New York Uniform Trust Code Legislative Advisory Group

Report on General Trustee Issues

November 2012

Part I: Introduction

In May of 2012, the EPTL-SCPA Advisory Committee sent its Sixth Report to the legislature. The Sixth Report recommends that the legislature enact the Uniform Trust Code (UTC), as modified, as new Article 7-A of the Estates, Powers and Trusts Law (EPTL).

The Sixth Report was submitted to the legislature with the understanding that the Trusts and Estates Law Section of the New York State Bar Association (NYSBA), the Estate and Gift Tax and Trusts, Estates & Surrogate's Court Committees of the New York City Bar (City Bar) and the Surrogate's Court Advisory Committee to Office of Court Administration (OCA) would comment on the proposed legislation before any legislative action was taken.

In anticipation of the final Sixth Report-there were several earlier drafts-the decision was made in the Spring of 2012 to form a NYUTC-Legislative Advisory Group (NYUTC-LAG) consisting of members of the Trusts and Estates Law Section of NYSBA, the Estate and Gift Tax and Trusts, Estates & Surrogate's Court Committees of the City Bar and the Surrogate's Court Advisory Committee to OCA. To that end, a steering committee for the NYUTC-LAG was created consisting of the following individuals: Ira Bloom (Chair of NYUTC Committee, T&E Section, NYSBA), Brit Geiger (Chair, Estate and Gift Tax Committee, City Bar), Sharon Klein (Chair, Trusts, Estates & Surrogate's Court Committee, City Bar) and William LaPiana (Chair, Subcommittee on NYUTC, of Surrogate's Advisory Committee to OCA).

The first task of the Steering Committee was to divide up the Sixth Report, which essentially includes the UTC with modifications, into functional areas. Such division was necessary because the UTC is an enormous product. Approved by National Conference of Commissioners on Uniform State Laws in 2000, with several later amendments, the UTC, which has been enacted in about half of the states, is an attempt to codify virtually all of the laws that pertain to trusts. It consists of 11 articles, including articles on trust creation, creditors' rights, revocable trusts, general trustee matters, trustee duties and powers and trustee liability issues.

The Steering Committee created five functional subcommittees: General Trustee Issues, Judicial and Procedural Matters, Trustee Duties and Powers, Estate Planning and Litigation. Thereafter, members from each organization were recruited to work on the different functional subcommittees. Beginning in June, weekly conference calls began for the General Trustee Issues, Judicial and Procedural Matters and Trustee Duties and Powers Groups. The Steering Committee members actively participated on as many calls as possible.

As these subcommittees worked over the summer, it become clear to the Steering Committee that the NYUTC-LAG should recommend a NY (Uniform) Trust Code. The recommendation includes using the UTC, as modified by the Sixth Report, as a starting point, but also integrating relevant EPTL Article 7 sections so that trust sections will be consolidated in one place in Article 7-A and not divided between two articles, Article 7 and Article 7-A.[1] As a

[1] Trust sections are also contained in other articles of the EPTL, most notably in Article 11. The NYUTC-LAG will also consider such sections and to the extent feasible recommend repeal and if appropriate integration into the NY Trust Code.

result, the relevant sections in Article 7 needed to be reviewed. Ultimately, the NYUTC-LAG will recommend the repeal of all relevant Article 7 sections with any necessary integration of repealed provisions into Article 7-A.

The functional subcommittees also quickly encountered another distinguishing feature of New York law as contrasted with the UTC. New York has numerous procedural provisions in the Surrogate's Court Procedure Act (SCPA) that pertain to trusts, while the UTC statutes do not typically distinguish between substance and procedural matters. Given the enormous scope of the project already undertaken, the Steering Committee thought that the NYUTC-LAG should not undertake to revise SCPA provisions unless absolutely necessary.

In September of 2012, the General Trustees Issues Subcommittee finished its deliberations and prepared its report for consideration by the constituent bodies. Thereafter the constituent bodies began consideration of the report. The Subcommittee's report, with a few modifications based on technical corrections and uncontroversial minor changes, is contained in Part III.

Part II includes general provisions in the Sixth Report that are essential to understanding and evaluating the Report in Part III.

Part II: General Provisions in the Sixth Report

The UTC, as modified by the Sixth Report, contains general provisions that may apply across functional areas, including to General Trustee Issues. . The most important of these provisions are found in Part 1 of the Sixth Report and include Sections 7-A-1.1, 7-A-1.2, 7-A-1.3, 7-A-1.5 and 7-A-1.6. These sections are set forth below as provided in the Sixth Report.

Note on 7-A-1.3: 7-A-1.3 (Definitions) is especially important. As the project continues, the NYUTC-LAG will be able to better focus on the details of each definition and may recommend certain changes. However, in evaluating the General Trustee Issues, the definitions in the Sixth Report were generally accepted.

Note on 7-A-1.5: Section 7-A-1.5 (Default and Mandatory Rules) is very significant. As set out in 7-A-1.5(a), most rules that are provided in the Code can be altered by the settlor; in effect, they are default rules. However, about 15 provisions in 7-A-1.5(b) cannot be changed by the settlor; in effect, these are mandatory rules. The Steering Committee divided up the mandatory rules as provided in (b) along functional lines. The General Trustees Issues Group was tasked with addressing (b)(7) and (b)(13) which are included below.

Note on 7-A-1.5: Section 7-A-11.5 (Application to Existing Relationships) is extremely important as the general rule is that unless otherwise provided, a provision will apply to trusts created before the effective date of enactment of Article 7-A as well as to newly created trusts. Because of this general retroactivity rule, the NYUTC-LAG will be recommending a new subsection dealing with effective dates, to ensure that vested rights will not be abrogated.

SECTION 7-A-1.1. SHORT TITLE. This [Article] may be cited as the New York (??)Trust Code. To the extent that any provision in this Article is inconsistent with any provision of the Estates, Powers and Trusts Law or the Surrogate's Court Procedure Act, the provisions of this Article shall control.

SECTION 7-A-1.2. SCOPE. This [Article] applies to express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust.

SECTION 7-A-1.3. DEFINITIONS. In this [Article]:

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

(2) "Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code of 1986, as in effect on [the effective date of this [Article] [amendment] [, or as later amended].

(3) "Beneficiary" means a person that:

(A) has a present or future beneficial interest in a trust, vested or contingent; or

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

(4) Charitable trust" means a trust, or portion of a trust, created for a charitable purpose described in Section 7-A-4.5(a).

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

(6) “Guardian” means a person appointed by the court, a parent, or a spouse to make decisions regarding the support, care, education, health, and welfare of a minor or adult individual. The term does not include a guardian ad litem.

(7) “Interests of the beneficiaries” means the beneficial interests provided in the terms of the trust.

(8) “Jurisdiction,” with respect to a geographic area, includes a State or country, or similar governmental entity.

(9) “Lifetime trust” means an express trust and all amendments thereto created other than by will and shall not include: a trust for the benefit of creditors, a resulting or constructive trust, a business trust where certificates of beneficial interest are issued to the beneficiary, an investment trust, voting trust, a security instrument such as a deed of trust and a mortgage, a trust created by the judgment or decree of a court, a liquidation or reorganization trust, a trust for the sole purpose of paying dividends, interest, interest coupons, salaries, wages, pensions or profits, instruments wherein persons are mere nominees for others, or a trust created in deposits in any banking institution or savings and loan institution.

(10) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, or joint venture; government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(11) “Power of withdrawal” means a presently exercisable general power of appointment other than a power: (A) limited by an ascertainable standard; or (B) exercisable by any person only upon consent of a person holding a substantial adverse interest or upon the consent of a trustee who is not the person holding the power.

(12) “Property” means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein.

(13) “Qualified beneficiary” means a beneficiary who, on the date the beneficiary’s qualification is determined:

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

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

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

(14) “Revocable,” as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding a substantial interest.

(15) “Settlor” means a person, including a testator, who contributes property to a trust, except to the extent another person has a power of withdrawal. If more than one person contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person’s contribution.

(16)“Spendthrift provision” means the terms of a trust or statutory default rule which restrains the ability of a creditor of a beneficiary to reach the beneficiary’s interest in the trust.

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

(18) “Terms of a trust” means the manifestation of the settlor’s intent regarding a trust’s provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.

(19) “Trust instrument” means an instrument executed by the settlor that contains terms of the trust, including any amendments thereto.

(20) “Trustee” includes an original, additional, and successor trustee, and a co-trustee. successor trustee, and a co-trustee.

SECTION 7-A-1.5. DEFAULT AND MANDATORY RULES.

(a) Except as otherwise provided in the terms of the trust, this [Article] governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.

(b) The terms of a trust prevail over any provision of this [Article] except:

(7) the requirement that a trustee of a testamentary trust secure judicial approval upon resigning as trustee, as provided under Section 7-A-7.5(d);

(13) the rights under Sections 7-A-10.9 through 7-A-10.12 of a person other than a trustee or beneficiary;

SECTION 7-A-1.6. COMMON LAW OF TRUSTS; PRINCIPLES OF EQUITY. The common law of trusts and principles of equity supplement this [Article], except to the extent modified by this [Article] or another statute of this State.

SECTION 7-A-11.5. APPLICATION TO EXISTING RELATIONSHIPS.

(a) Except as otherwise provided in this [Article], on [the effective date of this [Article]]:

(1) this [Article] applies to all trusts created before, on, or after [its effective date];

(2) this [Article] applies to all judicial proceedings concerning trusts commenced on or after [its effective date];

(3) this [Article] applies to judicial proceedings concerning trusts commenced before [its effective date] unless the court finds that application of a particular provision of this [Article] would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provisions of this [Article] does not apply and the superseded law applies;

(4) any rule of construction or presumption provided in this [Article] applies to trust instruments executed before [the effective date of the [Article]] unless there is a clear indication of a contrary intent in the terms of the trust; and

(5) an act done before [the effective date of the [Article]] is not affected by this [Article].

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

Part III: Report on General Trustee Issues

The following Report addresses each provision in the EPTL-SCPA Committee Report (hereinafter Sixth Report or 6th Report) that pertains to general trustee issues. Each provision is addressed as follows:

I. The EPTL section as proposed by the NYUTC-LAG is set forth, including the relevant UTC, section with modifications by either or both the 6th Report (reflected as underlined text) and the NYUTC-LAG (reflected as highlighted/shaded text). Changes since the last report are reflecte by track changes..
II. The UTC comments to the provision are set forth, as modified by the 6th Report.
III. Any specific comments in the 6th Report are included.
IV. Current New York law on the provision is explained.
V. The recommendation of the NYUTC-LAG is set forth.

I. PROPOSED EPTL § 7-A-1.5(b)(7) (UTC § 105) (new provision added by the 6th Report) DEFAULT AND MANDATORY RULES

…

(b) The terms of a trust prevail over any provision of this [Code] except:

~~(7) the requirement that a trustee of a testamentary trust secure judicial approval upon resigning as trustee, as provided under Section 7-A-7.5(d);~~

(7) the requirement that a trustee of a testamentary trust provide the court with written notice of resignation, as provided in Section 7-A-7.5(d).

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II. UTC COMMENTARY – as modified by the 6th Report

None. This is a new provision added by the 6th Report.

III. SEPARATE 6TH REPORT COMMENTARY

The 6th Report determined to retain the requirement under current law that a testamentary trustee seeking to resign must obtain court approval, as provided in newly-created subsection EPTL § 705(d). Because this rule cannot be altered or waived by a provision in the instrument, the 6th Report determined to include a reference to subsection EPTL § 705(d) in subsection (b) of this section. It should be emphasized that neither subsection EPTL § 705(d) nor the provision in subsection (b) referencing EPTL § 705(d) has any application in the case of an inter vivos trust.

IV. NEW YORK STATE LAW

Current New York State law requires that a testamentary trustee seeking to resign must obtain court approval. SCPA §§ 715 and 716.

V. NYUTC LEGISLATIVE ADVISORY GROUP RECOMMENDATION

The NYUTC-LAG recommends that its proposed version of EPTL ~~§~~ 7-A-1.5(b)(7) ~~not~~ be ~~adopted~~ enacted into law.

As discussed below with respect to EPTL § 7-A-7.5, the NYUTC-LAG agrees with the UTC that court approval should not be required for the resignation of a testamentary trustee, and accordingly the 6th Report's new subsection EPTL § 7-A-1.5(b)(7) should not be adopted.

However, the NYUTC-LAG believes that it should be mandatory for a trustee who wants to resign to provide written notice to the court, as provided in its Proposed version of EPTL § 7-A-1.5(b)(7). EPTL § 7-A-1.5(b)(7) effectively imposes this mandatory requirement.

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I. PROPOSED EPTL § 7-A-1.5(b)(13) (UTC § 105(b)(11)) DEFAULT AND MANDATORY RULES

…

(b) The terms of a trust prevail over any provision of this [Code] except:

(13) the rights under Sections 7-A-10.9 through 7-A-10.12 of a person other than a trustee or beneficiary;

…

II. UTC COMMENTARY–as modified by the 6th Report

Subsection (a) emphasizes that the Uniform Trust Code is primarily a default statute. While this Code provides numerous procedural rules on which a settlor may wish to rely, the settlor is generally free to override these rules and to prescribe the conditions under which the trust is to be administered. With only limited exceptions, the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary are as specified in the terms of the trust.

Subsection (b) lists the items not subject to override in the terms of the trust. Because subsection (b) refers specifically to other sections of the Code, enacting jurisdictions modifying these other sections may also need to modify subsection (b).

Subsection (b)(1) confirms that the requirements for a trust's creation, such as the necessary level of capacity and the requirement that a trust have a legal purpose, are controlled by statute and common law, not by the settlor. For the requirements for creating a trust, see Sections 401-409. Subsection (b)(12) makes clear that the settlor may not reduce any otherwise applicable period of limitations for commencing a judicial proceeding. See Sections 604 (period of limitations for contesting validity of revocable trust), and 1005 (period of limitation on action for breach of trust). Similarly, a settlor may not so negate the responsibilities of a trustee that the trustee would no longer be acting in a fiduciary capacity. Subsection (b)(2) provides that the terms may not eliminate a trustee's duty to act in good faith and in accordance with the purposes of the trust and the interests of the beneficiaries. For this duty, see Sections 801 and 814(a). Subsection (b)(3) provides that the terms may not eliminate the requirement that a trust and its terms must be for the benefit of the beneficiaries. Subsection (b)(3) also provides that the terms may not eliminate the requirement that the trust have a purpose that is lawful, not contrary to

public policy, and possible to achieve. Subsections (b)(2)-(3) are echoed in Sections 404 (trust and its terms must be for benefit of beneficiaries; trust must have a purpose that is lawful, not contrary to public policy, and possible to achieve), 801 (trustee must administer trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries), 802(a) (trustee must administer trust solely in interests of the beneficiaries), 814 (trustee must exercise discretionary power in good faith and in accordance with its terms and purposes and the interests of the beneficiaries), and 1008 (exculpatory term unenforceable to extent it relieves trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust and the interests of the beneficiaries).

The terms of a trust may not deny a court authority to take such action as necessary in the interests of justice, including requiring that a trustee furnish bond. Subsection (b)(6), (13). Additionally, should the jurisdiction adopting this Code enact the optional provisions on subject-matter jurisdiction and venue, subsection (b)(14) similarly provides that such provisions cannot be altered in the terms of the trust. The power of the court to modify or terminate a trust under Sections 410 through 416 is not subject to variation in the terms of the trust. Subsection (b)(4). However, all of these Code sections involve situations which the settlor could have addressed had the settlor had sufficient foresight. These include situations where the purpose of the trust has been achieved, a mistake was made in the trust's creation, or circumstances have arisen that were not anticipated by the settlor.

