

**FINAL REPORT ON THE EPTL-SCPA LEGISLATIVE
ADVISORY COMMITTEE'S 6th REPORT**

**Submitted to the Executive Committee
of the Trusts and Estates Law Section
January 27, 2016**

Prepared by

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INTERIM REPORT ON THE EPTL-SCPA LEGISLATIVE ADVISORY COMMITTEE'S 6th REPORT

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PART I. BACKGROUND ON FINAL REPORT

In May of 2012, the EPTL-SCPA Legislative Advisory Committee sent its 6th Report to the New York State Legislature. The 6th Report, which was based on years of study, recommends that the New York State Legislature enact the Uniform Trust Code (UTC), as modified, as new Article 7-A of New York's Estates, Powers and Trusts Law (EPTL).

The 6th Report was submitted to the New York State Legislature with the understanding that the Trusts and Estates Law Section of the New York State Bar Association (NYSBA), the Estate and Gift Taxation and the Trusts, Estates & Surrogate's Court Committees of the New York City Bar (City Bar), and the Office of Court Administration's Surrogate's Court Advisory Committee (OCA) would comment on the proposed legislation before any legislative action was taken.

In anticipation of the final 6th 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 Taxation and Trusts, Estates & Surrogate's Court Committees of the City Bar, and the Office of Court Administration's Surrogate's Court Advisory Committee. To that end, a Steering Committee for the NYUTC-LAG was created. As constituted the Steering Committee consisted of one individual from each of the constituent groups but over time the Committee has been enlarged to six individuals as the term limits of original City Bar Committee chairs expired and two new individuals became current chairs.

The first task of the Steering Committee was to divide up the 6th Report (which essentially includes the UTC with modifications) into functional areas. Such division was necessary because the UTC is an enormous product. Approved by the National Conference of Commissioners on Uniform State Laws (a/k/a Uniform Law Commission) in 2000, with several later amendments, the UTC, which has been enacted in more than half of the states, is an attempt to codify virtually all of the laws that pertain to trusts. It consists of eleven 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 and special thanks to the members of the Trusts and Estates Law section who served or continue to serve on one of the subcommittees, including several members of the Trusts and Estates Law Section. Special thanks Joe LaFerlita and Mike Ryan who served as reporters for their respective subcommittees.¹

Beginning in June of 2012, weekly conference calls began for the General Trustee Issues, Judicial and Procedural Matters, and Trustee Duties and Powers Subcommittees. Conference calls for the Estate Planning Subcommittee began in September of 2012. The Litigation Subcommittee began its calls during the summer of 2013. Steering Committee members actively participated on as many calls as possible.

As the subcommittees worked over the summer of 2012, it became clear to the Steering Committee that the 6th Report provided the vehicle for the NYUTC-LAG to recommend a long-overdue modern trust code for New York which would also codify outstanding case law.² To that end, the Steering Committee determined that the 6th Report (which modified the UTC) would be comprehensively reviewed, but that relevant EPTL Article 7 sections would also be reviewed and addressed.³ The ultimate goal is to consolidate trust provisions in one place in Article 7-A rather than have trust provisions divided between two articles, Article 7 and Article 7-A.⁴ Towards that goal, the NYUTC-LAG will recommend the repeal of all relevant Article 7 sections⁵ with any necessary integration of repealed provisions into Article 7-A.

Early on, the functional subcommittees also 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 statutes based on the UTC

¹ Members from the New York Bankers Association joined the Subcommittees on Trustee Duties and Powers, Estate Planning, and Litigation.

² Comprehensive trust legislation was last made by the Bennett Commission, almost 50 years ago. Indeed, several of New York's current trust provisions are based on provisions that were enacted in 1830!

³ The Steering Committee also determined that research on current New York law, including case law, should be undertaken.

⁴ Trust sections are also contained in other articles of the EPTL, most notably in Articles 8, 10, and 11. The NYUTC-LAG Subcommittees considered and recommended such sections and, to the extent feasible, recommend repeal and, if appropriate, integration into Article 7-A. However, Article 8 (Charitable Trusts) will remain intact, albeit with suggested modifications.

⁵ The 6th Report did recommend the repeal of a few Article 7 sections.

do not typically distinguish between substantive 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.⁶

In September of 2012, the General Trustee Issues Subcommittee finished its deliberations and prepared its Report for consideration by the constituent bodies. Thereafter, the Executive Committee of the Trusts and Estates Law Section of NYSBA⁷ and the two City Bar Committees began consideration of the Report.⁸ In December of 2012, the Executive Committee of the Trusts and Estates Law Section approved the Report (with a few minor changes) with the understanding that additional minor tweaks would likely be made when other groups considered the Report. By March of 2013, both City Bar Committees had approved the Report (with a few additional technical corrections and uncontroversial minor changes); again with the understanding that there may be additional minor tweaks to the final report.

In March of 2013, the Subcommittee on Judicial and Procedural Matters finished its Report. By May of 2013, the Executive Committee of the Trusts and Estates Law Section and the two City Bar Committees had reviewed and approved this Report, with various modifications.

The Subcommittee on Trustee Duties and Powers finished its work in August of 2013 and prepared its Report in September of 2013. From September 2013–May 2014, the Report was extensively reviewed by the two City Bar Committees and most of the sections in the Report were approved with modifications.⁹ In September of 2014, review began of the remaining sections; it is expected that the City Bar Committees will finish its review of these sections before the end of the 2015 bar year.

The Estate Planning Subcommittee, which was charged with reviewing and reporting on issues involving trust creation, creditors' rights, and revocable trusts, finished its work in the Spring of 2014. Thereafter, the City Bar Committees took up review of these challenging topics; its review is close to completion. At the TELS's Fall 2015 Meeting, Ira Bloom led a Round Table discussion of several of the issues in the Estate Planning area.

The Litigation Subcommittee finished its work in the Fall of 2015 and thereafter issued a comprehensive report. At the TELS's Fall 2015 Meeting, Mike Ryan, who was the Reporter for the Litigation Subcommittee, led a Round Table discussion of several of the issues in the Litigation area.

