trust instruments that beneficiaries have the power to remove a trustee, either with or without cause.

RESIGNATION

There is perhaps no more powerful measure of the seriousness of an appointment as trustee than the fact that once the appointment is accepted the trustee generally may not unilaterally resign or refuse to continue acting for the trust. There are two major exceptions. First, the provisions of the trust instrument may provide a method for resignation and even establish a procedure for appointment of a successor trustee. Second, the trustee may follow applicable legal procedures to secure a court approved resignation. Those exceptions, however, are not substitutes for the trustee's careful consideration of all relevant circumstances before accepting the trusteeship.

Resignation by the Terms of the Trust Instrument. The trust instrument may provide the trustee with a method of resigning as well as a procedure for the appointment of a successor trustee. If such language is clearly contained in the trust instrument, the trustee must follow those written provisions. That should include attention to (a) the trust instrument's procedure for the appointment of a successor trustee who is willing to accept such appointment, (b) the resigning trustee's obligation to furnish accountings to the beneficiaries, and (c) the delivery of the trust assets to the successor trustee.

Resignation by Judicial Procedures. If the trust was created under a Will, or if it is already subject to current supervision of a court, the rule is quite common that the trustee must petition the court having jurisdiction for permission to resign, regardless of the provisions contained in the Will. Likewise, if an inter vivos trust instrument does not provide a clear and specific procedure for resignation, the trustee would have

to petition the court having appropriate equity jurisdiction over the trust for permission to resign. The court may accept the resignation of the petitioning trustee and appoint a successor trustee, but the court does not necessarily have to do so. The primary concerns of the court will be that the trust assets be preserved and that the trustee's resignation is in the best interests of the trust's beneficiaries. The court will insist upon (a) the availability of a suitable successor trustee who is willing to accept such appointment, (b) the resigning trustee's obligation to furnish accountings to the beneficiaries, and (c) the delivery of the trust assets to the successor trustee.

CHOOSING TRUSTEES

At least one trustee must be named when a trust is established. That may be a qualified individual or an institution having trust powers under applicable law. Successors also may be named, in case the initial or prior trustee resigns or otherwise ceases to serve. Sometimes a trust instrument will describe a procedure by which successor trustees are to be selected.

The duties and responsibilities of a trustee are varied. Some consider it difficult for one individual to carry out all of the duties and responsibilities of a trustee; however, an individual trustee may, in most cases, engage the services of advisors to assist the trustee. The other option is to name a corporate trustee, intending that the corporate trustee would undertake all of the duties and responsibilities of a trustee itself, without delegating them. (References to a "person" in the following text will include corporate as well as individual trustees.)

What are the primary considerations in deciding whom to select to be trustee?

Responsibility and Reliability. The trustee selected should be a person who can be relied upon to carry out his or her duties in a timely and responsible manner. If there is any question whether that will be difficult for that person to accomplish, then perhaps a co-trustee, with capabilities that complement those of the other trustee, should be considered.

Experience and Expertise. A candidate for trusteeship should have had experience as trustee or at least analogous experience. Is there particular expertise that the candidate would bring to the task, given the type of assets likely to be administered and the problems to be faced? What are the opinions of others who have dealt with the candidate in relevant circumstances?

Conflicts. Does the candidate occupy a position that might create conflicts of interest, real or imagined? For instance, is the person a family member who has problems dealing with other family members who will be beneficiaries? Is the person a co-owner or busi-

ness partner in a business or entity that will have to be administered by that person as trustee? Would selecting a different person be more desirable in those cases?

Availability and Communication. Geographic proximity to the beneficiaries is usually desirable, but the technology now available reduces the impact of this factor. Nevertheless, a key consideration in selecting a trustee is the likelihood that the trustee will be available to the beneficiaries of the trust and will be a good communicator. A lack of communication skills or a reluctance of the trustee to be available to the beneficiaries may cause problems over the years.

Term of the Trust. How long a trust is anticipated to last may impact the choice of trustee. A person who is aging rapidly, has health problems, or is too busy, would generally not be a good candidate for a long-term trusteeship. Also, for longer duration trusts, a succession of trustees should be provided. A corporate trustee can usually be counted on to be available for the duration of a longer term trust.

Fees. It is generally understood that corporate trustees charge fees based on a percentage of the trust's income or principal, or both. In smaller trusts that can be expensive (especially where minimum fees are used). Family members often serve without fees, or with relatively minor fees, but they usually need to hire and compensate investment advisors, accountants or attorneys to assist them in carrying out their duties. Generally, those fees can be negotiated, and may be payable out of trust assets if the trust instrument or local laws permit.