Section 813 imposes a general obligation to keep the beneficiaries informed as well as several specific notice requirements. Subsections ~~(b)(8)~~ and (b)(9), which were placed in brackets and made optional provisions by a 2004 amendment, specify limits on the settlor's ability to waive these information requirements. With respect to beneficiaries age 25 or older, a settlor may dispense with all of the requirements of Section 813 except for the duties to inform the beneficiaries of the existence of the trust, of the identity of the trustee, and to provide a beneficiary upon request with such reports as the trustee may have prepared. Among the specific requirements that a settlor may waive include the duty to provide a beneficiary upon request with a copy of the trust instrument (Section 813(b)(1)), and the requirement that the trustee provide annual reports to the qualified beneficiaries (Section 813~~(c)~~). The furnishing of a copy of the entire trust instrument and preparation of annual reports may be required in a particular case, however, if such information is requested by a beneficiary and is reasonably related to the trust's administration.

Responding to the desire of some settlors that younger beneficiaries not know of the trust's bounty until they have reached an age of maturity and self-sufficiency, subsection ~~(b)(8)~~ allows a settlor to provide that the trustee need not even inform beneficiaries under age 25 of the existence of the trust. However, pursuant to subsection (b)(9), if the younger beneficiary learns of the trust and requests information, the trustee must respond. More generally, subsection (b)(9) prohibits a settlor from overriding the right provided to a beneficiary in Section 813(a) to request from the trustee of an irrevocable trust copies of trustee reports and other information reasonably related to the trust's administration.

During the drafting of the Uniform Trust Code, the drafting committee discussed and rejected a proposal that the ability of the settlor to waive required notice be based on the nature of the beneficiaries' interest and not on the beneficiaries' age. Advocates of this alternative approach concluded that a settlor should be able to waive required notices to the remainder beneficiaries, regardless of their age. Enacting jurisdictions preferring this alternative should substitute the language "adult and current or permissible distributees of trust income or principal" for the reference to "qualified beneficiaries" in subsection ~~(b)(8)~~. They should also delete the reference to beneficiaries "who have attained the age of 25 years."

Waiver by a settlor of the trustee's duty to keep the beneficiaries informed of the trust's administration does not otherwise affect the trustee's duties. The trustee remains accountable to the beneficiaries for the trustee's actions.

Neither subsection ~~(b)(8)~~ nor (b)(9) apply to revocable trusts. The settlor of a revocable trust may waive all reporting to the beneficiaries, even in the event the settlor loses capacity. If the settlor is silent about the subject, reporting to the beneficiaries will be required upon the settlor's loss of capacity. See Section 603.

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Waiver by a settlor of the trustee's duty to keep the beneficiaries informed of the trust's administration does not otherwise affect the trustee's duties. The trustee remains accountable to the beneficiaries for the trustee's actions.

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In conformity with traditional doctrine, the Uniform Trust Code limits the ability of a settlor to exculpate a trustee from liability for breach of trust. The limits are specified in Section 1008. Subsection (b)(10) of this section provides a cross-reference. Similarly, subsection (b)(7) provides a cross-reference to Section 708(b), which limits the binding effect of a provision specifying the trustee's compensation.

Finally, subsection (b)(11) clarifies that a settlor is not free to limit the rights of third persons, such as purchasers of trust property. Subsection (b)(5) clarifies that a settlor may not restrict the rights of a beneficiary's creditors except to the extent a spendthrift restriction is allowed as provided in Article 5.

III. SEPARATE 6TH REPORT COMMENTARY

None.

IV. NEW YORK STATE LAW

There is no current provision of New York law corresponding to the concept of "mandatory provisions."

V. NYUTC LEGISLATIVE ADVISORY GROUP RECOMMENDATION

The NYUTC-LAG recommends that proposed EPTL § 7-A-1.5(b)(13), as modified by the 6th Report, be enacted into law.

The NYUTC-LAG recommends the adoption of proposed Sections 7-A-10.9 –-10.12. The NYUTC-LAG agrees that the protections to third parties found in Sections 7-A-10.9 –7-A-10.12 cannot be removed by provisions in the trust agreement.

I. PROPOSED EPTL § 7-A-1.8 (UTC § 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 upon written notice to any court that has taken jurisdiction over the trust."

(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 7-A-7.4.

II. UTC COMMENTARY – as modified by the 6th Report

This section prescribes rules relating to a trust's principal place of administration. Locating a trust's principal place of administration will ordinarily determine which court has primary if not exclusive jurisdiction over the trust. It may also be important for other matters, such as payment of state income tax or determining the jurisdiction whose laws will govern the trust. See Section 107 comment.

Because of the difficult and variable situations sometimes involved, the Uniform Trust Code does not attempt to further define principal place of administration. A trust's principal place of administration ordinarily will be the place where the trustee is located. Determining the principal place of administration becomes more difficult, however, when cotrustees are located in different states or when a single institutional trustee has trust operations in more than one state. In such cases, other factors may become relevant, including the place where the trust records are kept or trust assets held, or in the case of an institutional trustee, the place where the trust officer responsible for supervising the account is located.

A concept akin to principal place of administration is used by the Office of the Comptroller of the Currency. Reserves that national banks are required to deposit with state authorities is based on the location of the office where trust assets are primarily administered. See 12 C.F.R. § 9.14(b) (2011).

Under the Uniform Trust Code, the fixing of a trust's principal place of administration will determine where the trustee and beneficiaries have consented to suit (Section 202), and the rules for locating venue within a particular state (~~Section 204~~). It may also be considered by a court in another jurisdiction in determining whether it has jurisdiction, and if so, whether it is a convenient forum.

A settlor expecting to name a trustee or cotrustees with significant contacts in more than one state may eliminate possible uncertainty about the location of the trust's principal place of administration by specifying the jurisdiction in the terms of the trust. Under subsection (a), a designation in the terms of the trust is controlling if (1) a trustee is a resident of or has its principal place of business in the designated jurisdiction, or (2) all or part of the administration occurs in the designated jurisdiction. 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.

Subsection (b) provides that 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. "Interests of the beneficiaries," defined in Section 103~~(8)~~(7), means the beneficial interests provided in the terms of the trust. Ordinarily, absent a substantial change or circumstances, the trustee may assume that the original place of administration is also the appropriate place of administration. The duty to administer the trust at an appropriate place may also dictate that the trustee not move the trust.

Subsections (c)-(f) provide a procedure for changing the principal place of administration to another state or country. Such changes are often beneficial. A change may be desirable to secure a lower state income tax rate, or because of relocation of the trustee or beneficiaries, the appointment of a new trustee, or a change in the location of the trust investments. The procedure for transfer specified in this section applies only in the absence of a contrary provision in the terms of the trust. See Section 105. To facilitate transfer in the typical case, where all concur that a transfer is either desirable or is at least not harmful, a transfer can

be accomplished without court approval unless a qualified beneficiary objects. To allow the qualified beneficiaries sufficient time to review a proposed transfer, the trustee must give the qualified beneficiaries at least 60 days prior notice of the transfer. Notice must be given not only to qualified beneficiaries as defined in Section 103~~(13)~~(12) but also to those granted the rights of qualified beneficiaries under Section 110. To assure that those receiving notice have sufficient information upon which to make a decision, minimum contents of the notice are specified. If a qualified beneficiary objects, a trustee wishing to proceed with the transfer must seek court approval.

In connection with a transfer of the principal place of administration, the trustee may transfer some or all of the trust property to a new trustee located outside of the state. The appointment of a new trustee may also be essential if the current trustee is ineligible to administer the trust in the new place. Subsection (f) clarifies that the appointment of the new trustee must comply with the provisions on appointment of successor trustees as provided in the terms of the trust or under Section 704. Absent an order of succession in the terms of the trust, Section 704(c) provides the procedure for appointment of a successor trustee of a noncharitable trust, and Section 704(d) the procedure for appointment of a successor trustee of a charitable trust.

While transfer of the principal place of administration will normally change the governing law with respect to administrative matters, a transfer does not normally alter the controlling law with respect to the validity of the trust and the construction of its dispositive provisions. See 5A Austin W. Scott & William F. Fratcher, The Law of Trusts Section 615 (4th ed. 1989).

III. SEPARATE 6TH REPORT COMMENTARY

The 6th Report determined to alter the UTC to require that, where the place of administration is to be changed, notice must be given to any Court having previously exercised jurisdiction over the trust.

IV. NEW YORK STATE LAW

Matter of Rockefeller, 2 Misc.3d 554, 773 N.Y.S.2d 529 (Sur. Ct. New York Co. 2003) summarizes New York law on change of situs, the law applicable to this section because the Official Comments state that the "principal place of administration" of a trust will determine which court has primary jurisdiction over a trust and "may also be important for other matters, such as payment of state income tax or determining the jurisdiction whose laws will govern the trust." The court in *Rockefeller* states "[i]t is undisputed that the court has the authority to change the situs of a trust subject to its jurisdiction," citing the general grant of jurisdiction in SCPA §§ 201 and 203 and earlier cases. The court had previously granted a petition for a change of trustee from a New York corporate trustee to the corporate trustee's Delaware affiliate, a change which ended the trust's liability for New York fiduciary income tax. The trustee also requested a change of situs to Delaware so that Delaware law would apply to the trust. Surrogate Roth denied the request, holding that "where the desired tax savings can be achieved by a change of

trustee, a change of situs will not be allowed unless it would result in some benefit to the trust apart from the tax considerations themselves."

There is also authority denying a petition for change of situs of an irrevocable lifetime trust, even though the creator of the trust joined the petition. In *Matter of Flexner*, 7 Misc.2d 621, 166 N.Y.S.2d 469 (Sup. Ct. New York Co. 1957) the court held that the situs of a lifetime trust which included terms stating that the trust was to be governed by New York law could not be changed because there was nothing in the trust terms permitting the transfer of the trust to another jurisdiction (*cf. Matter of Matthiessen*, 195 Misc. 598, 87 N.Y.S.2d 787 (Sup. Ct. New York Co. 1949, permitting a change of situs where the terms of the trust bore "evidence of the donor's intention to authorize the transfer of the situs of the trust.")

To the extent proposed EPTL § 7-A-1.8 allows a trustee to change the place of administration~~situs~~ of a trust other than by petitioning the appropriate court for permission to do, it makes a striking change in existing law.

V. NYUTC LEGISLATIVE ADVISORY GROUP RECOMMENDATION

The NYUTC-LAG recommends that proposed EPTL § 7-A-1.8, as modified by the 6th Report, and the NYUTC-LAG, be enacted into law.

The NYUTC-LAG agrees with the 6th Report's recommendation that, when a trustee proposes to transfer a trust's principal place of administration pursuant to EPTL § 7-A-1.8 (b), the trustee must give notice, pursuant to the modified subparagraph (c), of such intention to any court that has taken jurisdiction over the trust. NYUTC-LAG recommends that "written" notice be required.

The NYUTC-LAG has raised concerns over how the statute will work in practice. Requiring the trustee to notify a court of the intention to transfer the trust's principal place of administration is appropriate with respect to lifetime trusts for which pleadings have been previously filed with a New York court. Further, notifying a court of a trust's transfer is essential with respect to testamentary trusts where eligible trustees qualify pursuant to SCPA § 708 and have been appointed by a New York Surrogate's Court.

A New York court that has been asked to rule on issues for continuing lifetime trusts or has appointed trustees in testamentary trusts has a legitimate interest in being notified that such trust may leave its jurisdiction. Without the proposed modification to subparagraph (c) it is unclear how a court with jurisdiction would know that a transfer of a trust's administration is about to occur. Subparagraph (c), as modified by the 6th Report, codifies a trustee's right to initiate a transfer of a trust's principal place of administration, whether the trust agreement specifically permits it or not, but enables a court which has previously taken jurisdiction, to consider the appropriateness of the transfer.

The NYUTC-LAG believes that the intent and effect of this section should be clarified in the commentary and the NYUTC-LAG believes that the intent is to limit the scope of the court's inquiry to the standard provided in subparagraph (b) of the section.

I. PROPOSED EPTL § 7-A-1.9 (UTC § 109) METHODS AND WAIVER OF NOTICE

(a) Notice to a person under this [Article] or the sending of a document to a person under this [Article] must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document include (but are not limited to) first-class mail, special mail service, , or personal delivery to the person's last known place of residence or place of business.~~–~~, ~~or a properly directed electronic message.~~

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

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

(d) To add: provision when person entitled to notice lacks capacity along lines of current 10-6.6(j)(2)(to any guardian of the property, or personal representative of any such person or the parent or person with whom any such minor person resides)

(e~~d~~) Notice of a judicial proceeding must be given as provided in the surrogate's court procedure act and other applicable rules of civil procedure.

II. UTC COMMENTARY – as modified by the 6th Report

None.

III. SEPARATE 6TH REPORT COMMENTARY

The 6th Report determined to include a provision permitting notice to be given by a "special mail service".

"Special mail service" as defined in SCPA § 103 (37-a) and used in SCPA § 309(2)(b) includes such "private delivery service" as is recognized by section 7502(f)(12) of the Internal Revenue Code of 1986.

IV. NEW YORK STATE LAW

Current New York law deals only with notice in judicial proceedings (SCPA § 307 and various provisions of the CPLR). This section deals with notice other than in judicial

proceedings. The most recent statutory enactment dealing with notice other than in judicial proceedings is in the new decanting statute, EPTL § 10-6.6(j)(2), which requires that notice be given "by registered or certified mail, return receipt requested, or by personal delivery or in any other manner directed by the court having jurisdiction over the invaded trust." This provision would be superseded by EPTL § 7-A-1.9. Because the provisions of the new decanting statute are the result of extensive negotiations among various interested parties, it might be wise to exempt EPTL § 10-6.6(j)(2) from the general provisions of the proposed section.

V. NYUTC LEGISLATIVE ADVISORY GROUP RECOMMENDATION

The NYUTC-LAG recommends that proposed EPTL § 7-A-1.9, as modified by the 6th Report and the NYUTC-LAG, be enacted into law.

The NYUTC-LAG agrees with the 6th Report's modifications, specifically the addition of "special mail service" as an appropriate delivery method and a parenthetical providing for not limiting permissible methods to those enumerated. However, as explained below, the NYUTC-LAG determined that notice by electronic message should not be sufficient for notice under the statute and therefor recommends its deletion.

The UTC commentary to Section 109 confirms that this section applies to notices required in non-judicial proceedings. Notices required in judicial proceedings are governed by existing surrogate's court procedure. However, there are numerous and important actions taken in a non-judicial context requiring notice to qualified beneficiaries.

The UTC, as does the proposed EPTL § 7-A-1.9, states that notice "… must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document." The UTC enumerates specific acceptable methods of notice. The UTC commentary states that the enumerated acceptable methods of service are "illustrative, not exhaustive". The proposed NYUTC clarifies in the statute itself that acceptable notice "…***includes but is not limited to…"*** these same enumerated methods of notice.

The NYUTC-LAG is comfortable with the methods of notice enumerated in the section with the exception of "a properly directed electronic message". We understand the wisdom in not limiting an acceptable method of notice to the short list specified in the statute, as there may be instances where another method of notice, not enumerated, will be suitable under the circumstances and likely to result in receipt of the notice of document. We are, however, concerned with codifying the adequacy of e-mail notification.

Is the intent of the Code merely to accomplish "receipt"? If so, than even though an individual may receive hundreds of e-mails weekly, including endless solicitations, and plenty of spam, receiving an unexpected e-mail from what might be an unfamiliar URL can technically constitute "receipt" even though the recipient may delete the message without opening it. With the volume of e-mails most of us experience, can we be reasonably assured that such a "properly directed electronic message" is a method that conforms to the statutory language "…accomplished in a manner reasonably suitable…", presumably to the purpose of the notice.

If the intent of the section is to send a notification not merely to be "received" but likely to result in the beneficiary's recognition of what is actually occurring (which is what we expect it to mean), then we suggest the language concerning electronic message be deleted.

The NYUTC-LAG's other modification adds Surrogate's Court Procedure Act to (d).

I. PROPOSED EPTL § 7-A-1.10 (UTC § 110) OTHERS TREATED AS QUALIFIED BENEFICIARIES

~~(a) Whenever notice to qualified beneficiaries of a trust is required under this [Code], the trustee must also give notice to any other beneficiary who has sent the trustee a request for notice.~~

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

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

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

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

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

~~(d)~~ (c) The attorney general of this State has the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in this State.