In early 2014, the Executive Committee of the Trusts and Estates Law Section authorized Professor Ira Mark Bloom and Professor William P. LaPiana to prepare an Interim Report on the

⁶ Efforts have and will be made to provide in Article 7-A appropriate references to relevant SCPA provisions.

⁷ The Officers of the Trusts and Estates Law Section determined after the October 2012 EC meeting, where only a few sections were discussed, that the most efficient way to handle Subcommittee Reports was to have a lengthy conference call in advance of the Executive Committee meeting. For example, a conference call was conducted on the Report by the General Trustee Issues Subcommittee prior to the Executive Committee meeting in December of 2012.

⁸ As it developed, the Office of Court Administration's Surrogate's Court Advisory Committee decided not to review this Report. Instead, it will begin its review when the Interim Report is finalized.

⁹ Several sections were also approved by the Executive Committee of the Trusts and Estates Law Section.

EPTL-SCPA Legislative Advisory Committee's 6th Report. The Interim Report was completed and submitted to the Executive Committee of the Trusts and Estates Law Section in late January of 2015.

In early 2015, the Executive Committee of the Trusts and Estates Law Section authorized Professor Ira Mark Bloom and Professor William P. LaPiana to prepare a Final Report on the EPTL-SCPA Legislative Advisory Committee's 6th Report. This Final Report is being submitted to the Executive Committee of the Trusts and Estates Law Section on January 27, 2016. The Reporters would like to acknowledge the assistance of Ralph Scunziano, Albany Law School class of 2016.

The Surrogate's Court Advisory Committee to the Office of Court Administration is now expected to take up review of the 6th Report based on this Final Report. The City Bar Committees will hopefully complete its review of unreviewed sections in 2016 along with review by the Executive Committee of the Trusts and Estates Law Section. In addition, several other groups will likely wish to vet this Final Report during 2016.

In December of 2015, Executive Committee of the Trusts and Estates Law Section authorized Professor Ira Mark Bloom and Professor William P. LaPiana to prepare a Report to the Legislature recommending enactment of a new and modernized New York Trust Code. The Reporters hope that comprehensive vetting of the Final Report during 2016 will enable the Reporters to prepare New York Trust Code legislation that can be submitted to the legislature for enactment in 2017.

PART II. SCOPE OF FINAL REPORT

Based on the authorization from the Executive Committee of the Trusts and Estates Law Section, Professor Ira Mark Bloom and Professor William P. LaPiana (hereinafter referred to as "the Reporters") began their work on the Final Report in June of 2015 and continued their work through late January of 2015.¹⁰ This Final Report was finalized by the Reporters shortly before the Executive Committee Meeting of the Trusts and Estates Law Section on January 27, 2016.

As matters proceeded, the Reporters determined to prepare three documents for this Final Report, which are included as Appendix A, Appendix B and Appendix C. The more comprehensive document is entitled:

FINAL REPORT ON THE EPTL-SCPA LEGISLATIVE ADVISORY COMMITTEE'S 6th REPORT

The more comprehensive document, which is set forth in Appendix A, includes all of the provisions of the 6th Report and indicates what changes, if any, are recommended. For "completely reviewed" as well as for "partially reviewed" provisions in the 6th Report the

¹⁰ During the Spring and Fall of 2015, Professors Bloom and LaPiana presented various Estate Planning sections to the City Bar Committees for review and discussion. Many helpful changes were adopted by the Reporters.

Reporters also included a section that sets forth Present New York Law as well as a Discussion that explains the rationale for the provision.

A “completely reviewed” provision includes a provision that was reviewed and approved by both the Executive Committee of the Trusts and Estates Law Section and the two City Bar Committees.¹¹ These completely reviewed provisions include provisions involving General Trustee Issues, Judicial and Procedural Matters and a few provisions in the Trustee Duties and Powers area.¹² The Discussion portion of a completely reviewed section refers to decisions by the NYUTC-LAG.

“Partially reviewed” provisions include several provisions in the Trustee Duties and Powers and Estate Planning areas that have only been reviewed and approved by one or more of the City Bar Committees.¹³ “Partially reviewed” provisions also include a few sections in the Estate Planning that have not yet been considered by the Executive Committee of the Trusts and Estates Law Section and the two City Bar Committees. Finally, “partially reviewed” provisions include provisions in the Litigation area that have been reviewed only by the Litigation Subcommittee. The Reporters carefully considered the “partially reviewed” provisions and where appropriate, made modifications to take into account additional research which is reflected in the sections titled “Present New York Law” and “Discussion.”¹⁴

The Reporters also made changes to ensure that all the provisions of the Code would be part of a consistent whole. The Reporters also undertook to provide a comprehensive set of definitions that will apply in the New York Trust Code. The importance of these definitions is difficult to exaggerate. Defined terms appear in many different sections in different contexts and are critical to making sure that the Code is consistent.

The second document, which is set forth in Appendix B, is entitled:

PROPOSED NEW YORK TRUST CODE BASED ON THE RECOMMENDATIONS CONTAINED IN THE FINAL REPORT

This “clean” document contains the statutory language for the Proposed New York Trust Code based on the recommended provisions in the Final Report.

Appendix C provides a Distribution Table to show how sections from Article 7 were distributed in Article 7-A. These sections will be repealed. Included within the Distribution Table are those Article 7 sections which should simply be repealed as obsolete. Finally, the

¹¹ Approval was made with the understanding that a provision may need to be tweaked, which proved to be the case for the Reporters in several instances.

¹² In addition, a few sections in Part 1 were completely reviewed, including sections 7-A-1.1, 1.2, 1.4, 1.9 and 1.10.

¹³ A few sections in Estate Planning area, specifically sections 7-A-4.4-9-A, have not been reviewed by both City Bar Committees. In addition, the Reporters extensively reworked the Estate Planning Subcommittee’s recommendation for sections 7-A-1.7 and 7-A-1.8; these sections have yet been considered by the City Bar Committees.

¹⁴ The Reporters did not undertake to change recommendations made by the Litigation Subcommittee other than in a few instances.

Distribution Table identifies those sections in Article 7 that will remain in Article 7 as Miscellaneous Trust and Trust Related Provisions.