Summary. The various considerations above must be weighed in determining who would be best suited to act as trustee. There is not always a good or clear answer. Because the initial selection may not work out, it is advisable to build into the trust agreement a process for the trustee to resign or for the adult beneficiaries (or some designated third party) to remove the trustee and, in either event, to appoint a successor trustee. Trusts are not static. The types of assets being administered, as well as other needs of the beneficiaries, are apt to change significantly over the years. In selecting a trustee one should anticipate the changing nature of the trust's assets and the changing composition of the group of beneficiaries as well.

In the event of resignation or removal or a trustee's death a successor trustee must be appointed. Often the trust instrument will name a successor and the successor can either accept the appointment or not. If the former trustee is still alive, the former trustee has the duty to transfer all assets and pertinent records to the suc-

cessor. In the event of the death of an individual trustee the responsibility for those actions would fall upon the personal representative of his or her estate. If there is a successor trustee appointed by the trust instrument, generally a financial institution or title company will recognize the affidavit of death of the former trustee signed by the successor trustee together with a copy of the trust instrument as sufficient to pass title. Alternatively, if the Court has appointed a successor trustee, the certificate of appointment by the Court will be sufficient to enable the new trustee to obtain title to the assets. The successor trustee, like an initial trustee, has the duty to see that all the assets are collected.

As the foregoing discussion implies, it is often desirable to arrange for two or more trustees to serve concurrently, rather than to have one serving alone. Especially if the potential sole trustee is to be an individual, rather than a corporate trustee, there can be tremendous advantages in having co-trustees to share the required exercises of judgment, as well as to assure continuity if one of them becomes unable to perform. In fact, even with a corporate trustee it is often desirable to appoint an individual co-trustee to serve concurrently to provide a personal touch and oversight.

AFTERWORD

To summarize, a trusteeship requires many disciplines, such as: painstaking attention to detail, dogged emphasis on the safety of the trust's assets, a prudent and appropriate effort to maintain and enhance the investment value of the trust assets, awareness and management of continuing cycles of deadlines, and adequate maintenance of communications with beneficiaries.

The authors remind you that this *Guide* comprises a consensus of suggestions and considerations, and that no written words, set down at one time, can fully describe all of the contingencies which may occur in the future to test the trustee and, ultimately, the person or persons who appointed the trustee. Given those limitations, the over-riding quality of a trustee should be sound judgment, and the ability to exercise that judgment fairly in the myriad of circumstances which may arise as long as the trust continues.

As noted in the FOREWORD, the accuracy and applicability of issues raised in this *Guide*, and the possibility that there may be other relevant issues not raised here, should be addressed by your attorney in the context of the laws and practice in the jurisdictions whose laws govern the particular trust.

APPENDIX A

TYPES, PURPOSES AND PROVISIONS OF TRUSTS

Trusts in our era almost always are established by the terms of a written instrument, which may be the Will previously executed during the lifetime of a person who has died, or it may be an *inter vivos* instrument executed by a living person and which is effective immediately.

Trusts are created for a variety of purposes, but there are a few typical trusts that are the ones used most often in estate planning. Understanding the type and purpose of the trust is key to understanding the duties of the trustee. In common usage the governing instrument may be loosely referred to as the "trust", but strictly speaking the "trust" is the legal entity created under the instrument governing it.

Inter Vivos Trusts (Including "Living" Trusts).

Inter vivos trusts are trusts created during the lifetime of the grantor. *Inter vivos* trusts are either revocable or irrevocable by the grantor. *Inter vivos* trust instruments are most typically called "agreements" or "indentures", or sometimes "declarations" if the grantor is the trustee. *Inter vivos* trusts which are revocable are commonly referred to as "living trusts" and are often created to hold assets in the expectation that they should not be subject to the probate court process following the death of the grantor. Living trusts commonly continue after the disability or death of the grantor and the trust instrument spells out the subsequent terms of the ongoing trust. One common type of irrevocable *inter vivos* trusts is insurance trusts that are designed to hold life insurance so that the insurance proceeds are not included in the taxable estate of the grantor. Other types of irrevocable trusts are designed to hold lifetime gifts, as, for example, where the beneficiaries are minor children or are otherwise incapacitated and unable responsibly to manage the donated assets.

Testamentary Trusts. Testamentary trusts are created under the will of someone who has died and thus come into being only at the death of that person.