II. UTC COMMENTARY – as modified by the 6th Report

Under the Uniform Trust Code, certain notices need be given only to the "qualified" beneficiaries. For the definition of "qualified beneficiary," see Section 103~~(13)~~(12). Among these notices are notice of a transfer of the trust's principal place of administration (Section 108(d)), notice of a trust division or combination (Section 417), notice of a trustee resignation (Section 705(a)(1)), and notice of a trustee's annual report (~~Section 813(c)~~). Subsection (a) of this section authorizes other beneficiaries to receive one or more of these notices by filing a request for notice with the trustee.

Under the Code, certain actions, such as the appointment of a successor trustee, can be accomplished by the consent of the qualified beneficiaries. See, e.g., Section 704 (filling vacancy in trusteeship). Subsection (a) only addresses notice, not required consent. A person who requests notice under subsection (a) does not thereby acquire a right to participate in actions that can be taken only upon consent of the qualified beneficiaries.

Charitable trusts do not have beneficiaries in the usual sense. However, certain persons, while not technically beneficiaries, do have an interest in seeing that the trust is enforced. In the

case of a charitable trust, this includes the state's attorney general and charitable organizations expressly designated to receive distributions under the terms of the trust, Under subsection (b), charitable organizations expressly designated in the terms of the trust to receive distributions and who would qualify as a qualified beneficiary were the trust noncharitable, are granted the rights of qualified beneficiaries under the Code. Because the charitable organization must be expressly named in the terms of the trust and must be designated to receive distributions, excluded are organizations that might receive distributions in the trustee's discretion but that are not named in the trust's terms. Requiring that the organization have an interest similar to that of a beneficiary of a private trust also denies the rights of a qualified beneficiary to organizations holding remote remainder interests. For further discussion of the definitions of "qualified beneficiary", see Section 103 comment.

Subsection (c) similarly grants the rights of qualified beneficiaries to persons appointed by the terms of the trust or by the court to enforce a trust created for an animal or other trust with a valid purpose but no ascertainable beneficiary. For the requirements for creating such trusts, see Sections 408 and 409.

"Attorney general" is placed in ~~brackets~~ in subsection (d) to accommodate jurisdictions which grant enforcement authority over charitable trusts to another designated official. Because states take various approaches to enforcement of charitable trusts, by a 2004 amendment subsection (d) was placed in brackets in its entirety. For a discussion, see 2004 Amendment below.

Subsection (d) does not limit other means by which the attorney general or other designated official can enforce a charitable trust.

2001 Amendment. By amendment in 2001, "charitable organization expressly designated to receive distributions" was substituted for "charitable organization expressly entitled to receive benefits" in subsection (b). The amendment conforms the language of this section to terminology used elsewhere in the Code.

2004 Amendment. Subsection (b) is amended to better conform this provision to the Drafting Committee's intent. Charitable trusts do not have beneficiaries in the usual sense. Yet, such trusts are often created to benefit named charitable organizations. Under this amendment, which is based on the definition of qualified beneficiary in Section 103, a designated charitable organization has the rights of a qualified beneficiary only if it holds an interest similar to that of a qualified beneficiary in a noncharitable trust. The effect of the amendment is to exclude charitable organizations that might receive distributions in the trustee's discretion even though not expressly mentioned in the trust's terms. Also denied the rights of qualified beneficiaries are charitable organizations that hold only remote remainder interests. The previous version of subsection (b) had a similar intent but the language could be read more broadly.
The placing of subsection (d) in brackets recognizes that the role of the attorney general in the enforcement of charitable trusts varies greatly in the states. In some states, the legislature may prefer that the attorney general be granted the rights of a qualified beneficiary. In other states, the attorney general may play a lesser role in enforcement. The expectation is that states considering enactment will adapt this provision to the particular role that the attorney general

plays in the enforcement of charitable trusts in their state. Some states may prefer to delete this provision. Other states might provide that the attorney general has the rights of a qualified beneficiary only for trusts in which no charitable organization has been designated to receive distributions. Yet other states may prefer to enact the provision without change.

III. SEPARATE 6TH REPORT COMMENTARY

To maintain the alterations made by the 6th Report in current section 103(12), the above language was added to subsection (b) of this section.

IV. NEW YORK STATE LAW

There is no current New York law corresponding to the UTC concept of the "qualified beneficiary" beyond the required parties to accounting proceedings under SCPA §§ 315 and 2210.

V. NYUTC LEGISLATIVE ADVISORY GROUP RECOMMENDATION

The NYUTC-LAG recommends that proposed EPTL § 7-A-1.10, as modified by the 6th Report and the NYUTC-LAG, be enacted into law.

The term qualified beneficiary is roughly equivalent to what New York identifies as a necessary party to an accounting proceeding under SCPA §§ 315 and 2210, essentially current beneficiaries and presumptive remainderpersons. Other beneficiaries (we call them contingent beneficiaries), have a more remote interest in terms of time and certainty. We understand the UTC Commentary's explanation that: "*Subsection (a) only addresses notice, not required consent. A person who requests notice under subsection (a) does not thereby acquire a right to participate in actions that can be taken only upon consent of the qualified beneficiaries.*"

It is unclear, however, why he or she should be entitled to notice at all and the NYUTC-LAG does not agree that the "rights" of such individuals should be expanded. Further, it is not clear whether the act of requesting notice is a one-time request that requires a one-time response, or can the request be a standing demand for notice on any future act of the trustee which requires notice to qualified beneficiaries.

Trustees have traditionally responded to the requests for information from presumptive remainderpersons whether the current beneficiary likes it or not. The reason for this is that those individuals who are presumed as a matter of law to receive the corpus after the termination of the trust, have a present interest in the investment experience and distributions of principal of the account. Courts of law would presumably enforce the rights of necessary parties under SCPA § 2210 to receive information from the trustee.

Contingent remainderpersons, on the other hand, are presumed not to receive anything. Their interests mature only if and when the presumptive remainderpersons predecease the current beneficiaries of the trust. We believe that trustees would have no objection to sharing information with contingent remainderpersons provided the current and presumptive

beneficiaries give their consent to such action. We believe that many current beneficiaries and presumptive remainderpersons may have legitimate objections to broadening the scope of notice, whether the contingent beneficiary can actually object or not. The issue for many current and presumptive beneficiaries is the right to information, not the ability to object. Moreover, we are not at all convinced that enactment by the NY Legislature of subparagraph (a) reflects the broad consensus of the New York public for which trusts are relevant, and don't see the compelling necessity for it.

In fact, many states which have enacted the UTC, or variations thereof, have chosen to adopt UTC § 110 but exclude subparagraph (a) such as the following:

- Arizona (AZ Rev. Stat. 14-10110)
- Florida (Fla. Stat. 736.0110)
- Kansas (KS Stat. 58a-110)
- Maine (Maine Rev. Stat. 18-B-110)
- Michigan (Michigan 386-1998-VII-700-7110)
- Missouri (Mo. Rev. Stat. 456.1-110)
- New Hampshire (N.H. Rev. Stat. Ann. 564B:1-110)
- New Mexico (N.M. Stat. Ann. 45A-1-110) --New Mexico had included (a) when it first enacted the UTC and then amended it
- North Carolina (N.C. Gen. Stat. 36C-1-110)
- North Dakota (N.D. U.T.C. 59-09-10)

The NYUTC-LAG therefore supports the adoption of the proposed EPTL § 7-A-1.10 without the inclusion of subparagraph (a).

I. PROPOSED EPTL § 7-A-2.2(a) (UTC § 202) JURISDICTION OVER TRUSTEE AND BENEFICIARY

(a) By accepting the trusteeship of a trust having its principal place of administration in this State or by moving the principal place of administration to this State, the trustee submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.

(b) With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this State are subject to the jurisdiction of the courts of this State regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.

(c) This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust.

II. UTC COMMENTARY -- as modified by the 6th Report

This section clarifies that the courts of the principal place of administration have jurisdiction to enter orders relating to the trust that will be binding on both the trustee and beneficiaries. Consent to jurisdiction does not dispense with any required notice, however. With respect to jurisdiction over a beneficiary, the Uniform Probate Code § 7-103 cmt. (1997), upon which portions of this section are based, is instructive:

> *It also seems reasonable to require beneficiaries to go to the seat of the trust when litigation has been instituted there concerning a trust in which they claim beneficial interests, much as the rights of shareholders of a corporation can be determined at a corporate seat. The settlor has indicated a principal place of administration by its selection of a trustee or otherwise, and it is reasonable to subject rights under the trust to the jurisdiction of the Court where the trust is properly administered.*

The jurisdiction conferred over the trustee and beneficiaries by this section does not preclude jurisdiction by courts elsewhere on some other basis. Furthermore, the fact that the courts in a new State acquire jurisdiction under this section following a change in a trust's principal place of administration does not necessarily mean that the courts of the former principal place of administration lose jurisdiction, particularly as to matters involving events occurring prior to the transfer.

The jurisdiction conferred by this section is limited. Pursuant to subsection (b), until a distribution is made, jurisdiction over a beneficiary is limited to the beneficiary's interests in the trust. Personal jurisdiction over a beneficiary is conferred only upon the making of a distribution. Subsection (b) also gives the court jurisdiction over other recipients of distributions. This would include individuals who receive distributions in the mistaken belief they are beneficiaries.

For a discussion of jurisdictional issues concerning trusts, see 5A Austin W. Scott & William F. Fratcher, The Law of Trusts §§ 556-573 (4th ed. 1989).

III. SEPARATE 6th REPORT COMMENTARY

None.

IV. NEW YORK STATE LAW

The question of obtaining jurisdiction over the trustee of a testamentary trust is not of great concern because such a trustee becomes a trustee only by receiving letters from the appropriate Surrogate's Court.

Jurisdiction over the trustee of a lifetime trust must come from SCPA § 210 which in subsection (1) gives the court "jurisdiction over persons and property as heretofore or hereafter permitted by law" and subsection (2) deals with long-arm jurisdiction. These sections have been elaborated by many cases which are beyond the scope of this brief statement. They do not appear to have been the subject of criticism for lack of usefulness, breath, or reach. For example, in Matter of Schreiter, 169 Misc.2d 706, 647 N.Y.S.2d 69 (Sur. Ct. New York Co. 1996), the court had no difficulty in establishing personal jurisdiction over an out-of-state "de facto" trustee under SCPA § 210(2)(b).

V. NYUTC LEGISLATIVE ADVISORY GROUP RECOMMENDATION

The NYUTC-LAG recommends that proposed EPTL § 7-A-2.2(a) be enacted into law.

Subsections (b) and (c) of EPTL § 7-A-2.2 will be addressed by another NYUTC-LAG functional committee,

I. PROPOSED EPTL § 7-A-4.17 (UTC § 417) COMBINATION AND DIVISION OF TRUSTS.

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

"(b) Unless the terms of the trust provide otherwise, the commissions allowed to a trustee as determined under article twenty-three of the surrogate's court procedure act, as amended from time to time, shall not be increased by reason of the establishment of separate trusts pursuant to this section unless the court otherwise permits an increase, provided, however, that such trustee shall be entitled to charge the trust for any additional reasonable and necessary expenses incurred in the administration of such separate trusts."

II. UTC COMMENTARY – as modified by the 6th Report

This section, which authorizes the combination or division of trusts, is subject to contrary provision in the terms of the trust. See Section 105 and Article 4 General Comment. Many trust instruments and standardized estate planning forms include comprehensive provisions governing combination and division of trusts. Except for the requirement that the qualified beneficiaries receive advance notice of a proposed combination or division, this section is similar to Restatement (Third) of Trusts Section 68 (2003).

This section allows a trustee to combine two or more trusts even though their terms are not identical. Typically the trusts to be combined will have been created by different members of the same family and will vary on only insignificant details, such as the presence of different perpetuities savings periods. The more the dispositive provisions of the trusts to be combined differ from each other the more likely it is that a combination would impair some beneficiary's interest, hence the less likely that the combination can be approved. Combining trusts may prompt more efficient trust administration and is sometimes an alternative to terminating an uneconomic trust as authorized by Section 414. Administrative economies promoted by combining trusts include a potential reduction in trustees' fees, particularly if the trustee charges a minimum fee per trust, the ability to file one trust income tax return instead of multiple returns, and the ability to invest a larger pool of capital more effectively. Particularly if the terms of the trust are identical, available administrative economies may suggest that the trustee has a responsibility to pursue a combination. See Section 805 (duty to incur only reasonable costs).

Division of trusts is often beneficial and, in certain circumstances, almost routine. Division of trusts is frequently undertaken due to a desire to obtain maximum advantage of exemptions available under the federal generation-skipping tax. While the terms of the trusts which result from such a division are identical, the division will permit differing investment objectives to be pursued and allow for discretionary distributions to be made from one trust and not the other. Given the substantial tax benefits often involved, a failure by the trustee to pursue a division might in certain cases be a breach of fiduciary duty. The opposite could also be true if

the division is undertaken to increase fees or to fit within the small trust termination provision. See Section 414.

This section authorizes a trustee to divide a trust even if the trusts that result are dissimilar. Conflicts among beneficiaries, including differing investment objectives, often invite such a division, although as in the case with a proposed combination of trusts, the more the terms of the divided trusts diverge from the original plan, the less likely it is that the settlor's purposes would be achieved and that the division could be approved.

This section does not require that a combination or division be approved either by the court or by the beneficiaries. Prudence may dictate, however, that court approval under Section 410 be sought and beneficiary consent obtained whenever the terms of the trusts to be combined or the trusts that will result from a division differ substantially one from the other. For the provisions relating to beneficiary consent or ratification of a transaction, or release of trustee from liability, see Section ~~1009~~1008.

While the consent of the beneficiaries is not necessary before a trustee may combine or divide trusts under this section, advance notice to the qualified beneficiaries of the proposed combination or division is required. This is consistent with Section 813, which requires that the trustee keep the beneficiaries reasonably informed of trust administration, including the giving of advance notice to the qualified beneficiaries of several specified actions that may have a major impact on their interests.

Numerous States have enacted statutes authorizing division of trusts, either by trustee action or upon court order. For a list of these statutes, see Restatement (Third) Property: Donative Transfers Section 12.2 Statutory Note (Tentative Draft No. 1, approved 1995). Combination or division has also been authorized by the courts in the absence of authorizing statute. See, e.g., In re Will of Marcus, 552 N.Y.S. 2d 546 (N.Y. Surr. Ct. 1990) (combination); In re Heller Inter Vivos Trust, 613 N.Y.S. 2d 809 (N.Y. Surr. Ct. 1994) (division); and BankBoston v. Marlow, 701 N.E. 2d 304 (Mass. 1998) (division).

For a provision authorizing a trustee, in distributing the assets of the divided trust, to make non-pro-rata distributions, see Section 816(22).

III. SEPARATE 6th REPORT COMMENTARY

The 6th Report determined to adopt section 417 and to repeal EPTL § 7-1.13.

The 6th Report determined to add subsection (b) to this section. It contains the provision that had been EPTL § 7-1.13(j).

The 6th Report emphasized that a trust could be divided under this section even if the resulting trusts differ in their dispositive terms from the original trust. The 6th Report acknowledged that there may be various circumstances in which it may be helpful or appropriate for a trustee to create different terms in the resulting trust and expressed its wish to make clear that, in replacing EPTL § 7-1.13, no inference should be drawn by reason of the failure to

include in this new section provisions contained in EPTL § 7-1.13. For example, the 6th Report expressly indicated there is no intent to abrogate the effective-date concept in EPTL § 7-1.13(b).

IV. NEW YORK STATE LAW

First enacted in 1995 and amended in 2000 and 2002, EPTL § 7-1.13 creates an elaborate scheme governing the division of existing trusts. Subsection (a) paragraph (1) allows the trustee to divide a trust to accomplish certain tax related ends "without prior court approval or the consent of the persons interested"; paragraph (2) allows the trustee to divide the trust "with the consent of all the persons interested in the trust but without prior court approval, for any reason which is not directly contrary to the primary purpose of the trust"; and paragraph (3) allows the court to do the same on the petition of the trustee or of any person interested in the trust on notice to all interested persons.