APPENDIX A

FINAL REPORT ON THE EPTL-SCPA LEGISLATIVE ADVISORY COMMITTEE'S 6th REPORT

This Appendix A sets forth the Reporters' **FINAL REPORT ON THE PROVISIONS
OF THE EPTL-SCPA LEGISLATIVE ADVISORY COMMITTEE'S 6th REPORT.**

Each reviewed section consists of three parts:

Part I is the text of the statute. Strikeouts and bold face indicate changes from the 6th Report; additions to the heading are indicated by underlining.

Part II is Present New York Law.

Part III is the Discussion for the statute, including the reasons for making any changes to the 6th Report. Where a statute has been reviewed and approved by the Executive Committee of the Trusts and Estates Law Section and the two City Bar Committees, the Discussion refers to the "NYUTC-LAG."¹⁵ Where only the City Bar Committees have approved a provision, including sections in Part 4 (dealing with Creation Issues), all sections in Part 5 (dealing primarily with Spendthrift Trusts and Creditors' Rights) and Part 6 (Revocable Trusts), and various sections in Part 8 (Trustee Duties and Powers), the Discussion refers to the "City Bar Committees." For provisions in the Litigation area, the Discussion refers to the "Litigation Subcommittee" because those provisions have only been thoroughly considered by that group.¹⁶ Finally, the Discussion refers to "the Reporters" when a section was not otherwise considered elsewhere,¹⁷ where the Reporters made changes to a reviewed provision, and when a section is transported into Article 7-A from Article 7.

¹⁵ Parts 2 and 7 were reviewed and approved by the Executive Committee of the Trusts and Estates Law Section and the two City Bar Committees, as were sections 7-A-1.1 and 7-A-1.2, 7-A-1.4, 7-A-1.9, 7-A-4.10–4.17, 7-A-8.1, 7-A-8.4–8.13.

¹⁶ The Reporters made a few clarifying changes.

¹⁷ These include sections 7-A-1.7 (Governing Law), 7-A-1.8 (Principal Place of Administration) and many definitions in section 7-A-1.3.

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PART 1
IN GENERAL

SUMMARY OF PART

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- § 7-A-1.9. Methods and Waiver of Notice.**
- § 7-A-1.10. Others Treated as Qualified Beneficiaries.**
- § 7-A-1.11. ~~Nonjudicial Settlement Agreements.~~ [Reserved]**
- ~~§ 7-A-1.12. Rules of Construction.~~**

I. SECTION 7-A-1.1. SHORT TITLE.

This Article may be cited as the New York ~~[Uniform]~~ Trust Code. ~~To the extent that any provision in this Article is inconsistent with any provisions of the Estates, Powers and Trusts Law or the Surrogate's Court Procedure Act, the provisions of this Article shall control.~~

II. PRESENT NEW YORK LAW.

New York substantive trust law consists of both statutory and case law. Article 7 of the EPTL contains the bulk of the statutory provisions but Article 10 (Powers) and Articles 11 (Fiduciaries and Powers of Duties) also have sections that apply to trusts. Article 8 applies many of the rules for Charitable Trusts. In addition, several SCPA provisions apply to the procedural aspects of trusts. Case law also is a source of many trust rules, for example, the duty of loyalty.

III. DISCUSSION.

The NYUTC-LAG believes that Article 7-A be titled “New York Trust Code” rather than the New York “Uniform” Trust Code as recommended by the 6th Report. Due to the uniqueness of New York trust law, starting with trust enactments in 1830, Article 7-A differs in significant ways from many of the UTC provisions. On the other hand, the NYUTC-LAG agrees with the 6th Report that the structure of the UTC be used in Article 7-A so that the differences between the UTC and New York trust law can be readily discerned.

In recommending enactment of new Article 7-A, the NYUTC-LAG believes that, to the extent practicable, Article 7-A should contain New York’s substantive law of trusts, including relevant provisions that are currently contained in Article 7. To that end, provisions in Article 7 that apply to trusts (other than non-gratuitous trusts) would be repealed and included as part of Article 7-A. In addition, obsolete provisions in Article 7 would be repealed. Where possible, provisions from Article 10 and 11 would be incorporated into Article 7-A. Article 8 provisions, however, would continue although the NYUTC-LAG would recommend various amendments. Significantly, New York case law would be codified, with some modern modifications, in Article 7-A.

The NYUTC-LAG does not agree with the 6th Report’s recommendation that is contained in the following sentence: “To the extent that any provision in this Article is inconsistent with any provisions of the Estates, Powers and Trusts Law or the Surrogate’s Court Procedure Act, the provisions of this Article shall control.” In the view of the NYUTC-LAG this approach would place an undue burden on lawyers and judges by requiring them to confirm that any provision outside of Article 7-A was not in conflict with a provision in Article 7-A. Indeed, Article 7-A, as proposed by the NYUTC-LAG, takes the opposite approach by providing that an identified provision outside of Article 7-A, especially one in the SCPA, would still be applicable. Where Article 7-A was intended to be the exclusive authority on a matter, the NYUTC-LAG’s version of Article 7-A recommends repeal of the identified and inconsistent provision.

I. SECTION 7-A-1.2. SCOPE.

(a) This Article applies to express trusts **that are noncharitable or charitable, to resulting trusts, and where expressly made applicable to bank accounts in trust form.**

~~express 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~~

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

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

II. PRESENT NEW YORK LAW.

Present New York law on express trusts is provided by statute and case law. Case law provides the authority for resulting trusts arising in connection with express trusts as EPTL 7-1.2 has abolished purchase-money resulting trusts. Part 5 of Article 7 provides the rules for bank accounts in trust form. Constructive trusts, which are really remedial devices, are creatures of case law.

III. DISCUSSION.

The NYUTC-LAG generally agrees with the 6th Report that Article 7-A should apply to express trusts, charitable and noncharitable, but with an important modification: The NYUTC-LAG believes that Article 7-A should be generally limited to gratuitous trust arrangements as opposed to commercial and business trusts. *See* section 7-A-1.3(6), which defines “express trusts.”¹⁸ This approach is similar to the approach taken in the recent Powers of Attorney legislation under the General Obligations Law. *See* GOL § 5-1501C (excluding business and commercial powers of attorney).