Common Subtrusts. Either in a Will or in an *inter vivos* trust a married person might create subtrusts that would come into effect upon the death of whichever spouse dies first, and then continue for the lifetime of the surviving spouse. Examples would be a

"marital deduction trust" intended to qualify for the estate tax marital deduction and a "credit shelter trust" or similar entity designed to hold assets qualifying for the grantor's exemption from estate tax. Such trusts often also provide family subtrusts or separate shares for children or other ultimate beneficiaries.

Generation-Skipping or "Dynasty" Trusts.

Trusts that are intended to take advantage of the exemptions from the federal generation-skipping transfer tax, benefiting distant or multiple generations of a person's descendants, are sometime called generation-skipping or "dynasty" trusts.

Charitable Split-Interest Trusts. Another common type of trust would benefit one or more individuals and one or more charities, often called a "charitable split-interest trust". The federal tax law imposes strict restrictions on the types of charitable split-interest trusts that qualify for the charitable income tax and estate tax deductions. A common type of charitable split-interest trust is a charitable remainder unitrust that benefits a family member or members for life or a period of years, after which the trust estate is to pass to one or more charities.

Changing the Terms of a Trust Instrument. Generally a trust instrument provides explicitly whether it is "revocable" or "irrevocable". If a trust instrument is revocable, it may be changed by the grantor or someone else, by following the procedures established under the trust instrument. If a trust instrument is irrevocable, it cannot be modified unless a court having jurisdiction over the trust orders a modification, following what is essentially a trial involving all persons interested in the trust. Under certain circumstances the Court will allow a modification of the terms of the trust and/or its termination if all the beneficiaries, including representatives such as guardians *ad litem* for unborn beneficiaries, consent to the change or termination. For example, a Will may have created a trust that was of sufficient size to be practicable when the will was written, but with the passage of time it may become so small as to be uneconomical to administer and the Court might order the distribution of the trust assets to such of the beneficiaries as the Court determines would most closely honor the intent of the decedent.

APPENDIX B

A LIST OF TRUSTEES' TYPICAL RECORDS

Legal Records

Governing instrument(s) (including disclaimers or documents exercising a power of appointment)

Written evidence of the resignations and appointments of trustees, preferably the signed resignations and appointments themselves.

Court filings with respect to the trust (*e.g.*, accounts, petitions for adjudication, schedules of distribution, petitions for appointment or resignation of trustee, with all attendant papers)

Court judgments and decrees with respect to the trust and its trustees

Out-of-court agreements regarding administration/distribution/termination of the trust

Agreements with respect to trustee compensation (including fee schedules, formal waivers, etc.)

Tax receipts with respect to the trust fund

Legal opinions furnished by counsel to the trustees

Record of discretionary actions taken, and the basis for same

Record of investment decisions made, and the basis for same

Record of adjustments between principal and income (if permitted by local law) and basis for same

Record of selection/change of advisors (legal, investment, or tax) and basis for same

Financial Records

Tax returns (income, gift, estate, real estate, employment, etc.)

Asset and transaction statements

Deed, certificate, etc. of any non-financial asset owned by the trust

Tax basis of trust assets

Appraisals of trust assets

Accountings

Operational Records

All correspondence sent or received by the trustee in his or her role as trustee

Current family tree for beneficiaries

For each beneficiary: name, tax identification number, address, telephone numbers and email addresses; date of birth, adoption, marriage, divorce, and death; and circumstances, if any, of incapacity

For each trustee: name, address, telephone numbers and email addresses

APPENDIX C ABOUT ACTEC

The American College of Trust and Estate Counsel (ACTEC) is a professional association comprising approximately 2,700 lawyers from throughout the United States. Fellows of the College are nominated by other Fellows in their geographic area and are elected by the membership at large. Fellows are selected on the basis of professional reputation and ability in the fields of trusts and estates and on the basis of having made substantial contributions to these fields through lecturing, writing and teaching.

Among the purposes of ACTEC are improving and reforming trust laws, maintaining an association of lawyers skilled and experienced in the preparation of

wills and trusts, and bringing together qualified lawyers whose character and ability will contribute to these purposes.

Within ACTEC there are various national working committees of Fellows, among which is the Practice Committee, whose members concentrate on how trust and estate lawyers can increase the efficiency of their practices, how they should deal with practical and ethical problems and how they can expand the scopes of their practices. Members of that Committee serving during 2004 and recent prior years have prepared this *Guide*.

Information about ACTEC may be found at www.actec.org.