The rest of the section sets forth detailed rules to govern different situations requiring division of a trust. With the repeal of the section, the need for court approval will be removed. The continuing authority of the cases decided under the section is uncertain. Less uncertain is the authority of EPTL§ 7-1.13 once it is repealed. The detailed rules contained in the section will no longer be law and if they are to govern divisions of trusts, they presumably must be made effective either by reenactment or through the development of decisional law. For example, EPTL § 7-1.13(b) states that "unless the court otherwise directs" trusts established by division under the section "shall be deemed to have been established as of the effective date of the disposing instrument [the instrument creating the original trust]" except that the establishment of separate trusts under the authority conferred by the statute allowing the trustee to create separate trusts with the consent of persons interested in the trust but without court approval "may be become effective" on the date or dates provided in the instrument creating the new separate trusts which instrument must be filed in the appropriate court under EPTL § 7-1.13(e). If that rule is to remain in force, either the new statute must be amended or the courts will have to develop an effective date rule through decisional law.

V. NYUTC LEGISLATIVE ADVISORY GROUP RECOMMENDATION

The NYUTC-LAG recommends that proposed EPTL § 7-A-4.17, as modified by the 6th Report, be enacted into law and that EPTL § 7-1.13 be repealed.

The proposed section would liberalize existing New York state law so as to permit a Trustee to combine or divide trusts without the consent of the beneficiaries and without court supervision. Under the existing statute, a trustee may divide a trust without the consent of the beneficiaries or court approval only to achieve certain tax results. Divisions of trusts for other purposes may be effectuated upon the consent of all persons interested in the trust and without court approval so long as the reasons for dividing the trust do not conflict with the primary purpose of the trust. As noted by the 6th Report, there may be circumstances in which it may be helpful or appropriate for a trustee to create different terms in the resulting trust. Proposed EPTL 7-A-4.17 would provide Trustees with greater flexibility while still protecting beneficiaries with the requirement that they be notified of any division or combination of trusts.

Subsection (b) was added by the 6th Report and the NYUTC-LAG agrees the adoption of this subsection. Furthermore, the NYUTC-LAG agrees with the 6th Report comment that, in replacing EPTL section 7-1.13, no inference should be drawn by reason of the failure to include other provisions contained in EPTL section 7-1.13. The NYUTC-LAG presumes that the effective date for trusts divided under proposed EPTL 7-A-4.17 shall continue to be the effective date of the original trust.

I. PROPOSED EPTL § 7-A-5.6 (UTC § ~~507~~ 506) PERSONAL OBLIGATIONS OF TRUSTEE

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

II. UTC COMMENTARY – as modified by the 6th Report

Because the beneficiaries of the trust hold the beneficial interest in the trust property and the trustee holds only legal title without the benefits of ownership, the creditors of the trustee have only a personal claim against the trustee. See Restatement (Third) of Trusts Section 5 cmt. k (2003); Restatement (Second) of Trusts Section 12 cmt. a (1959). Similarly, a personal creditor of the trustee who attaches trust property to satisfy the debt does not acquire title as a bona fide purchaser even if the creditor is unaware of the trust. See Restatement (Second) of Trusts Section 308 (1959). The protection afforded by this section is consistent with that provided by the Bankruptcy Code. Property in which the trustee holds legal title as trustee is not part of the trustee's bankruptcy estate. 11 U.S.C. Section 541(d).

The exemption of the trust property from the personal obligations of the trustee is the most significant feature of Anglo-American trust law by comparison with the devices available in civil law countries. A principal objective of the Hague Convention on the Law Applicable to Trusts and on their Recognition is to protect the Anglo-American trust with respect to transactions in civil law countries. See Hague Convention Art. 11. See also Henry Hansmann&UgoMattei, The Functions of Trust Law: A Comparative Legal and Economic Analysis, 73 N.Y.U. L. Rev. 434 (1998); John H. Langbein, The Secret Life of the Trust: The Trust as an Instrument of Commerce, 107 Yale L.J. 165, 179-80 (1997).

III. SEPARATE 6th REPORT COMMENTARY

None. The 6th Report agreed to adopt UTC section 507, renumbering it to section 506.

IV. NEW YORK STATE LAW

There is no direct statement of this principle, which is a basic principle of the law of trusts, in New York law. The basic premise of New York trust law, that the trustee takes an estate in the trust property only to the degree and extent necessary to carry out the duties imposed on the trustee by the terms of the trust (see, e.g. Matter of Tompkins, 154 N.Y. 634 (1898)) would seem to exclude the possibility that the trustee could have any property interest a creditor could reach.

V. NYUTC LEGISLATIVE ADVISORY GROUP RECOMMENDATION

NYUTC-LAG recommends that proposed EPTL § 7-A-5.6 be enacted into law.

I. PROPOSED EPTL § 7-A-6.2 (UTC § 602) REVOCATION OR AMENDMENT OF REVOCABLE TRUST

(a) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This subsection does not apply to a trust created under an instrument executed before [the effective date of this [Code]].

(b) If a revocable trust is created or funded by more than one settlor:

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

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

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

(c) Upon notice to the trustee, the settlor may revoke or amend revocable trust:

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

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

(A) executing a later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or

(B) any other method manifesting clear and convincing evidence of the settlor's intent; provided that

(3) the settlor may not expand, restrict or otherwise modify the trustee's duties, powers or obligations without the trustee's consent.

(d) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs ~~The settlor may amend a revocable trust provided that the formalities required for the formation of the trust in section 402(d) are satisfied.~~

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

(f) A~~[conservator] of the settlor or, if no [conservator] has been appointed, a [~~guardian~~]~~ of the settlor may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the ~~[conservatorship] or [~~guardianship~~]~~.

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

II. UTC COMMENTARY-- as modified by the 6th Report

Subsection (a), which provides that a settlor may revoke or modify a trust unless the terms of the trust expressly state that the trust is irrevocable, changes the common law. Most States follow the rule that a trust is presumed irrevocable absent evidence of contrary intent. See Restatement (Second) of Trusts § 330 (1959). California , Iowa, Montana, Oklahoma, and Texas presume that a trust is revocable. The Uniform Trust Code endorses this minority approach, but only for trusts created after its effective date. This Code presumes revocability when the instrument is silent because the instrument was likely drafted by a nonprofessional, who intended the trust as a will substitute. The most recent revision of the Restatement of Trusts similarly reverses the former approach. A trust is presumed revocable if the settlor has retained a beneficial interest. See Restatement (Third) of Trusts § 63 cmt. c (Tentative Draft No. 3, 2001). Because professional drafters habitually spell out whether or not a trust is revocable, subsection (a) will have limited application.

A power of revocation includes the power to amend. An unrestricted power to amend may also include the power to revoke a trust. See Restatement (Third) of Trusts § 63 cmt. g (Tentative Draft No. 3, 2001); Restatement (Second) of Trusts § 331 cmt. g and h (1959).

Subsection (b), which is similar to Restatement (Third) of Trusts § 63 cmt. k (Tentative Draft No. 3, 2001), provides default rules for revocation or amendment of a trust having several settlors. The settlor's authority to revoke or modify the trust depends on whether the trust contains community property. To the extent the trust contains community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses. The purpose of this provision, and the reason for the use of joint trusts in community property States, is to preserve the community character of property transferred to the trust. While community property does not prevail in a majority of States, contributions of community property to trusts created in noncommunity property States does occur. This is due to the mobility of settlors, and the fact that community property retains its community character when a couple move from a community to a noncommunity State. For this reason, subsection (b), and its provision on contributions of community property, should be enacted in all States, whether community or noncommunity.

With respect to separate property contributed to the trust, or all property of the trust if none of the trust property consists of community property, subsection (b) provides that each settlor may revoke or amend the trust as to the portion of the trust contributed by that settlor. The inclusion of a rule for contributions of separate property does not mean that the drafters of this Code concluded that the use of joint trusts should be encouraged. The rule is included because of the widespread use of joint trusts in noncommunity property States in recent years. Due to the desire to preserve the community character of trust property, joint trusts are a

necessity in community property States. Unless community property will be contributed to the trust, no similarly important reason exists for the creation of a joint trust in a noncommunity property State. Joint trusts are often poorly drafted, confusing the dispositive provisions of the respective settlors. Their use can also lead to unintended tax consequences. See Melinda S. Merk, Joint Revocable Trusts for Married Couples Domiciled in Common-Law Property States, 32 Real Prop. Prob. & Tr. J. 345 (1997).

Subsection (b) does not address the many technical issues that can arise in determining the settlors' proportionate contribution to a joint trust. Most problematic are contributions of jointly-owned property. In the case of joint tenancies in real estate, each spouse would presumably be treated as having made an equal contribution because of the right to sever the interest and convert it into a tenancy in common. This is in contrast to joint accounts in financial institutions, ownership of which in most States is based not on fractional interest but on actual dollar contribution. See, e.g., Uniform Probate Code § 6-211. Most difficult may be determining a contribution rule for entireties property. In Holdener v. Fieser, 971 S.W. 2d 946 (Mo. Ct. App. 1998), the court held that a surviving spouse could revoke the trust with respect to the entire interest but did not express a view as to revocation rights while both spouses were living

This section does not explicitly require that the other settlor or settlors be notified if a joint trust is revoked by less than all of the settlors, but such notice would be required pursuant to Section 603. While a trust is revocable and the settlor has capacity, Section 603(a) provides that the duties of the trustee, including the duty to keep the beneficiaries informed of administrative developments, are owed exclusively to the settlor. With respect to trusts having several settlors, Section 603(c) clarifies that the trustee's duties, including the duty to keep the beneficiaries informed of developments, are owed to all settlors having capacity. Notifying the other settlor or settlors of the revocation or amendment will place them in a better position to protect their interests. If the revocation or amendment by less than all of the settlors breaches an implied agreement not to revoke or amend the trust, those harmed by the action can sue for breach of contract. If the trustee fails to notify the other settlor or settlors of the revocation or amendment, the parties aggrieved by the trustee's failure can sue the trustee for breach of trust.

Subsection (c), which is similar to Restatement (Third) of Trusts § 63 cmt. h and i (Tentative Draft No. 3, 2001), specifies the method of revocation and amendment. Revocation of a trust differs fundamentally from revocation of a will. Revocation of a will, because a will is not effective until death, cannot affect an existing fiduciary relationship. With a trust, however, because a revocation will terminate an already existing fiduciary relationship, there is a need to protect a trustee who might act without knowledge that the trust has been revoked. There is also a need to protect trustees against the risk that they will misperceive the settlor's intent and mistakenly assume that an informal document or communication constitutes a revocation when that was not in fact the settlor's intent. To protect trustees against these risks, drafters habitually insert provisions providing that a revocable trust may be revoked only by delivery to the trustee of a formal revoking document. Some courts require strict compliance with the stated formalities. Other courts, recognizing that the formalities were inserted primarily for the trustee's and not the settlor's benefit, will accept other methods of revocation as long as the settlor's intent is clear. See Restatement (Third) of Trusts § 63 Reporter's Notes to cmt. h-j (Tentative Draft No. 3, 2001).

This Code tries to effectuate the settlor's intent to the maximum extent possible while at the same time protecting a trustee against inadvertent liability. While notice to the trustee of a revocation is good practice, this section does not make the giving of such notice a prerequisite to a trust's revocation. To protect a trustee who has not been notified of a revocation or amendment, subsection (g) provides that a trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust, as unamended, was still in effect. However, to honor the settlor's intent, subsection (c) generally honors a settlor's clear expression of intent even if inconsistent with stated formalities in the terms of the trust.

Under subsection (c), the settlor may revoke or amend a revocable trust by substantially complying with the method specified in the terms of the trust or by a later executed will or codicil or any other method manifesting clear and convincing evidence of the settlor's intent. Only if the method specified in the terms of the trust is made exclusive is use of the other methods prohibited. Even then, a failure to comply with a technical requirement, such as required notarization, may be excused as long as compliance with the method specified in the terms of the trust is otherwise substantial.

While revocation of a trust will ordinarily continue to be accomplished by signing and delivering a written document to the trustee, other methods, such as a physical act or an oral statement coupled with a withdrawal of the property, might also demonstrate the necessary intent. These less formal methods, because they provide less reliable indicia of intent, will often be insufficient, however. The method specified in the terms of the trust is a reliable safe harbor and should be followed whenever possible.

Revocation or amendment by will is mentioned in subsection (c) not to encourage the practice but to make clear that it is not precluded by omission. See Restatement (Third) of Property: Wills and Other Donative Transfers § 7.2 cmt. e (Tentative Draft No. 3, 2001), which validates revocation or amendment of will substitutes by later will. Situations do arise, particularly in death-bed cases, where revocation by will may be the only practicable method. In such cases, a will, a solemn document executed with a high level of formality, may be the most reliable method for expressing intent. A revocation in a will ordinarily becomes effective only upon probate of the will following the testator's death. For the cases, see Restatement (Third) of Trusts § 63 Reporter's Notes to cmt. h-i (Tentative Draft No. 3, 2001).

A residuary clause in a will disposing of the estate differently than the trust is alone insufficient to revoke or amend a trust. The provision in the will must either be express or the will must dispose of specific assets contrary to the terms of the trust. The substantial body of law on revocation of Totten trusts by will offers helpful guidance. The authority is collected in William H. Danne, Jr., Revocation of Tentative ("Totten") Trust of Savings Bank Account by Inter Vivos Declaration or Will, 46 A.L.R. 3d 487 (1972).

Subsection (c) does not require that a trustee concur in the revocation or amendment of a trust. Such a concurrence would be necessary only if required by the terms of the trust. If the

trustee concludes that an amendment unacceptably changes the trustee's duties, the trustee may resign as provided in Section 705.

Subsection (d), providing that upon revocation the trust property is to be distributed as the settlor directs, codifies a provision commonly included in revocable trust instruments.

Subsection (e), which is similar to Restatement (Third) of Trusts § 63 cmt. l (Tentative Draft No. 3, 2001), authorizes an agent under a power of attorney to revoke or modify a revocable trust only to the extent the terms of the trust or power of attorney expressly so permit. An express provision is required because most settlors usually intend that the revocable trust, and not the power of attorney, to function as the settlor's principal property management device. The power of attorney is usually intended as a backup for assets not transferred to the revocable trust or to address specific topics, such as the power to sign tax returns or apply for government benefits, which may be beyond the authority of a trustee or are not customarily granted to a trustee.

Subsection (f) addresses the authority of a ~~conservator or~~ guardian to revoke or amend a revocable trust. Under the Uniform Trust Code, ~~a "conservator" is appointed by the court to manage the ward's party,~~ a "guardian" to make decisions with respect to the ward's personal affairs. See Section 103. Consequently, subsection (f) authorizes a guardian to exercise a settlor's power to revoke or amend a trust ~~only if a conservator has not been appointed~~.

Many state ~~conservatorship~~ statutes authorize a conservator to exercise the settlor's power of revocation with the prior approval of the court supervising the conservatorship. See, e.g., Uniform Probate Code § 411(a)(4). Subsection (f) ratifies this practice. Under the Code, a conservator may exercise a settlor's power of revocation, amendment, or right to withdraw trust property upon approval of the court supervising the conservatorship. Because a settlor often creates a revocable trust for the very purpose of avoiding conservatorship, this power should be exercised by the court reluctantly. Settlors concerned about revocation by a conservator may wish to deny a conservator a power to revoke. However, while such a provision in the terms of the trust is entitled to considerable weight, the court may override the restriction if it concludes that the action is necessary in the interests of justice. See Section 105(b)~~(13)~~(14).

Steps ~~a conservator~~ can take to stem possible abuse is not limited to petitioning to revoke the trust. The ~~conservator~~ could petition for removal of the trustee under Section 706. The conservator, acting on the settlor-beneficiary's behalf, could also bring an action to enforce the trust according to its terms. Pursuant to ~~Section 303~~, a conservator may act on behalf of the beneficiary whose estate the conservator controls whenever a consent or other action by the beneficiary is required or may be given under the Code.

~~If a conservator has not been appointed~~, subsection (f) authorizes a guardian to exercise a settlor's power to revoke or amend the trust upon approval of the court supervising the guardianship. The court supervising the guardianship will need to determine whether it can grant a guardian authority to revoke a revocable trust under local law or whether it will be necessary to appoint a ~~conservator~~ for that purpose.