Although the NYUTC-LAG agrees with the 6th Report that judicially created trusts and other trusts be included within the scope of Article 7-A, the NYUTC-LAG recommends that these trusts be included in the definition of “express trusts” in section 7-A-1.3(7). As a result, the NYUTC-LAG recommends that that portion of the 6th Report’s proposed statute be stricken.

Unlike the 6th Report which relied on a UTC comment that would exclude resulting trusts, the Reporters believe that resulting trusts should be included within the scope of Article 7-A. Indeed, resulting trusts arise on the failure in whole or in part of an express trust.

¹⁸ Sections in Article 7 that apply to non-gratuitous trusts would be retained in a drastically reduced Article 7. These include sections 7-8 (duration of trusts for benefit of creditors), 7-2.1(c) (rules for certain business trusts), 7-2.7(b) (rules for real estate and mortgage participation certificates), 7-2.5 (suspension of trustee powers in non-gratuitous trusts) and 7-2.8 (commissions of trustee to sell real property for the benefit of creditors). In addition, Part 6 (Uniform Transfers to Minors Act) and Part 7 (Child Performer Trust Account) would be retained in Article 7.

Article 7-A will also include Part 4A, which imports Part 5 of Article 5 (Bank Accounts in Trust Form).

Unlike the 6th Report, which relied on a UTC comment that would exclude resulting trusts, the Reporters believe that exclusion of constructive trusts should be expressly stated by statute.

Finally, the cross-reference to Article 8 will be helpful. Although Article 7-A generally applies to charitable trusts, Article 8 has some exclusive provisions that apply in the charitable trust area.

I. SECTION 7-A-1.2-A. PURCHASE-MONEY RESULTING TRUST ABOLISHED.

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

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

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

II. PRESENT NEW YORK LAW.

EPTL 7-1.3 abolishes purchase-money resulting trusts by the language provided in Section 7-A-1.2-A.

III. DISCUSSION.

The Reporters recommend that the language of EPTL 7-1.3 be included as section 7-A-1.3-A, and that EPTL 7-1.3 be repealed.

I. 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, **including a person who would be entitled to trust property if a resulting trust arose**, or

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

(4) “Charitable trust” means a trust, or portion of a trust, created for a charitable purpose described in ~~section 7-A-4.5(a)~~; **section 8-1.1**.

(5) “Creator” means a person defined by **section 1-2.2**.

~~(56)~~ “Environmental law” means a federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.

(7) “Express trust,” is defined as follows:

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

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

(ii) **the benefit of charity, or**

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

**(iv) a noncharitable purpose as provided in section 7-A-4.9,
and includes a trust created pursuant to any other statute, judgment, or decree that
requires the trust to be administered in the manner of an express trust.**

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

~~(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.~~

**(8) “Guardian for property” means a guardian for property management as appointed
under article 17 or 17A of the surrogate court procedure act or under article 81 of the
mental hygiene law or any person appointed by a court outside of New York for property
management of an incapacitated person. The term does not include a guardian ad litem.**

~~(79) “Interests of the beneficiaries” means the beneficial interests provided in the terms of the
trust.~~

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

~~(811)~~ “Jurisdiction,” with respect to a geographic area, includes a State or country, or similar governmental entity.

(12) “Irrevocable Trust” means a trust that is not a revocable trust.

(13) “Lifetime trust” means an express trust and all amendments thereto created other than by will.

~~(1014)~~ “Person” means **a person as defined in section 1-2.12. As the context indicates, person may include more than one person.** ~~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.~~

~~(1115)~~ “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.~~

~~(1216)~~ “Property” means **property as defined by section 1-2.15.** ~~anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein.~~

~~(1317)~~ “Qualified beneficiary” means a beneficiary who, on the date the beneficiary’s **status as qualified beneficiary** ~~qualification~~ is determined:

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

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

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

(18) “Resulting Trust” means a trust that arises in favor of the settlor or the settlor’s successor’s interest on the failure of an express trust in whole or in part.

~~(1419)~~ **“Revocable” as applied to a trust, means revocable by a trust contributor settlor without the consent of the trustee or a person holding a substantial adverse interest.**

~~(15) “Settlor” means a person, including a testator, who contributes property to a trust, except 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.~~

(20) “Settlor” means the person, including the testator, who

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

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

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

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

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

~~(1621) “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.~~

“Spendthrift provision” means the restraint on voluntary alienation of a beneficiary’s interest as provided by the terms of a trust or by application of sections 7-A-5.1 and 7-A-5.2 and the restraint on involuntary alienation of a beneficiary’s interest by any statutory rule restraining

the involuntary alienation of a beneficiary's interest. "Terms of a trust" includes any provision stating that the interest of a beneficiary is held subject to a "spendthrift trust" or words of similar import.

(1722) "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.

(1823) "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.

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

(25) "Trust," unless otherwise provided, means a lifetime trust and a testamentary trust but does include a resulting trust.

(26) "Trust contributor" means

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

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

For purposes of paragraph (B):

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

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

appointment in favor of, a trustee

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

(1927) “Trust instrument” means ~~on a properly executed an instrument executed by the settlor~~ that contains terms of the trust, including any amendments thereto.

(2028) “Trustee” means a person who has accepted an appointment as trustee or has been issued letters of trusteeship. “Trustee” includes an original, additional, and successor trustee, and a co-trustee.

II. PRESENT NEW YORK LAW.

Article 1 of the EPTL provides several definitions that apply in the trust area. These include the definitions for creator, person, property, will, and lifetime trust.

III. DISCUSSION.

The Reporters agree with many of the definitions that are proposed by the 6th Report. However, the Reporters believe that some definitions should be modified and that several more definitions should be added. The following discusses non-obvious changes from the 6th Report.

“Beneficiary” The Reporters believe that a person who would be a resulting trust beneficiary when a resulting trust arises should be treated as the beneficiary of an express trust before the resulting trust arises. For example, if a trust merely provided “income to A for life,” the settlor (or the successors in interest) would be the resulting trust beneficiary or beneficiaries when A dies. During A’s lifetime, the settlor (or the successors in interest) should be treated as beneficiaries with all the rights that appertain thereto so that the rights as a resulting trust beneficiary when they arise will be fully protected.