III. SEPARATE 6th REPORT COMMENTARY

The 6th Report determined that EPTL § 7-1.17(b) should be repealed. For, contrary to EPTL § 7-1.17(b), a revocation of a revocable trust can be achieved by this section of the Code without a writing. For example, as the UTC Commentary indicates, the physical destruction of the document could affect the revocation if the requisite showing of the settlor's intent to revoke is made (*i.e.*, if clear and convincing evidence of such intent is established). While this section of the Code does not explicitly indicate that a document of revocation executed by the person having authority to effect a revocation under the instrument would suffice, the 6th Report determined that such a document would affect revocation under section 602(c)(2)(B) of the Code. As an alternative, the validity could also be established if shown to be in accordance with the terms of the trust or if in substantial compliance with the method provided in the terms of the trust. To that end, subsection (c) has been amended.

The 6th Report also determined that an amendment of a revocable trust must be accomplished by using the same formalities that are applicable to the formation of a trust. Subsection (d) reflects this determination.

The 6th Report deleted the stricken language in Subsection (f) given that New York does not have a conservatorship concept.

IV. NEW YORK STATE LAW

EPTL § 1-1.17(b) requires that any amendment or revocation of a revocable lifetime trust shall be in writing and executed by the person who holds the power to amend or revoke "and except as otherwise provided in the governing instrument shall be acknowledged or witnessed" in the manner set forth in EPTL § 1-1.17(a) for creating a lifetime trust. The subsection also requires that the written notice be delivered to at least one other trustee "within a reasonable time" if the person executing the amendment or revocation is not the sole trustee. The provision applies to anyone holding the power to amend or revoke and not just to the settlor.

V. NYUTC LEGISLATIVE ADVISORY GROUP RECOMMENDATION

The NYUTC-LAG recommends that proposed EPTL § 7-A-6.2, as modified by the 6th Report and the NYUTC-LAG, be enacted into law.

The NYUTC-LAG was concerned that the version of this section proposed by the 6th Report would allow a settlor to revoke a trust without informing the Trustee. Although subsection (g) would relieve a Trustee who was unaware of any revocation or modification of the trust from any liability for distributions made from the trust or for other actions taken by the Trustee, the NYUTC-LAG recommends that notice of any revocation or amendment of a trust be given to the Trustee. Provided that the above amendment is made to subsection (c), the NYUTC-LAG supports the adoption of subsection (g).

The NYUTC-LAG does not intend for the notice requirement to be construed as requiring the consent of the trustee to the revocation or amendment of a trust, unless the proposed amendment expands, restricts or otherwise modifies the Trustee's powers. The NYUTC-LAG specifically considered the issue of Trustee compensation and declined to require a Trustee's consent to the modification of the Trustee's compensation structure.

The NYUTC-LAG disagrees with the 6th Report insofar as it recommended that any amendment of a trust also comply with the formalities required for the creation of a trust. Rather, the NYUTC-LAG recommends that subsection (d) of the Uniform Trust Code be adopted as subsection (d) of proposed EPTL § 7-A-6.2

Subsections (a), (b), (d), (e) and (f) will be addressed by other NYUTC-LAG functional groups.

I. PROPOSED EPTL § 7-A-7.1 (UTC §701) ACCEPTING OR DECLINING TRUSTEESHIP OF A LIFETIME TRUST

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

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

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

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

(c) A person designated as trustee of a lifetime trust, without accepting the trusteeship, may:

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

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

II. UTC COMMENTARY – as modified by the 6th Report

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

To avoid the inaction that can result if the person designated as trustee fails to communicate a decision either to accept or to reject the trusteeship, subsection (b) provides that a failure to accept within a reasonable time constitutes a rejection of the trusteeship. What will constitute a reasonable time depends on the facts and circumstances of the particular case. A major consideration is possible harm that might occur if a vacancy in a trusteeship is not filled

in a timely manner. A trustee's rejection normally precludes a later acceptance but does not cause the trust to fail. See Restatement (Third) of Trusts § 35 cmt. c (Tentative Draft No. 2, approved 1999). Regarding the filling of a vacancy in the event of a rejection, see Section 704.

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

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

Because of the potential liability that can inhere in trusteeship, subsection (c)(2) allows a person designated as trustee to inspect the trust property without accepting the trusteeship. The condition of real property is a particular concern, including possible tort liability for the condition of the premises or liability for violation of state or federal environmental laws such as CERCLA, 42 U.S.C. § 9607. For a provision limiting a trustee's personal liability for obligations arising from ownership or control of trust property, see Section ~~1010~~1009(b).

III. SEPARATE 6TH REPORT COMMENTARY

None.

IV. NEW YORK STATE LAW

UTC § 701 codifies New York governing acceptance of the trusteeship of a lifetime trust, *see Sankel v. Spector*, 33 A.D.3d 167, 819 N.Y.S.2d 520 (1st Dep't 2006). The law governing testamentary trusts, however, is quite different and is governed by SCPA Article 7. Generally, a testamentary trustee becomes trustee only by receiving letters of trusteeship from the Surrogate's Court that has admitted to probate the will creating the trust. (And under SCPA § 724, the provisions of Article 7 "except as expressly provided or required by context" are not applicable to trustees of lifetime trusts.) In addition, the provisions of Article 7 apply to all fiduciaries, not just trustees, and therefore govern qualification of guardians of the property, executors, and administrators.

V. NYUTC LEGISLATIVE ADVISORY GROUP RECOMMENDATION

The NYUTC-LAG recommends that proposed EPTL § 7-A-7.1, as modified by the NY UTC-LAG, be enacted into law.

The 6th Report had no proposed changes to Section 701 of the UTC. While the NYUTC-LAG agrees with the provisions of this section, it recommends that this section be modified to clarify that it only applies to lifetime trusts. The NYUTC-LAG believes that the applicable SCPA provisions should continue to govern the procedure for the acceptance or refusal of a trusteeship for a testamentary trust. In addition, the NYYUTC-LAG recommends that knowledge of the event that triggers the vacancy be required since a trustee may know of the designation but there is not yet a vacancy.

I. PROPOSED EPTL §7-A-7.2 (UTC § 702) TRUSTEE'S BOND

(a) Except as provided in surrogate's court procedure act section seven hundred ten, subdivision 2, a trustee shall give bond to secure performance of the trustee's duties only if the court finds that a bond is needed to protect the interests of the beneficiaries or is required by the terms of the trust and the court has not dispensed with the requirement.

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

(c) A regulated financial-service institution qualified to do trust business in this State need not give bond, even if required by the terms of the trust.

II. UTC COMMENTARY – as modified by the 6th Report

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

Despite the ability of the court pursuant to Section 105(b)(6) to override a term of the trust waiving bond, the court should order bond in such cases only for good reasons. Similarly, the court should rarely dispense with bond if the settlor directed that the trustee give bond.

This section does not attempt to detail all of the technical bonding requirements that the court may impose. Typical requirements are listed in the Uniform Probate Code sections cited above. The amount of a bond otherwise required may be reduced by the value of trust property deposited in a manner that prevents its unauthorized disposition, and by the value of real property which the trustee, by express limitation of power, lacks power to convey without court authorization. Also, the court may excuse or otherwise modify a requirement of a bond, reduce or increase the amount of a bond, release a surety, or permit the substitution of another bond with the same or different sureties.

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

III. SEPARATE 6TH REPORT COMMENTARY

None

IV. NEW YORK STATE LAW

Article 8 of the SCPA is devoted solely to "general provisions relating to bonds." It includes detailed rules governing the amount of the bond (SCPA § 801), procedures for approving and filing the bond, proceedings on the bond, and separate rules for bonds of administrators, temporary administrators and administrators c.t.a. (SCPA § 805), testamentary trustees (SCPA § 806) and legal life tenants (SCPA § 807). Under SCPA § 806 the will may excuse a testamentary trustee from filing a bond. In addition, under SCPA § 811, provisions of CPLR Article 25 apply to bonds in the Surrogate's Court "as to matters of detail not provided for [in SCPA Article 7]." (The most relevant CPLR provisions are sections 2506, 2507 and 2508 which concern the parties' rights to request an adjustment of the amount of the bond.)

The statutory provisions are not completely clear. Under SCPA § 806 a testamentary trustee must post a bond. Under SCPA § 801(1)(c) that bond shall be in "such amount as the court directs" and the introductory language to SCPA § 801 allows the court to reduce the amount of the bond otherwise required by the statute and even "to dispense with it entirely." In *Matter of Scheer*, 153 Misc.2d 545, 581 N.Y.S.2d 259 (Sur. Ct. Bronx County 1992) the court held that where the will did not dispense with the bond for a testamentary trustee the bond would be required and that the burden was on the trustee to present clear and convincing reasons why the bond should be dispensed with or required in a reduced amount.

Under EPTL § 7-2.3(b)(1), a successor trustee "shall give security in such amount as the court shall direct."

Finally, under Banking Law § 100-a(5) a trust company need not post a bond but under the same section the court may upon application may require such security as the court may deem proper.

V. NYUTC LEGISLATIVE ADVISORY GROUP RECOMMENDATIONS

The NYUTC-LAG recommends that proposed EPTL § 7-A-7.2, as modified by the 6th Report and the NYUTC-LAG, be enacted into law.

The 6th Report has removed the brackets on subsection (c) to Section 702 of the UTC. As a result, a corporate fiduciary would not be required to post a bond, even if required by the terms of the trust. The NYUTC-LAG agrees that a bond should only be required where the court finds it necessary to protect the interests of the beneficiaries or if a bond is required by the terms of the trust and the court has not dispensed with said requirement. Accordingly, the NYUTC-LAG recommends that SCPA § 806 should be repealed in its entirety and that references to said Section 806 in SCPA § 710(1) should also be deleted. Finally, the NYUTC-LAG recommends the modification of UTC § 702(a) to add the words "Except as provided in surrogate's court procedure act section seven hundred ten, subdivision 2" to deal with nondomiciliaries.

VI. Proposed EPTL §7-A-7.3 (UTC §703) COTRUSTEES ~~(*See EPTL §10-10.7*)~~

I. ~~(a) Cotrustees who are unable to reach a unanimous decision may act by majority decision.~~

~~(b) If a vacancy occurs in a cotrusteeship, the remaining cotrustees may act for the trust.~~

~~(c) A cotrustee must participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity or the cotrustee has properly delegated the performance of the function to another trustee.~~

~~(d) If a cotrustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.~~

~~(e) A trustee may not delegate to a cotrustee the performance of a function the settlor reasonably expected the trustees to perform jointly. Unless a delegation was irrevocable, a trustee may revoke a delegation previously made.~~

~~(f) Except as otherwise provided in subsection (g), a trustee who does not join in an action of another trustee is not liable for the action.~~

~~(g) Each trustee shall exercise reasonable care to:~~
~~(1) prevent a cotrustee from committing a serious breach of trust; and~~
~~(2) compel a cotrustee to redress a serious breach of trust.~~

~~(h) A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified any cotrustee of the dissent at or before the time of the action is not liable for the action unless the action is a serious breach of trust.~~

Unless contrary to the express provisions of an instrument affecting the disposition of property, a joint power other than a power of appointment, conferred upon three or more trustees, by the terms of such instrument, or by statute, or arising by operation of law, may be exercised by a majority of such trustees , or by a majority of survivor trustees , or by the survivor trustee Such a power conferred upon or surviving to two such trustees may be exercised jointly by both such trustees or by the survivor trustee, unless contrary to the express terms of the instrument creating the power. A trustee who fails to act through absence or disability, or a dissenting trustee who joins in carrying out the decision of a majority of the trustees if his dissent is expressed promptly in writing to his co-trustees, shall not be liable for the consequences of any majority decision, provided that liability for failure to join in administering the estate or trust or to prevent a breach of the trust may not thus be avoided. A power vested in one or more persons under a trust of real property created in connection with the salvaging of mortgage participation certificates may be executed by one or more of such persons as provided in such trust.

II. UTC COMMENTARY – as modified by the 6th Report

This section contains most but not all of the Code's provisions on cotrustees. Other provisions relevant to cotrustees include Sections 704 (vacancy in trusteeship need not be filled if cotrustee remains in office), 705 (notice of resignation must be given to cotrustee), 706 (lack of cooperation among cotrustees as ground for removal), 707 (obligations of resigning or removed trustee), 813 (reporting requirements upon vacancy in trusteeship), and ~~1013~~1012 (authority of cotrustees to authenticate documents).

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

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

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

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

Under subsection (b), a majority of the remaining trustees may act for the trust when a vacancy occurs in a cotrusteeship. Section 704 provides that a vacancy in a cotrusteeship need be filled only if there is no trustee remaining in office.

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

all of the functions of another trustee who is unavailable to perform duties as provided in subsection (c).

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

By permitting the trustees to act by a majority, this section contemplates that there may be a trustee or trustees who might dissent. Trustees who dissent from the acts of a cotrustee are in general protected from liability. Subsection (f) protects trustees who refused to join in the action. Subsection (h) protects a dissenting trustee who joined the action at the direction of the majority, such as to satisfy a demand of the other side to a transaction, if the trustee expressed the dissent to a cotrustee at or before the time of the action in question. However, the protections provided by subsections (f) and (h) no longer apply if the action constitutes a serious breach of trust. In that event, subsection (g) may impose liability against a dissenting trustee for failing to take reasonable steps to rectify the improper conduct. The responsibility to take action against a breaching cotrustee codifies the substance of Sections 184 and 224 of the Restatement (Second) of Trusts (1959).

III. SEPARATE 6TH REPORT COMMENTARY

None.

IV. NEW YORK STATE LAW

EPTL § 10-10.7 creates three major default rules governing the actions of multiple fiduciaries: each of several serving fiduciaries can act with regard to "several powers," second, non-several powers must be exercised jointly and where there are three or more fiduciaries, a majority may act. In addition, a surviving fiduciary may exercise fiduciary powers unless such exercise is expressly contrary to the provisions of the instrument. What powers are "several" powers is not exactly clear. Most of the case law involves executors and powers such as taking custody of estate property and paying debts and expenses. The rules as to custody, of course, can apply to trustees.

The liability of a co-fiduciary is not liable for the consequences of decisions taken by a majority of her co-fiduciaries if she cannot act because of absence or disability or joins in the act but expresses her dissent "promptly and in writing" to her co-fiduciaries, although liability for failure to prevent a breach of trust cannot be avoided by written dissent.

SCPA § 706 provides rules under which surviving fiduciaries may act and gives them ample authority to fulfill their duties. Also under that section, the surrogate's court may appoint a trustee when there is no trustee eligible to act.

V. NYUTC LEGISLATIVE ADVISORY GROUP RECOMMENDATION

The NYUTC-LAG recommends that proposed EPTL § 7-A-7.3 not be enacted into law but that the language of EPTL §10-10.7 as applied to trustees be substituted as new EPTL § 7-A-7.3. EPTL § 10-10.7 adequately governs the relationship among co-trustees without introducing ambiguities such as what constitutes "a serious breach of trust" or what functions "the settlor reasonably expected the trustees to perform jointly."

The 6th Report had no comments on Section 703 of the UTC relating to the conduct of co-trustees.

I. PROPOSED EPTL §7-A-7.4 (UTC §704) VACANCY IN TRUSTEESHIP; APPOINTMENT OF SUCCESSOR

(a) A vacancy in a trusteeship occurs if:

(1) a person designated as trustee rejects the trusteeship;

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

(3) a trustee resigns;

(4) a trustee is disqualified or removed;

(5) a trustee dies; or

(6) a [guardian] ~~or [conservator]~~ is appointed for an individual serving as trustee.

(7) To add: when vacancy provided for in trust

(b) If one or more cotrustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustee. If for any reason the trust has no remaining trustee, the trust estate immediately vests in the supreme court or surrogate's court, as the case may be, unless the settlor provides otherwise.

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

(1) by a person designated in the terms of the trust to act as successor trustee;

(2) by a person appointed by unanimous agreement of the qualified beneficiaries; or

(3) by a person appointed by the court.