“Creator” For certain purposes, it is appropriate to use the term “creator” rather than settlor. *See, e.g.,* §§ 7-A-4.11(a) and 7-A-5.5(b).

“Express trust” The definition employs the traditional definition for an express trust, *see* 3d Rest. Trusts § 2, as amplified to reflect the recognition of pet trusts and purpose trusts. The definition also includes trusts that are created by other statutes and courts that will be

administered as an express trust. In addition, the definition limits express trusts to essentially gratuitous trusts. *See* § 7-A-1.2 (discussing limitation).

“Guardian for property” Unlike many states, New York does not employ the concept of “custodian” as the person appointed for property management, and “guardian” as the person appointed to manage an incapacitated person’s personal needs. Rather a guardian in New York can include a person appointed to manage an incapacitated person’s property or personal needs or both. The 6th Report deleted the UTC’s definition of “custodian” but retained the definition for “guardian” relating to personal needs. Instead, the Reporters recommend a definition for “guardian for property” as that person will have various types of authority under Article 7-A.

“Person” The Reporters recommend that the definition of “person” in EPTL 1-2.12, which was part of the Bennett Commission Report in the 1960s, be updated to reflect new developments, including the use of LLCs. Because New York does not recognize a trust as an entity, a trust would not be included in the definition of person. As revised, EPTL 1-2.12 would read as follows:

1-2.12 Person

The term “person” includes an individual, corporation, business trust, estate, partnership, limited liability company, association, or joint venture; government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

The Reporters also added that a person may include more than one person as the context indicates. For example, if two persons initially transfer to a trustee, each person would be a settlor as defined by section 7-A-1.3(20)(A).

“Power of withdrawal” Because a trustee does not have an adverse interest in opposing the exercise of a withdrawal power, the 6th Report’s exception could facilitate inappropriate results. Indeed, New York powers of appointment law does not recognize this exception for creditors. The 6th Report would effectively change New York law. As a result, the Reporters believe that “power of withdrawal” is defined to exclude trustees from the definition.

“Qualified Beneficiary” This is an important definition as it is used throughout Article 7-A. The basic premise is to divide beneficiaries into two categories: qualified and not qualified. Qualified beneficiaries are accorded greater rights because they have more important trust interests.

“Revocable” Because a trustee does not have an adverse interest in opposing the exercise of a power to revoke, the 6th Report’s exception could facilitate inappropriate results. For example, a creditor would not be able to reach trust property in a revocable trust if the consent of a “friendly” trustee was required for trust revocation. As a result, the Reporters believe that “revocable” should be defined to apply to any trust which a trust contributor can revoke without the consent of anyone other than a person with a substantial **adverse** interest in the trust property.

“Settlor” The definition of “settlor” is critical as it is employed throughout Article 7-A. The Estate Planning Subcommittee determined that the 6th Report’s definition, which limited settlor to the person contributing trust property, was not precise enough to reflect the many nuances of trust law. For example, a person who exercises a special power of appointment in favor of a trustee effectively creates a trust and should therefore be treated as a settlor. By including the donee of a special power of appointment, the uncertain application of the relation back doctrine would be discarded. Similarly, the trustee in a decanting situation would be treated as a settlor as the exercise of a decanting power is considered to be the exercise of a special power of appointment. See § 7-A-10-19(c).

The Estate Planning Subcommittee also disagreed with the 6th Report’s exception to the definition of a settlor: a person who contributes to a trust is not a settlor if another person has the power to withdraw the contribution. Under this formulation, if a trust was created and a person had a *Crummey* demand power over the entire contribution, there would not even be a settlor.

If two persons initially transfer to a trustee, each person would be a settlor based on the definition of person in Section 7-A-1.3(14).

Excluded from the definition of settlor is a person who subsequently contributes property to the trustee of an existing trust; by adding property to the trust, such person effectively agrees with the original trust terms. A person who makes a subsequent contribution would be treated as a trust contributor. See § 7-A-1.3(26).

“Spendthrift provision” Because the Estate Planning Subcommittee thought that spendthrift should be imposed by the settlor, rather than by statute as it is proposed by the 6th Report, the definition of “spendthrift provision” was modified accordingly. New York law regarding spendthrift is unique. In terms of voluntary alienation, the default rule of EPTL 7-1.5, which will be continued under section 7-A-5.1, allows the gratuitous alienation of some or all of an income interest in certain instances but not alienation of an interest for consideration. Although under present New York law the principal interest is voluntarily alienable by default, the default rule for new trusts will be that the principal interest cannot be alienated. See § 7-A-5.2. A settlor may change any of these default rules. Regarding involuntary alienation, CPLR 5205 provides mandatory rules; as a result, a settlor cannot change these rules.

Because New York has mandatory rules for creditors, it makes no sense to require, as the 6th Report did in its proposed Section 7-A-5.2(a) and (b), that “A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary’s interest.” and “A term of a trust providing that the interest of a beneficiary is held subject to a “spendthrift trust,” or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary’s interest.” However, the Reporters agree that a statement that a trust is spendthrifted is sufficient to restrain voluntary alienation; the second sentence of the definition effectively provides that rule.

“Trust contributor” A separate definition is provided for “trust contributor” because that concept, which includes many settlors, has significance especially in the area of creditors’

rights and for other revocable trust issues. Excluded from the definition of “trust contributor” are persons who contribute property to a revocable trust and where a person has a non-lapsing power of appointment over the contributed property.

“Trustee” The first sentence provides a helpful definition for a trustee, which is not contained in the 6th Report. By defining trustee as the person who accepts an appointment or is issued letters, reference throughout Article 7-A is simplified.

I. SECTION 7-A-1.4. KNOWLEDGE.

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

(1) has actual knowledge of it;

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

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

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

II. PRESENT NEW YORK LAW.

There is no New York *trust* law addressing knowledge or notice in particular but compare NY UCC §1-201(25) - (27):

- (25) A person has "notice" of a fact when
- (a) he has actual knowledge of it; or

- (b) he has received a notice or notification of it; or
- (c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists.

A person "knows" or has "knowledge" of a fact when he has actual knowledge of it. "Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by this Act.

(26) A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when

- (a) it comes to his attention; or
- (b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.

(27) Notice, knowledge or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information.

III. DISCUSSION.

The NYUTC-LAG agrees that section 7-A-1.4 be enacted into law with the minor change indicated. This provision codifies existing standards and is therefore acceptable.

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

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

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

(1) the rules for judicial proceedings (as provided in sections 7-A-2.1 and 7-A-2.2);

(12) the requirements for creating **and amending** a trust (as provided in sections 7-A-4.1 to 7-A-4.9-A);

~~(2) the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries (as provided in section 7-A-8.1), and the duty to administer the trust as a prudent person would and, in satisfying this standard, to exercise reasonable care, skill and caution (as provided in section 7-A-8.4);~~¹⁹

~~(3) the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve;~~

(3) the rules for commencing a proceeding (as provided in section 7-A-4.10(b)) and the limitations on modification and termination (as provided in section 7-A-4.10(c));

(4) the power of the court to amend or revoke a trust under section 7-A-4.11(c), to modify or terminate a trust under section 7-A-4.12 and sections 7-A-14 through 7-A-4.16 or to combine or divide trusts under section 7-A-4.17

~~(5) the rights of creditors of trust beneficiaries and assignees reach a trust (as provided in Part 5);~~

~~(6) the power of the court to require, dispense with, or modify or terminate a bond (as provided in section 7-A-7.2);~~

(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)); ~~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);~~

¹⁹ These rules are provided in (b)(6) and (7).

~~(8) The power of the court under section 7-A-7.8(b) to adjust a corporate trustee's compensation specified in the terms of the trust which is unreasonably low or high;~~²⁰

~~(28) the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries (as provided in section 7-A-8.1); and the duty to administer the trust as a prudent person would and, in satisfying this standard, to exercise reasonable care, skill and caution (as provided in section 7-A-8.4);~~

(9) the duty to administer the trust as a prudent person would and, in satisfying this standard, to exercise reasonable care, skill and caution (as provided in section 7-A-8.4).

(10) the duties relating to delegation if a delegation is made (as provided in section 7-A-8.7);

(11) an advisor shall be a fiduciary and perform the duties and powers (as provided in section 7-A-8.8);

(12) the duties relating to recordkeeping and identification of property (as provided in section 7-A-8.10);

~~(913) the duty under section 7-A-8.13(a) to respond to the request of a qualified beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust;~~ **Beginning at the death of the later to die of the settlor or the settlor's surviving spouse or after 21 years if the settlor is not an individual, the duty under section 7-A-8.13(a) to respond to the reasonable request of a beneficiary of an irrevocable trust for information related to the administration of a trust;**

~~(1014) the duty under section 7-A-8.13(b)(2) and (3) to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity~~

²⁰ Because the NYUTC-LAG believes that the rules for commissions should continue under the SCPA, this mandatory rule for commissions is unnecessary.

~~of the trustee, and of their right to request trustee's reports;~~ **Beginning at the death of the later to die of the settlor or the settlor's surviving spouse, or after 21 years if the settlor is not an individual, the duty under section 7-A-8.13(b)(2) and (3) to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their right to request information related to the administration of the trust;**

(15) the duty under section 7-A-8.19(g) and the restrictions on powers as provided in section 7-A-8.19;

~~(11)~~**(16)** the principles for the computation of damages (as provided in section 7-A-10.2);

~~(12)~~**(17)** the effect of an exoneration provision under section (as provided in 7-A-10.8);

~~(13)~~**(18)** the rights under sections 7-A-10.9 **10** through 7-A-10.1**23** of a person other than a trustee or beneficiary;

~~(14)~~**(19)** periods of limitation for commencing a judicial; and

~~(15)~~**(20)** the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice.

II. PRESENT NEW YORK LAW.

The vast majority of New York's trust law rules are default rules. For example, although a trustee has the duty of loyalty that duty may be abrogated by the "creator," which is the term that New York uses for anyone who disposes of property.

Some trust rules are mandatory, although that terminology is not used in statutes. For example, EPTL 7-1.17 requires that every lifetime trust must be in writing. SCPA 710 prohibits a trustee and other fiduciaries from removing property from New York without court approval.

III. DISCUSSION.

Section 7-A-1.5(a) states a basic premise of the trust law rules under Article 7-A: they are merely default rules that can be changed by the settlor. The NYUTC-LAG believes that reference should be made to judicial orders or decrees and other statutes that may also provide a source of trust law in New York.

Section 7-A-1.5(b) is an incredibly helpful provision which identifies specific trust rules in Article 7-A that may not be changed by the settlor. In effect, these trust rules are mandatory. As seen, there are several changes to the 6th Report's enumeration of mandatory provisions. One structural change is to include mandatory rules in the order of Article 7-A. In contrast, the 6th Report's enumeration is not in order. For example, the mandatory rule of section 7-A-8.1 is situated before the mandatory rules under sections 7-A-4.10–4.16.

The following discusses non-obvious changes from the 6th Report.

Sections 7-A-4.4 provides “the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve.” Because section 7-A-1.5(b)(1) includes sections 7-A-4.4, it is redundant to include it as a separate mandatory rule.²¹

(b)(2) Because section 7-A-4.4 (trust purposes) is included within sections 7-A-4.1–4.9-A, a separate mandatory rule for this section (which the 6th Report proposed) is unnecessary.

(b)(4) Because the NYUTC-LAG would require court approval to revoke a trust when not all beneficiaries agree to revocation, it also believes that such requirement should be mandatory. In addition, because section 7-A-4.13 (Cy Pres) is handled under EPTL 8-1.1, the NYUTC-LAG believes that reference to section 7-A-4.13 needs to be deleted.

(b)(7) Because the NYUTC-LAG believes that a trustee can resign without court permission provided written notice is given to the court, the NYUTC-LAG believes that this notice requirement be mandatory.

(b)(11) When section 7-A-8.8 was considered, the goal was to make directed trusts as attractive as possible, which included allowing a settlor to change the default rule that an advisor was a fiduciary. On reflection, the Reporters believe that an advisor should be a fiduciary to prevent gaps in liability. Hence, the Reporters recommend the mandatory rule of this subparagraph.