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

(1) by a person designated in the terms of the trust to act as successor trustee;

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

(3) by a person appointed by the court.

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

~~(f) For purposes of this section, on the death of the sole surviving trustee, the trust estate does not vest in his or her personal representative or pass to his or her distributes or devisees, but, in the absence of a contrary direction by the settlor, the trust estate vests in the supreme court or the surrogate's court, as the case may be.~~

(f~~g~~) Nothing in this section shall be construed to limit the application of section seven hundred six and one thousand five hundred two of the surrogate's court procedure act.

II. UTC COMMENTARY – as modified by the 6th Report

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

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

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

Subsection (c) provides a procedure for filling a vacancy in the trusteeship of a noncharitable trust. Absent an effective provision in the terms of the trust, subsection (c)(2) permits a vacancy in the trusteeship to be filled, without the need for court approval, by a person selected by unanimous agreement of the qualified beneficiaries. An effective provision in the terms of the trust for the designation of a successor trustee includes a procedure under which the successor trustee is selected by a person designated in those terms. Pursuant to Section 705(a)(1), the qualified beneficiaries may also receive the trustee's resignation. If a trustee resigns following notice as provided in Section 705, the trust may be transferred to a successor appointed pursuant to subsection (c)(2) of this section, all without court involvement. A nonqualified beneficiary who is displeased with the choice of the qualified beneficiaries may petition the court for removal of the trustee under Section 706.

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

Subsection (d) specifies a procedure for filling a vacancy in the trusteeship of a charitable trust. Absent an effective designation in the terms of the trust, a successor trustee may be selected by the charitable organizations expressly designated to receive distributions in the terms of the trust but only if the attorney general concurs in the selection. If the attorney general does not concur in the selection, however, or if the trust does not designate a charitable

organization to receive distributions, the vacancy may be filled only by the court. For the reason why the reference to the Attorney General is placed in brackets, see 2004 Amendment below.

In the case of a revocable trust, the appointment of a successor will normally be made directly by the settlor. As to the duties of a successor trustee with respect to the actions of a predecessor, see Section 812.

***2001 Amendment**. Subsection (d), which creates a procedure for the filling of a vacancy in the trusteeship of a charitable trust, was added by a 2001 amendment.*

***2004 Amendment**. The amendment to Section 704(d)(2) is a conforming amendment to the amendment to Section 110(d). Section 110(d) provides that the attorney general has the rights of a qualified beneficiary with respect to charitable trusts having a principal place of administration in the state. If the enacting jurisdiction elects to delete or modify Section 110(d), then the enacting jurisdiction may wish to also modify subsection Section 704(d)(2) of this Section, which requires that the attorney general concur in the selection of a successor trustee nominated by a designated charitable organization.*

III. SEPARATE 6TH REPORT COMMENTARY

None.

IV. NEW YORK STATE LAW

Under New York law the testator may appoint successor trustees of a testamentary trust and the creator of a lifetime trust may also appoint successors, although the language used is likely to be strictly construed. (E.g., if the document appoints a successor upon either the failure of a named fiduciary to qualify or subsequent resignation, the appointment is not effective is the acting fiduciary is removed or dies, *Matter of Gluck*, N.Y.L.J., June 28, 1996 (Sur. Ct. Nassau County); *Matter of Keech*, 187 Misc. 154, 61 N.Y.S.2d 435 (Sur. Ct. Orange County 1946.)

Under SCPA § 1502 the Surrogate's Court may appoint a trustee, co-trustee, or successor trustee of both testamentary and lifetime trusts. Under SCPA § 1502(2) the court shall *not* appoint a trustee, successor, or co-trustee if would contravene the express provisions of the trust or a successor trustee, substitute, or co-trustee is named in the trust "and is not disqualified to act."

EPTL § 7-2.6 permits the Supreme Court, subject to the relevant provisions of the CPLR, to deal with trustees of lifetime trusts by accepting the trustee's resignation, suspend or remove a trustee who has or threatens "to violate his trust," who is or is about to become insolvent, or who for any reason is unsuitable, and, finally, to appoint a successor trustee.

V. NYUTC LEGISLATIVE ADVISORY GROUP RECOMMENDATION

The NYUTC-LAG recommends that proposed EPTL § 7-A-7.4, as modified by the 6th Report and the NYUTC-LAG, be enacted into law and that EPTL § 7-2.3 as it relates to

resignation be repealed since substance of provision is provided in last sentence of subsection (b). .

The 6th Report approved Section 704 of the UTC with two minor changes. The first change was to delete the reference to conservator in subsection (a)(6) of the Section to conform with Article 81 of the NY Mental Hygiene Law. In addition, the 6th Report removed the brackets from the requirement that the attorney general concur in the selection of a successor trustee for a charitable trust under subsection (d)(2).

The NYUTC-LAG agrees that even absent an express provision in the instrument, a vacancy in trusteeship should be filled by unanimous agreement of the qualified beneficiaries without the need for court approval. Accordingly, NYUTC-LAG recommends that SCPA § 1502(2) be amended to allow for a vacancy to be filled by a person appointed by unanimous agreement of the qualified beneficiaries before being filled by the court.

In addition, the NYUTC-LAG recommends that SCPA 706 and 1502, which permits court appointment of a successor trustee, be referenced in (f) to make clear that the rules in SCPA 706 and 1502 may also be availed of by the court.

I. PROPOSED EPTL § 7-A-7.5 (UTC § 705) RESIGNATION OF TRUSTEE

(a) A trustee may resign:

(1) upon at least 30 days' notice to (1) the settlor and all cotrustees in the case of a revocable trust and (ii) the qualified beneficiaries and all cotrustees, in the case of any other trust;; or

(2) with the approval of the court.

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

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

~~(d) Notwithstanding the terms of the trust, a trustee of a testamentary trust shall not resign without giving written notice to the court of such resignation court approval."~~

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

II. UTC COMMENTARY – as modified by the 6th Report

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

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

Regarding the residual responsibilities of a resigning trustee until the trust property is delivered to a successor trustee, see Section 707.

In the case of a revocable trust, because the rights of the qualified beneficiaries are subject to the settlor's control (see Section 603), resignation of the trustee is accomplished by giving notice to the settlor instead of the beneficiaries.

III. SEPARATE 6TH REPORT COMMENTARY

The 6th Report determined that provisions concerning the removal of a trustee, the resignation of a trustee or the appointment of a successor trustee shall be governed by the terms of the trust in the case of an inter vivos trust. If the terms of the trust do not address these issues, the provisions of the Code and the provisions of Article 7 of the SCPA shall govern as default rules. In the case of a testamentary trust, on the other hand, the 6th Report determined to retain current law. Thus, for example, the appointment of a successor trustee in the case of a testamentary trust would require an order of the court even if the terms of the trust provided otherwise (see Article 7 of the SCPA).

IV. NEW YORK STATE LAW

Current New York State law requires that a testamentary trustee seeking to resign must obtain court approval. SCPA §§ 715 and 716. EPTL § 7-2.6 provides that the supreme court may accept the resignation of trustees.

V. NYUTC LEGISLATIVE ADVISORY GROUP RECOMMENDATION

The NYUTC-LAG recommends that proposed EPTL § 7-A-7.5, as modified by the NYUTC-LAG, be enacted into law, that SCPA §§ 715 and 716 be modified to provide that no court approval is required for the resignation of a testamentary trustee and that EPTL § 7-2.6 be repealed as superfluous.

The NYUTC-LAG agrees with the UTC that court approval should not be required for the resignation of a testamentary trustee. Under existing New York State law, a testamentary trustee who wishes to resign must petition the court for permission to do so and the court is then required to analyze such petition, even if all interested parties consent to the resignation. Such court proceedings are often time consuming and expensive, especially where the "virtual representation" provisions of SCPA § 315 do not dispense with service on all parties under a disability and the appointment, and compensation, of a guardian *ad litem* is required, and the burden of this expense falls upon the beneficiaries of the trust, the very parties who are ostensibly being protected by this requirement, whether they want such protection or not.

Sophisticated estate planners already avoid this issue by drafting pour-over will and revocable trust combinations (where the will simply pours the testator's probate estate into the lifetime trust which contains the dispositive provisions) instead of stand-alone wills which create testamentary trusts. The NYUTC-LAG believes that the beneficiaries of a testator whose estate planner drafted a more traditional stand-alone will should not have to bear the cost of such proceeding simply because of the choice of testamentary device used or because the will dates from a time when the use of pour-over wills and revocable trust combinations was much less prevalent. Furthermore, EPTL § 10-6.6(b) (proposed as Section 7-A.4.18(b)) already provides statutory authority and a mechanism for changing trustees of a testamentary trust without requiring judicial approval (since a "decanting" under that section can be used for this purpose) and the NYUTC-LAG believes that if the result may be reached without judicial approval by decanting, the same result should be reachable without judicial approval by more straight-forward means. Concerns that allowing testamentary trustees to resign without court approval

could be detrimental to the interests of the beneficiaries of the trust should be allayed because the process would not impair an interested party from requiring the resigning trustee to account or from objecting to any such accounting.

Although the NYUTC-LAG believes that court approval should not be required for a testamentary trustee to resign, it does feel strongly that the resignation of a testamentary trustee should not be effective until written notice of such resignation is provided to the court that has taken jurisdiction over the trust. As a result, proposed (d) is made a mandatory rule by proposed Section 7-A-1.5(b)(7).

I. Proposed EPTL § 7-A-7.6 (UTC § 706) REMOVAL OF TRUSTEE

(a) In addition to any method provided in the trust instrument, the settlor, a cotrustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.

(b) The court may remove a trustee if:

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

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

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

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

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

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

(e) Nothing in this section shall be construed to limit the application of sections seven hundred eleven, seven hundred twelve, seven hundred thirteen and seven hundred nineteen of the surrogate's court procedure act.

II. UTC COMMENTARY – as modified by the 6th Report

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

Trustee removal may be regulated by the terms of the trust. See Section 105. In fashioning a removal provision for an irrevocable trust, the drafter should be cognizant of the

danger that the trust may be included in the settlor's federal gross estate if the settlor retains the power to be appointed as trustee or to appoint someone who is not independent. See Rev. Rul. 95-58, 1995-2 C.B. 191.

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

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

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

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

Subsection (b)(3) authorizes removal for a variety of grounds, including unfitness, unwillingness, or persistent failure to administer the trust effectively. Removal in any of these cases is allowed only if it best serves the interests of the beneficiaries. For the definition of "interests of the beneficiaries," see Section 103~~(8)~~(7). "Unfitness" may include not only mental incapacity but also lack of basic ability to administer the trust. Before removing a trustee for

unfitness the court should consider the extent to which the problem might be cured by a delegation of functions the trustee is personally incapable of performing. "Unwillingness" includes not only cases where the trustee refuses to act but also a pattern of indifference to some or all of the beneficiaries. See Restatement (Third) of Trusts Section 37 cmt. e (Tentative Draft No. 2, approved 1999). A "persistent failure to administer the trust effectively" might include a long-term pattern of mediocre performance, such as consistently poor investment results when compared to comparable trusts.

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

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

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

III. SEPARATE 6TH REPORT COMMENTARY

None.

IV. NEW YORK STATE LAW

SCPA § 711 provides for the revocation of letters of trusteeship on notice to the trustee and any other persons whose interests are sufficient so that the court finds them to be necessary parties, upon petition of a co-trustee, creditor, person interested, any person on behalf of an infant or a surety on a bond of the trustee where it is found that the trustee was disqualified, guilty of misconduct or that the trusteeship terminated by the terms of the governing instrument. SCPA § 711(11) provides that the surrogate's court can remove or suspend the trustee of an lifetime trust where the supreme court could have done so. During the pendency of a proceeding under SCPA § 711, the court may suspend the trustee wholly or partly from the exercise of his powers. SCPA § 712. SCPA § 719 permits the court to remove or suspend a trustee without a petition or issuance of process. EPTL § 7-2.6 permits the supreme court to remove or suspend a trustee who has violated or threatens to violate his trust, who is or is imminently insolvent or who for any reason is unsuitable to execute the trust.

EPTL § 7-2.6 was applicable to both the surrogate's courts and the supreme courts, but was restricted to the supreme court in 1967 since the provisions dealing with the resignation, suspension or removal in the surrogate's court "vary considerably." Sixth and Final Report of the Temporary State Commission of the Law of Estates, 1967 Leg. Doc. No. 19 at 26. However, courts have treated the standards for removal under both provisions as being comparable. *See* Matter of Trust made by Giles, 74 A.D.3d 1499, 902 N.Y.S. 717 (3rd Dept. 2010); Matter of Bornkamp Trust, 2005 N.Y. Misc. LEXIS 3375; 233 N.Y.L.J. 113 (Nassau Surr. 2005).

V. NYUTC LEGISLATIVE ADVISORY GROUP RECOMMENDATION

The NYUTC-LAG recommends that proposed EPTL § 7-A-7.6, as modified by the NYUTC-LAG, be enacted into law, and that EPTL § 7-2.6 be repealed as superfluous In addition, EPTL § 7-2.5, which provides for the suspension of a trustee in war service, should be repealed since EPTL § 7-A-7.6 (c) effectively authorizes any court suspensions, which include one involving a trustee in war service.

The proposed addition to (a) makes clear that a settlor may provide the method for trustee removal, including removal by one or more beneficiaries.

Proposed (d) makes clear that removal may occur in the supreme or surrogate's court.

Proposed (e) makes clear that existing removal procedures in the SCPA may also be applied.

I. PROPOSED EPTL § 7-A-7.7 (UTC § 707) DELIVERY OF PROPERTY BY FORMER TRUSTEE

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

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

II. UTC COMMENTARY – as modified by the 6th Report

This section addresses the continuing authority and duty of a resigning or removed trustee. Subject to the power of the court to make other arrangements or unless a cotrustee remains in office, a resigning or removed trustee has continuing authority until the trust property is delivered to a successor. If a cotrustee remains in office, there is no reason to grant a resigning or removed trustee any continuing authority, and none is granted under this section. In addition, if a cotrustee remains in office, the former trustee need not submit a final trustee's report. See ~~Section 813(c)~~.

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

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

III. SEPARATE 6TH REPORT COMMENTARY

None.

IV. NEW YORK STATE LAW

SCPA § 716 provides that a decree discharging a testamentary trustee may be made after a resigning trustee fully accounts and pays over all money found to be due from him and delivering over all books, papers and other property in his hands to his successor, or in such manner as the court directs. There is no similar statutory provision regarding lifetime trustees.

V. NYUTC LEGISLATIVE ADVISORY GROUP RECOMMENDATION

The NYUTC-LAG recommends that proposed EPTL § 7-A-7.7, as modified by the 6th Report, be enacted into law.

The NYUTC-LAG agrees with the 6th Report that subsection (b) should be redrafted to make clear that the resigning trustee may retain a reasonable reserve, but otherwise agrees with the UTC. The NYUTC-LAG believes that this section simply codifies the procedures that well-advised fiduciaries currently follow.

~~I.~~ **PROPOSED EPTL § 7-A-7.8 (UTC § 708) COMPENSATION OF TRUSTEE** ~~*(See SCPA §§ 2308-2313)*~~

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~~If a corporate trustee is serving and if the terms of a the trust do not specify the corporate trustee's compensation, a the corporate trustee is entitled to compensation that is reasonable under the circumstances.~~

~~(b) If the terms of a the trust specify the corporate trustee's compensation, the corporate 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.~~

The rules for compensating a trustee are provided in surrogate's court procedure act sections two thousand three hundred eight through two thousand three hundred thirteen.

~~II.~~VI. UTC COMMENTARY – as modified by the 6th Report

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

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

Because "trustee" as defined in Section 103~~(20)~~(19) includes not only an individual trustee but also cotrustees, each trustee, including a cotrustee, is entitled to reasonable compensation under the circumstances. The fact that a trust has more than one trustee does not mean that the trustees together are entitled to more compensation than had either acted alone. Nor does the appointment of more than one trustee mean that the trustees are eligible to receive the compensation in equal shares. The total amount of the compensation to be paid and how it will be divided depend on the totality of the circumstances. Factors to be considered include the

settlor's reasons for naming more than one trustee and the level of responsibility assumed and exact services performed by each trustee. Often the fees of cotrustees will be in the aggregate higher than the fees for a single trustee because of the duty of each trustee to participate in administration and not delegate to a cotrustee duties the settlor expected the trustees to perform jointly. See Restatement (Third) of Trusts Section 38 cmt. i (Tentative Draft No. 2, approved 1999). The trust may benefit in such cases from the enhanced quality of decision-making resulting from the collective deliberations of the trustees.