(b)(13) Subparagraphs (b)(13) (and b(14)) are two of the most controversial provisions in Article 7-A (and in those states that have enacted the UTC).²² The 6th Report makes mandatory the trustee's duties to provide trust information to a qualified beneficiary's reasonable request, for the same. The Estate Planning Subcommittee believes that while any beneficiary should be entitled to information, that the settlor could bar the trustee from providing the same until the later death of the settlor or the settlor's spouse.²³ When the settlor is not an individual, the Reporters believe that the settlor can limit the furnishing of information for 21 years.

²¹ As discussed in section 7-A-4.4, the Estate Planning Subcommittee recommended deletion of the 6th Report's “benefit-for-the beneficiary” rule, as well as the requirement that the purpose be possible to achieve.

²² See the Discussion under section 7-A-8.13, which discusses how the Trustee Duties and Powers Subcommittee arrived at its compromise recommendations.

²³ Although the City Bar's Trusts and Estates and Surrogate's Court Committee agreed with this compromise, the City Bar's Estate and Gift Tax Committee could not reach a consensus on the issue.

(b)(14) This provision is probably the most controversial provision in Article 7-A (and in those states that have enacted the UTC). The 6th Report makes mandatory the trustee's duty to inform qualified beneficiaries who are 25 years or older of the existence of the trust, the name of the trustees and the right to request information. In effect, the 6th Report does not allow a trust to be kept secret from a qualified beneficiary who is 25 years or older. The Estate Planning Subcommittee thought that the settlor should be able to keep the trust secret to the extent of barring the trustee from providing information to the beneficiaries until the later of the death of the settlor and the settlor's spouse.²⁴ When the settlor is not an individual, the Reporters believe that the settlor can keep the trust secret for 21 years.

(b)(15) The rules for decanting need to be mandatory.

I. 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.

II. PRESENT NEW YORK LAW.

Section 7-A-1.6 states present New York law.

III. DISCUSSION.

The Estate Planning Subcommittee agrees that section 7-A-1.6 should be enacted.

I. SECTION 7-A-1.7. GOVERNING LAW.

(a) The **intrinsic validity, effect, interpretation and amendment** of ~~the terms any term~~ of a **lifetime trust and the revocation of a lifetime trust** are determined by:

(1) the law of the jurisdiction designated in the **trust instrument** ~~terms of the trust~~ unless the designation of that jurisdiction's law is contrary to **a mandatory trust rule or** a strong public policy, **including the rule against perpetuities**, of the jurisdiction having the most significant relationship to the matter at issue; or

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

²⁴ Although the City Bar's Trusts and Estates and Surrogate's Court Committee agreed with this compromise, the City Bar's Estate and Gift Tax Committee could not reach a consensus on the issue.

For purposes of this paragraph (a) factors to consider in determining which jurisdiction has the most significant relationship to the matter at issue include the place of the trust's creation, the location of trust property, and the domicile of the settlor, the trustee, and the beneficiaries.

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

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

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

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

(c) For purposes of paragraphs (a) and (b),

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

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

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

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

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

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

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

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

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

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

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

II. PRESENT NEW YORK LAW.

EPTL 3-5.1 provides conflict of laws rules for testamentary trusts.

Conflict of laws rules for lifetime trusts present difficult issues. As the Court of Appeals in *Hutchinson v. Ross*, 262 N.Y. 381, 388 (1933) noted: “The situs of personal property in a jurisdiction other than that where the owner of the property is domiciled has given rise to many difficulties and perplexities.”

EPTL 7-1.10, which with minor variation is set forth in paragraph (b), provides a limited conflicts rule for lifetime trust that allows New York law to govern when a settlor so indicates and the trust property is located in New York or the trustee has substantial connections to New York. *Shannon v. Irving Trust Co.*, 275 N.Y. 95 (1937) holds that, under certain circumstances, a settlor may provide that another state’s law governs even if the trust is administered in New York.

Shannon v. Irving Trust Co. also effectively recognizes the doctrine of depeçage, which allows different state laws to control on different issues.

When a settlor does not provide which state law governs, the law of the jurisdiction having the most significant contacts will generally control. See *In re Moore*, 493 N.Y.S.2d 924 (N.Y. Sup. Ct. 1985). See generally 106 NY Jur trusts § 25.

III. DISCUSSION.

The Reporters believe that Section 7-A-1.7, as recommended by the 6th Report, is in need of substantial revision and clarification. First, Section 7-A-1.7(a) needs to be revised to make clear that it only applies to lifetime trusts as EPTL 3-5.1 generally applies the applicable rules for testamentary trusts. Similar to EPTL 3-5.1, paragraph (a) should apply to the intrinsic validity, effect, interpretation and amendment and revocation of a lifetime trust and not just the meaning and effect of trust terms. Also, paragraph (a) needs to reflect New York's recognition of depeage, which allows a settlor to designate applicable state law on an issue by issue basis. In contrast, the 6th Report would only allow a settlor to designate one jurisdiction's law as controlling.

Although a departure from New York law, the Reporters agree with the 6th Report, as provided in subparagraph (a)(1), that a settlor can designate a jurisdiction's law to control even though that jurisdiction does not have substantial or even any contacts with the trust subject to public policy limitations of the jurisdiction having the most significant relationship to the issue.²⁵ However, the Reporters would also limit a settlor's choice of law if the chosen law is contrary to a mandatory trust rule of the jurisdiction having the most significant relationship to the issue.²⁶

Paragraph (b) includes the substance of EPTL 7-1.10 but would also extend to property that may be added to the trust if that property is situated in New York. In addition, paragraph (b) would allow specific terms to be governed by New York law.

Paragraph (c) provides appropriate definitions.

The Reporters recommend paragraph (d), which provides conflict of laws rules for the law governing trust administration. It applies to both testamentary trusts and lifetime trusts because EPTL 3-5.1 does not provide choice of law rules for administration. Unless the settlor's designation violates a mandatory trust rule or strong public policy of the jurisdiction where the principal place of administration occurs, the law designated by the settlor will control. If the settlor does not designate controlling law, the law of the jurisdiction where the trust's principal place of administration will control.

Paragraph (e) parallels paragraph (b).