Financial institution trustees normally base their fees on published fee schedules. Published fee schedules are subject to the same standard of reasonableness under the Uniform Trust Code as are other methods for computing fees. The courts have generally upheld published fee schedules but this is not automatic. Among the more litigated topics is the issue of termination fees. Termination fees are charged upon termination of the trust and sometimes upon transfer of the trust to a successor trustee. Factors relevant to whether the fee is appropriate include the actual work performed; whether a termination fee was authorized in the terms of the trust; whether the fee schedule specified the circumstances in which a termination fee would be charged; whether the trustee's overall fees for administering the trust from the date of the trust's creation, including the termination fee, were reasonable; and the general practice in the community regarding termination fees. Because significantly less work is normally involved, termination fees are less appropriate upon transfer to a successor trustee than upon termination of the trust. For representative cases, see Cleveland Trust Co. v. Wilmington Trust Co., 258 A.2d 58 (Del. 1969); In re Trusts Under Will of Dwan, 371 N.W. 2d 641 (Minn. Ct. App. 1985); Mercer v. Merchants National Bank, 112 N.H. 441, 298 A.2d 736 (1972); In re Estate of Payson, 148 Misc. 2d 807, 562 N.Y.S. 2d 329 (Surr. Ct. 1990); In re Indenture Agreement of Lawson, 414 Pa.Super. 550, 607 A.2d 803 (1992); In re Estate of Ischy, 490 Pa. 71, 415 A.2d 37 (1980); Memphis Memorial Park v. Planters National Bank, 1986 Tenn. App. LEXIS 2978 (Tenn. Ct. App. May 7, 1986); In re Trust of Sensenbrenner, 76 Wis.2d 625, 252 N.W.2d 47 (1977).

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

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

Compensation may be set by agreement. A trustee may enter into an agreement with the beneficiaries for lesser or increased compensation, although an agreement increasing

compensation is not binding on a nonconsenting beneficiary. See Section 111(d) (matters that may be the resolved by nonjudicial settlement). See also Restatement (Third) of Trusts Section 38 cmt. f (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 242 cmt. i (1959). A trustee may also agree to waive compensation and should do so prior to rendering significant services if concerned about possible gift and income taxation of the compensation accrued prior to the waiver. See Rev. Rul. 66-167, 1966-1 C.B. 20. See also Restatement (Third) of Trusts Section 38 cmt. g (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 242 cmt. j (1959).

Section 816(15) grants the trustee authority to fix and pay its compensation without the necessity of prior court review, subject to the right of a beneficiary to object to the compensation in a later judicial proceeding. Allowing the trustee to pay its compensation without prior court approval promotes efficient trust administration but does place a significant burden on a beneficiary who believes the compensation is unreasonable. To provide a beneficiary with time to take action, and because of the importance of trustee's fees to the beneficiaries' interests, Section ~~813(b)(4)~~ requires a trustee to provide the qualified beneficiaries with advance notice of any change in the method or rate of the trustee's compensation. Failure to provide such advance notice constitutes a breach of trust, which, if sufficiently serious, would justify the trustee's removal under Section 706.

Under Sections 501-502 of the Uniform Principal and Income Act (1997), one-half of a trustee's regular compensation is charged to income and the other half to principal. Chargeable to principal are fees for acceptance, distribution, or termination of the trust, and fees charged on disbursements made to prepare property for sale.

~~III.~~VII. SEPARATE 6TH REPORT COMMENTARY

The 6th Report determined to adopt this section. It replaces section 2312 of the SCPA. In other respects, the compensation of trustees will continue to be governed by current law (i.e., sections 2308 thru 2313 of the SCPA).

~~IV.~~VIII. NEW YORK STATE LAW

New York has an elaborate statutory law of trustee commissions. SCPA 2309 governs commissions of individual trustees, directs from which trust property they are to be paid, and has special rules for commissions on real estate and on accumulated income. SCPA 2312 governs commission of corporate trustees and provides that they are entitled to "reasonable" compensation for serving as trustee of a trust the principal of which is worth $400,000 or more. This section also has elaborate rules which govern payment and calculation of these commissions.

Under both sections the testator or creator of a lifetime trust may provide for trustee compensation as part of the terms of the trust.

~~V.~~IX. NYUTC LEGISLATIVE ADVISORY GROUP RECOMMENDATION

The NYUTC-LAG recommends that proposed EPTL § 7-A-7.8 as modified by the NYUTC

Because the NYUTC-LAG believes that the current provision of the SCPA governing trustee commissions are preferred to the reasonable compensation regime being proposed by the UTC, including the . 6th Report's modification regarding corporate trustees, the NYUTC-LAG does not think it makes sense to modify the existing commission provisions as they are well-developed, detailed and thorough. In our view, the UTC creates uncertainty and fails to address issues such as attorney-trustee compensation that the SCPA expressly addresses. Hence, the NYUTC-LAG recommends that SCPA §2308 through 2313 should continue to govern the compensation of both individual and corporate trustees in New York. Therefore, NYUTC-LAG recommends that UTC §105(b)(8) as redrafted by the 6th Report should be deleted.

I. PROPOSED EPTL § 7-A-7.9 (UTC § 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.

II. UTC COMMENTARY – as modified by the 6th Report

A trustee has the authority to expend trust funds as necessary in the administration of the trust, including expenses incurred in the hiring of agents. See Sections 807 (delegation by trustee) and 816(15) (trustee to pay expenses of administration from trust).

Subsection (a)(1) clarifies that a trustee is entitled to reimbursement from the trust for incurring expenses within the trustee's authority. The trustee may also withhold appropriate reimbursement for expenses before making distributions to the beneficiaries. See Restatement (Third) of Trusts § 38 cmt. b (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 244 cmt. b (1959). A trustee is ordinarily not entitled to reimbursement for incurring unauthorized expenses. Such expenses are normally the personal responsibility of the trustee.

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

Subsection (b) implements Section 802(h)(5), which creates an exception to the duty of loyalty for advances by the trustee for the protection of the trust if the transaction is fair to the beneficiaries.

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

III. SEPARATE 6TH REPORT COMMENTARY

None.

IV. NEW YORK STATE LAW

EPTL § 11-1.1(b)(22) provides that a trustee may properly pay all reasonable and proper expenses of administration from the property of the trust. SCPA §§ 2308(1), 2309(1) and 2312(7) provide that upon the settlement of the account of a trustee, the court must allow the trustee his, her or its reasonable and necessary expenses actually paid by the trustee.

V. NYUTC LEGISLATIVE ADVISORY GROUP RECOMMENDATION

The NYUTC-LAG recommends that proposed EPTL § 7-A-7.9 be enacted into law.

EPTL § 11-1.1(b)(22) makes clear that a trustee may properly pay all reasonable and proper expenses of administration from the property of the trust. SCPA §§ 2308(1), 2309(1) and 2312(7) make clear that upon the settlement of the account of a trustee, the court must allow the trustee his, her or its reasonable and necessary expenses actually paid by the trustee. However, transactions between a trust and its trustee may be self-dealing and may violate the trustee's duty of undivided loyalty to trust and its beneficiaries. The NYUTC-LAG believes that the trustee should not be penalized for advancing his, her or its own funds if it is to the benefit of the trust and its beneficiaries. Accordingly, the NYUTC-LAG agrees that a limited exception to the duty of undivided loyalty should be made where a trustee advances his, her or its own funds for the benefit of the trust and its beneficiaries so that such trustee would be entitled to interest as appropriate on such sums.

I. PROPOSED EPTL § 7-A-10.9 (UTC § 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 failed to exercise reasonable care, diligence and prudence.

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

(d) In any case where liability is found against the ~~trust~~ trustee ~~a~~as the result of an action or proceeding brought under subdivision (c), issues of liability as between the ~~trust~~ trustee in the trustee's fiduciary capacity and the trustee in the trustee's individual capacity, shall be determined in an accounting proceeding brought pursuant to section twenty-two hundred five of the surrogate's court procedure act.

II. UTC COMMENTARY —as modified by the 6th Report

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

Subsection (b) addresses trustee liability arising from ownership or control of trust property and for torts occurring incident to the administration of the trust. Liability in such situations is imposed on the trustee personally only if the trustee was personally at fault, either intentionally or negligently. This is contrary to Restatement (Second) of Trusts § 264 (1959), which imposes liability on a trustee regardless of fault, including liability for acts of agents under respondeat superior. Responding to a particular concern of trustees, subsection (b) specifically protects a trustee from personal liability for violations of environmental law such as CERCLA (42 U.S.C. § 9607) or its state law counterparts, unless the trustee was personally at fault. See also Sections 701(c)(2) (nominated trustee may investigate trust property to determine

potential violation of environmental law without having accepted trusteeship) and 816(13) (trustee powers with respect to possible liability for violation of environmental law).

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

III. SEPARATE 6TH REPORT COMMENTARY

The Committee determined to adopt this section.

IV. NEW YORK STATE LAW

Subsection (a) - The absolution from personal liability on a contract of a trustee who discloses the fiduciary capacity in the contract codifies New York law. In *East River Savings Bank v. Samuels*, 284 N.Y. 470, 31 N.E.2d 906 (1940) the Court of Appeals held that trustees were not personally liable on a mortgage secured by trust property in spite of the general rule:

> It is the settled law, in the absence of evidence to the contrary and subject to exceptions not here pertinent, that where the contracts made by trustees are executory, upon a new and independent consideration and the liability claimed is not based upon any obligation of the creator of the trust, in spite of the fact that they are not made for the benefit of the trustees but rather for the benefit of the trust estate, as to third parties a personal obligation on the part of the trustees is created and the third party may not look to the trust estate to satisfy his obligations.

In the instant case, however, the trustees were not personally liable because the mortgage documents sufficiently disclosed their fiduciary capacity:

> The appellants might have absolved themselves from any personal liability by inserting in the instruments a clause to the effect that they could not be held personally liable. Pumpelly v. Phelps, 40 N.Y. 59, 100 Am.Dec. 463; Knipp v. Bagby, 126 Md. 461, 95 A. 60, L.R.A.1915F, 1072; United States Trust Co. v. Stanton, 139 N.Y. 531, 34 N.E. 1098; Austin v. Munro, 47 N.Y. 360, 366; 3 Bogert on Trusts, § 714, and cases cited; Taylor v. Davis, 110 U.S. 330, 4 S.Ct. 147, 28 L.Ed. 163; Wachtel v. Rosen, 249 N.Y. 386, 164 N.E. 326, 62 A.L.R. 374. In none of the aforesaid instruments was there a specific provision exempting the trustees from personal liability. Nevertheless, the recital in the instruments of the character in which the trustees were acting, as a class and not individually or jointly and severally, their signing and executing as trustees under the trust instrument, the fact that the instruments refer to the trust instrument and the place of its public record, gave notice to the plaintiff of all of the provisions of the trust agreement, the character under which they acted and under which they had authority to act and established the limitation of their liability as individuals. Under those circumstances, the instruments on their face do not create a personal liability. In the light of the circumstances surrounding their execution and

> delivery, they cannot properly be read in any other way. We need not resort to parol evidence to discover the understanding between the parties as to the character of the liability intended to be imposed. That appears in the language of the instruments themselves.

Presumably, the meaning of "disclosed the fiduciary capacity" will continue to be found in cases like *East River Savings Bank* (*see, e.g., Sisler v. Security Pacific Business Credit, Inc.*, 201 A.D.2d 216, 614 N.Y.S.2d 985 (1st Dep't 1994)).

Subsection (b) - Although it is widely accepted that under the common law that trustees are personally liable for torts involving trust property and are entitled to indemnification from the trust property only if they are free from willful misconduct (Restatement (Second) of Trusts § 247) the New York cases are very few. The general principles are stated with approval in *Kirchner v. Mueller*, 280 N.Y. 2319 N.E.2d 665 (1939). *Kirchner*, in turn, cites *Matter of Lathers*, 137 Misc. 226, 243 N.Y.S. 366 (Sur. Ct. New York Co. 1930) in which the Surrogate Slater discussed the cases at great length and concluded that the law of New York does indeed conform to the general principles. Subsection (b), therefore, will codify existing law.

Subsection (c) - EPTL 11-4.7 by its terms applies only to executors and administrators, leaving the common law of personal liability which once applied to all fiduciaries still applicable to trustees. As stated by Surrogate Horey in *Matter of Burke*, 129 Misc.2d 145, 492 N.Y.S.2d 892 (Sur. Ct. Cattaraugus Co. 1985):

> The general rule applicable to all fiduciaries prior to 1979 [date of enactment of EPTL 11-4.7] was that a fiduciary could not enter into a new and independent contract and bind the estate he represented even though such contract was made in the interest and for the benefit of such estate. The fiduciary was held to be personally liable upon such contracts. See O'Brien v. Jackson, 167 N.Y. 31, 60 NE 238; East River Savings Bank v. 245 Broadway Corp., 284 N.Y. 470, 31 N.E.2d 906; Carmody Wait 2d, Vol. 27, Sec. 157:40.

In *Burke* the executrix of decedent's estate who was also co-trustee of a testamentary trust established by the will contracted for repairs to real property owned by the trust. The court held that she was indeed personally responsible for the costs of repair but because the repairs were found to be necessary and proper for the preservation of trust property she was entitled to reimburse from the trust, a proposition that is also part of established law:

> However, as co-trustee, she is not without redress. Despite the rule that she incurred no liability on the part of the trust estate but only her own personal liability, it appears equally well established that if the expenditure was necessary and proper in the interest of the trust estate, she is entitled to be indemnified from the assets of the trust. Matter of Damsky (Surr.Co., King's Co., 1940) 175 Misc. 460, 23 N.Y.S.2d 897; To the same effect see Philco Radio & Television Corp. v. Damsky, 250 A.D. 485, 294 N.Y.S.2d 776 Carmody Wait 2d, Vol. 27, Sec. 157:40 contains the following applicable statement: "It is well established that although the fiduciary in legal theory is responsible in the first instance for

> satisfying the contractual obligation from his own funds, yet if the expenditure was necessary and proper in the interest of the estate, he is entitled to be reimbursed or indemnified therefor from its assets." The propriety of the charges and liability are required to be determined in the accounting of the fiduciary.

Subsection (c) of the proposed provision, therefore, simplifies existing law by allowing actions against the trustee in her fiduciary capacity so that the trust will be directly liable if liability is indeed established. Questions of whether the trust should be liable, that is, whether the contract entered into by the trustee was "necessary and proper" in the interest of the trust or whether the trustee "failed to exercise reasonable care, diligence and prudence," would be resolved in an accounting proceeding.

V. NYUTC LEGISLATIVE ADVISORY GROUP RECOMMENDATION

The NYUTC-LAG recommends that proposed EPTL § 7-A-7.10.9, as modified by the NYUTC-LAG, be enacted into law.

The NYUTC-LAG recommends the following two changes:

(1) In subsection (b) the standard "personally at fault" should be "failed to exercise reasonable care, diligence and prudence." This is the standard from EPTL §11-4.7 (b) liability of the personal representative for claims arising out of the administration of the estate.

(2) Add a subsection (d) to parallel EPTL §11-4.7 (d) which provides: "In any case where liability is found against the estate as the result of an action or proceeding brought under subdivision (c), issues of liability as between the estate and the personal representative shall be determined in an accounting proceeding brought pursuant to section twenty-two hundred five of the surrogate's court procedure act."

I. PROPOSED EPTL § 7-A-10.10 (UTC § 1011) INTEREST AS A GENERAL PARTNER

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

(b) ~~Except as otherwise provided in subsection (c),~~ a trustee who holds an interest as a general partner is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault.

~~(c) The immunity provided by this section does not apply if an interest in the partnership is held by the trustee in a capacity other than that of trustee or is held by the trustee's spouse or one or more of the trustee's descendants, siblings, or parents, or the spouse of any of them.~~

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

II. UTC COMMENTARY – as modified by the 6th Report

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

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

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

partnership in another capacity or if an interest is owned by the trustee's spouse or the trustee's descendants, siblings, parents, or the spouse of any of them.

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

This section has been placed in brackets to alert enacting jurisdictions to consider modifying the section to conform it to the State's specific laws on partnerships and other forms of unincorporated businesses.

III. SEPARATE 6TH REPORT COMMENTARY

The Committee determined to adopt this section.

IV. NEW YORK STATE LAW

There is no provision of current New York law that corresponds to proposed EPTL 7-A-10.10.

V. NYUTC LEGISLATIVE ADVISORY GROUP RECOMMENDATION

The NYUTC-LAG recommends that proposed EPTL § 7-A-10.10, as modified by the NYUTC-LAG, be enacted into law.

The NYUTC-LAG agrees in part and disagrees in part with the 6th Report. The NYUTC - LAG disagrees with subsection (c) which provides for personal liability of a trustee where the trust is a partner and the trustee (individually) or any member of the trustee's family is also a general or limited partner. This subsection changes New York law and makes it unlikely families will use trusts in structuring business entities. Eliminating subsection (c) will require modifications of subsections (a) and (b) by deleting the phrase "Except as otherwise provided in subsection (c)…".

I. PROPOSED EPTL § 7-A-10.11 (UTC § 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 transfers money or property to a trustee is not responsible for the proper application of such money or property; and any right or title derived by him from the trustee in consideration of such transfer is not affected by the trustee's misapplication of such money or property.

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

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

II. UTC COMMENTARY — as modified by the 6th Report

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

Subsection (a) protects two different classes; persons other than beneficiaries who assist a trustee with a transaction, and persons other than beneficiaries who deal with the trustee for value. As long as the assistance was provided or the transaction was entered into in good faith and without knowledge, third persons in either category are protected in the transaction even if the trustee was exceeding or improperly exercising the power. For the definition of "know," see Section 104. This Code does not define "good faith" for purposes of this and the next section. Defining good faith with reference to the definition used in the State's commercial statutes would be consistent with the purpose of this section, which is to treat commercial transactions with trustees similar to other commercial transactions.

Subsection (b) confirms that a third party who is acting in good faith is not charged with a duty to inquire into the extent of a trustee's powers or the propriety of their exercise. The third party may assume that the trustee has the necessary power. Consequently, there is no need to request or examine a copy of the trust instrument. A third party who wishes assurance that the trustee has the necessary authority instead should request a certification of trust as provided in Section ~~1013~~1012. Subsection (b), and the comparable provisions enacted in numerous States, are intended to negate the rule, followed by some courts, that a third party is charged with constructive notice of the trust instrument and its contents. The cases are collected in George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 897 (Rev. 2d ed. 1995); and 4 Austin W. Scott & William F. Fratcher, The Law of Trusts § 297 (4th ed. 1989).

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

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

Subsection (e) clarifies that a statute relating to commercial transactions controls whenever both it and this section could apply to a transaction. Consequently, the protections provided by this section are superseded by comparable protective provisions of these other laws. The principal statutes in question are the various articles of the Uniform Commercial Code, including Article 8 on the transfer of securities, as well as the Uniform Simplification of Fiduciary Securities Transfer Act.

III. SEPARATE 6TH REPORT COMMENTARY

The Committee determined to adopt this section.

IV. NEW YORK STATE LAW

Subsections (a) and (b) - EPTL 7-2.4 states: If the trust is expressed in the instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee, in contravention of the trust, except as authorized in this article and by any other provision of law, is void.

If one takes away the clause beginning "except as authorized" the statute is identical in substance to R.S., pt. 2, c. 1, tit. 2, § 65, that is, a provision of the Revised Statutes exacted in 1828-1830, generally referred to as "the Revised Statutes of 1830." This provision was frequently amended throughout the late nineteenth and early twentieth centuries when it was Real Property Law § 105 to include provisions giving the courts the authority to authorize trustees to deal with real property in ways that would otherwise contravene the trust. These amendments, of course, reflect a time when trustees did not have powers to sell, lease or mortgage real property as a matter of default law. The language added by those amendments was removed in 1937 (L. 1937 c. 141) when the provisions allowing a trustee to lease real property were rewritten into new separate sections. The enactment of the ancestor of EPTL 7-2.4 was closely related to the overall scheme of the Statute of Uses and Trusts which was Article Second of Title II of Part Two of the Revised Statutes. Under that scheme, the types of express trusts that could be legally created were limited to four and the type we would recognize as a trust, an express private trust (usually involving a gift from the creator to the beneficiaries) was to be created only for beneficiaries under legal disabilities who could not manage property for themselves. Because trusts were to be established to protect beneficiaries who could not take care of themselves, the interest of an income beneficiary was made inalienable (the origin of the

New York "statutory spendthrift rule") and the beneficiary was protect against malfeasance by the trustee by the provision voiding any action of the trustee in contravention of the trust.

Today the trust law of New York has lost many of the unique features of the scheme created by the Revised Statutes although some prominent fossils like the statutory spendthrift rule, the rule against undue suspension of the power of alienation, and the voiding of any action by the trustee in contravention of the trust are still with us.

Related to EPLT 7-2.4 is 7-3.2:An express trust not declared in the disposition to the trustee or an implied or resulting trust does not defeat the title of a purchaser from the trustee for value and without notice of the trust, or the rights of a creditor who extended credit to the trustee in reliance upon his apparent ownership of the trust property.

The substance of this section can also be traced to the Revised Statutes of 1830 (R.S., pt. 2, c. 1, tit. 2, § 64). The effect of this section (then Real Property Law § 104) was described by Robert Ludlow Fowler in his treatise, *The Real Property Law of the State of New York*, 3d ed (1909), p. 504:

> While the statute still contemplates that an express trust shall be effected by means of a conveyance or will, yet the declaration of trust may be separate from the instrument of conveyance. As subsequent purchasers have notice of all recorded instruments affecting the title, this section relieves only *bona fide* purchasers and creditor of the grantee from the necessity of inquiring whether a recorded conveyance to their grantor, absolute on its face, is in reality connected with a trust, raised *dehors* such conveyance. [footnotes omitted]

The statute, therefore, does not protect purchasers or creditors who know a trust exists from the possibility that the trustee actions with regard to the real property involved is void because it is in contravention of the trust under current EPTL 7-2.4.

Fowler's statement of the effect of what is now EPTL 7-3.2 is certainly at odds with proposed EPTL 7-A-10.12(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." Whether or not the exacting the proposed subsection will actually change New York law is difficult to say because the few cases that deal with the existing provision usually involve circumstances which make it possible to find that the person dealing with the trustee did not act in "good faith." A good example is *Kirsch v. Tozier*, 143 N.Y. 390, 38 N.E. 375 (1894). There the beneficiary of a trust brought an action to reinstate a mortgage that had been held by the trust and to foreclose on it. The trustee acquired title to the mortgaged property, properly executed a discharge of the mortgage and properly recorded the discharge. He then mortgaged the land to a bank which before making the loan examined an abstract certified by the town clerk which showed that the mortgagor was indeed the owner of the land and which described the mortgage as "in trust" for three named beneficiaries and noted it was "discharged."

The court described as "the only serious question" the bank's claim that it was not chargeable with notice nor "put upon inquiry to ascertain that the defendant [trustee] had no

authority to discharge the mortgage in question." The court disagreed, stating that the there was no indication in the mortgage that any power was given the trustee to accept payment before the mortgage became due and or to vary the security held by the trust. The court also stated that precedent made it abundantly clear that no such power could be implied "in the case of a trustee of a specified security for the benefit of minors and no other evidence of his actually authority exists other than may be implied from the fact that he is trustee of the security." The court then went on observe that

> There is a very pregnant circumstance . . . bearing up on the point of constructive notice. The bank relied upon a discharge by [the trustee] of a lien held by him as trustee on his own land. The transaction as disclosed by the record showed that in executing the satisfaction [the trustee] was dealing with himself, and that the act was in his own interest, and not only so, but that the mortgage was not due. [The trustee] was acting in the double capacity of owner of the land and trustee of a lien thereon for other persons. The transaction was unusual and special and the savings bank with knowledge of [the trustee]'s relation to the land as owner and trustee was, we think, bound to inquire by what authority he acted, and if inquiry had been made the invalidity of the transaction would or might have been disclosed.

The mortgagee bank, therefore, was charged with knowing the trustee's action was a breach of trust. That action was therefore void as being in contravention of the trust, the bank was not entitled to the protection of a bona fide purchaser and the plaintiff beneficiary was entitled to the reinstatement of the mortgage and its foreclosure, the bank bearing the loss.

Would *Kirsch* be decided the same way under proposed EPTL 7-A-10.12? It is likely that the answer is "yes" because the facts are sufficient to put the bank on notice that it should inquire further, although as the court in *Kirsch* notes, "[w]hat circumstances will amount to constructive notice, or will put a party upon inquiry, is in many cases a question of much difficulty."

A more contemporary case is *Matter of Muratori*, 183 Misc. 967, 52 N.Y.S.2d 350 (Sup. Ct. Queens Co. 1944). Husband and wife applied for an order under Real Property Law § 333-b cancelling and discharging a mortgage on the deposit in court of the principal, accrued interest and other charges. The mortgage had been assigned and the last recorded assignment was to a bank "as Trustee" under an agreement the title insurer, the respondent in the action. The mortgagors' attorney insisted on seeing a copy of the trustee agreement in order to determine if the subsequent unrecorded assignments from the bank as trustee to the title company respondent and from the respondent to the mortgagors' nominee, made "without warranties of any kind, express or implied, and without recourse to the assignor in any event whatsoever," were proper. The respondent's attorney refused and thus the current action.

The court held that the mortgagors "were under an absolute duty to inquire into the terms of the trust." Otherwise, they could not be sure that the assignment from the trustee to the title company was not in breach of trust. If it was, of course, it was void under then Real Property Law § 105. The court noted that in this case, unlike cases where a grantee or assignee is simply described as "trustee," the existence of the trust could not be in doubt since the last recorded

assignment to the bank described the bank "as trustee under agreement with Investors Syndicate Title and Guaranty Co., dated September 9th, 1935." In addition, this is not a case where successive transfers from the trustee's grantee and the grantee's successors in title have taken place so long ago that a presumption may arise that the trustee acted within the powers given in the trust instrument.

Although *Muratori* was decided almost seventy years ago and has not been cited in a single reported decision, it may have some relevance to current litigation concerning the collapse of the mortgage markets and the increase in foreclosure actions. In addition, it is still cited in various reference works on New York mortgage law (for example, 26A Carmody-Wait 2d § 154:53; 1 Mortgages and Mortgage Foreclosure in N.Y. § 18:9; 35 N.Y.Prac., Mortgage Liens in New York § 12:6 (2d. ed.)).

The question remains whether proposed EPTL 7-A-10.12 would change the result in *Muratori*. The broad protection given the person who deals in good faith with a trustee could make the concerns of the mortgagors in *Muratori* meaningless. However, that result depends on "good faith" a concept no freer of difficulty today than it was 118 years ago when the *Kirsch* court made the observation quoted above.

It is not at all certain how significant the statutory provisions voiding acts of the trustee in contravention of the trust and charging persons dealing with a known trustee with knowledge of the trustee's powers are in the modern world. These provisions are from a time when trustees did not have the broad authority to deal with trust property that they have today especially with regard to real property which in addition probably was a far greater proportion of trust property than it is today. A contemporary trust which holds publically traded financial instruments almost always holds those investments in a brokerage account which in turn hold the securities in nominee name (authorized by EPTL 11-1.9). No purchaser in the open market can ever know that he or she is dealing with securities held in trust making both EPTL 7-2.4 and 7-3.2 of little import. The continued relevance of both sections to real estate and mortgages held in trust is more difficult to assess. In particular, we cannot be certain how important they may be in litigation related to the mortgage crisis.

One thing that seems very likely is that there is a good deal of New York law on the question of good faith in dealing with a trustee.

One thing that is certain is that the enactment of proposed EPTL 7-A-10.12 requires the repeal of EPTL 7-2.4 and 3.2. Serious consideration should be given to making the new provisions applicable only to trusts created on or after their effective date because in order not to change the significance of events that have happened while the prior law was in effect.

Subsection (c)

EPTL 7-3.3 also is descended from an almost identical provision in the Revised Statutes, R.S., pt. 2, c. 1, tit. 2, § 66. When it was enacted it overturned the common law and of course has been in effect ever since. It is a somewhat more complete statement of the principle in UTC 1012(c) and should be substituted for that provision in proposed EPTL 7-A-10.12(c).

V. NYUTC LEGISLATIVE ADVISORY GROUP RECOMMENDATION

The NYUTC-LAG recommends that proposed EPTL § 7-A-7.10.12, as modified by the NYUTC-LAG, be enacted into law and recommends the *prospective* repeal of EPTL § 7-2.4 and 7-3.2 on or after the enactment of the proposed legislation.

The NYUTC-LAG agrees with the 6th Report to adopt the section but with a modification. The NYUTC-LGA recommends that the entire text of EPTL §7-3.3 "Person paying money to the trustee protected" be substituted for subsection (c). It provides:

> "A person who in good faith transfers money or property to a trustee is not responsible for the proper application of such money or property; and any right or title derived by him from the trustee in consideration of such transfer is not affected by the trustee's misapplication of such money or property."

I. PROPOSED EPTL § 7-A-10.12 (UTC § 1013) CERTIFICATION OF TRUST

(a) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:

(1) that the trust exists and the date the trust instrument was executed;

(2) the identity of the settlor;

(3) the identity and address of the currently acting trustee;

(4) the powers of the trustee;

(5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;

(6) the authority of cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee;

(7) the trust's taxpayer identification number; and

(8) the manner of taking title to trust property.

(b) A certification of trust may be signed or otherwise authenticated by any trustee.

(c) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

(d) A certification of trust need not contain the dispositive terms of a trust.

(e) A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments which designate the trustee and confer upon the trustee the power to act in the pending transaction.

(f) A person who acts in reliance upon a certification of trust without knowledge that the representations contained therein are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the certification.

(g) A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

(h) A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.

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

II. UTC COMMENTARY — as modified by the 6th Report

This section, derived from California Probate Code § 18100.5, is designed to protect the privacy of a trust instrument by discouraging requests from persons other than beneficiaries for complete copies of the instrument in order to verify a trustee's authority. Even absent this section, such requests are usually unnecessary. Pursuant to Section ~~1012~~1011(b), a third person proceeding in good faith is not required to inquire into the extent of the trustee's powers or the propriety of their exercise. This section adds another layer of protection.

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

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

To encourage compliance with this section, a person demanding a trust instrument after already being offered a certification may be liable under subsection (h) for damages if the refusal to accept the certification is determined not to have been in good faith. A person acting in good faith would include a person required to examine a complete copy of the trust instrument pursuant to due diligence standards or as required by other law. Examples of such due diligence and legal requirements include (1) in connection with transactions to be executed in the capital markets where documentary standards have been established in connection with underwriting concerns; (2) to satisfy documentary requirements established by state or local government or regulatory agency; (3) to satisfy documentary requirements established by a state or local government or regulatory agency; and (4) where the insurance rates or premiums or other expenses of the party would be higher absent the availability of the documentation.

The Uniform Trust Code leaves to other law the issue of how damages for a bad faith refusal are to be computed and whether attorney's fees might be recoverable. For a discussion of the meaning of "good faith," see Section ~~1012~~1011 Comment.

III. SEPARATE 6TH REPORT COMMENTARY

The Committee determined to adopt this section.

IV. NEW YORK STATE LAW

There is no provision of current New York law that corresponds to proposed EPTL 7-A-10.12.

V. NYUTC LEGISLATIVE ADVISORY GROUP RECOMMENDATION

The NYUTC-LGA recommends that proposed EPTL § 7-A-10.12 be enacted into law.