I. SECTION 7-A-1.8. PRINCIPAL PLACE OF ADMINISTRATION.

(a) The terms of a trust designating the principal place of administration of the trust are valid only if there is a sufficient connection with the designated jurisdiction. Without

²⁵ The Reporters would also make clear that the rule against perpetuities is a strong public policy.

²⁶ Instead of designation a jurisdiction's law, a settlor presumably could obtain the same result by setting the actual law as a trust term.

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~~**usual** 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.~~

(b) Unless validly designated in the trust instrument:

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

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

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

(B) If there is no corporate co-trustee or if there are more than one corporate co-trustee, the usual place of business of residence of any of the co-trustees as agreed upon by the co-trustees.

(c) Notwithstanding paragraph (b), if a corporate trustee is designated as the trustee of a trust and the corporate trustee has offices in multiple states and performs administrative functions for the trust in multiple states, the corporate trustee may designate the corporate trustee's usual place of business by providing notice to the qualified beneficiaries and trust advisors described in section 7-A-8.8. The notice is valid

and controlling if the corporate trustee has a connection to the jurisdiction designated in the notice, including an office where trustee services are performed and the actual performance of some administrative functions for that particular trust in that particular jurisdiction. The subsequent transfer of some of the administrative functions of the corporate trustee to another state or states does not transfer the usual place of business as long as the corporate trustee continues to maintain an office and perform some administrative functions in the jurisdiction designated in the notice and the corporate trustee does not transfer the principal place of administration pursuant to paragraph (e).

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

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

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

(2) without the approval of any Court and in the absence of any objection by a qualified beneficiary proved that all qualified beneficiaries have received a notice of proposed transfer conforming to paragraph (f).

(f) The notice of proposed transfer referred to in paragraph (e)(2) must include:

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

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

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

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

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

(fg) 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 7.4 of this article.

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

II. PRESENT NEW YORK LAW

The distinction between “principal place of administration” and “governing law” of a trust is often not as clear as it should be. Part of the reason for this confusion is the traditional link between “situs” and “governing law.” The law governing a trust was usually seen as the law of the place where the trust was administered, its “situs.” In the modern world, the concept of situs has been more frequently divided in two by separating the issue of the location of the principal place of administration of the trust from the question of what law governs that administration. In New York, that separation has been fostered by the tax related concept of the exempt resident trust, a trust exempt from New York State fiduciary income tax on non-New York generated income so long as no trustee is in New York. In *Matter of Rockefeller*, 2 Misc.3d 554, (Sur. Ct. New York Cnty. 2003) Surrogate Roth approved the resignation of the corporate trustee and its replacement by its Delaware affiliate in order to bring a testamentary trust under the resident trust exception, but did not approve a change of “situs” that would have made the trustee subject to the Delaware courts and Delaware law the governing law of the trust. While a change of situs can be ordered when it does not contradict the intention of the settlor and will improve the administration of the trust. For example, where the beneficiaries reside in another state and would prefer a local trustee, approval of a change of situs was granted. *Matter of Weinberger*, 21 A.D.2d 780 (1st Dep’t 1964) (testamentary trust), *Matter of Matthiessen*, 195 Misc. 598, (Sup. Ct. New York Cnty. 1949) (lifetime trust). In short, court approval is needed to change situs of a trust.

III. DISCUSSION

The Reporters believe that Section 7-A-1.8 as recommended by the 6th Report, like Section 7-A-1.7 to which it is closely related, is in need of substantial revision. First, the section

has been revised, based to some degree on modifications in states that have adopted the UTC, to provide rules to identify the principal place of administration when the terms of the trust do not expressly deal with individual, corporate, and co-trustees and those which expressly deal with individual, corporate, and co-trustees. Second, in keeping with the policies of the UTC, the section has been revised to allow a change of place of administration without court approval so long as notice, as defined in the section, is given to the qualified beneficiaries and to any trust advisors, and no qualified beneficiary objects. An objection would therefore require the trustee to see court approval for the desired change. Under Section 7-A-1.7(d), the law of the principal place of administration governs the administration of the trust and a change of principal place of administration will change the law governing the administration of both testamentary and lifetime trusts. A change of principal place of administration, therefore, would make the trustee subject to the courts of the new principal place of administration which might have to apply the law of another state or states in matters involving the “intrinsic validity, effect, interpretation and amendment” of the trust terms.

I. SECTION 7-A-1.9. METHODS AND WAIVER OF NOTICE.

(a) Notice to a person under this Article or the sending of a document to a person under this Article must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document **to the person’s last known place of residence or place of business** include (but are not limited to) first-class mail, special mail service, **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) Notice to an incapacitated person may be given to any guardian for property of such incapacitated person or to the parent or person with whom any such incapacitated 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.

(f) The notice provision of section 7-A-8.19(i)(2) shall apply in lieu of this section.

II. PRESENT NEW YORK LAW.

Current New York law deals only with notice in judicial proceedings. *See* 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."

III. DISCUSSION.

The NYUTC-LAG recommends that section 7-A-1.9, as modified by the NYUTC-LAG, be enacted into law.

The NYUTC-LAG is comfortable with the methods of notice enumerated in paragraph (a) with the exception of "a properly directed electronic message," which is discussed below. However, the NYUTC-LAG believes that paragraph (a) should be modified in terms of the placement of notice to a person's address.

The NYUTC-LAG also agrees with the parenthetical in paragraph (a), which provides that the enumerated methods are not exclusive. The NYUTC-LAG understands 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.

The NYUTC-LAG is concerned with codifying the adequacy of e-mail notification by "a properly directed electronic message" because the language may be read to include mere receipt of an e-mail. Yet, a person 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 could technically constitute by "a properly directed electronic message" even though the recipient may delete the message without opening it. With the volume of e-mail most everyone experiences, the NYUTC-LAG does not believe a "properly directed electronic message" is a method that conforms to the statutory language "...accomplished in a manner reasonably suitable...", which presumably is the purpose of the notice.

The NYUTC-LAG's other modifications add paragraph (d) to deal with incapacitated persons and "surrogate's court procedure act" to paragraph (e).

Because New York's decanting provision in section 7-A-8.19(i)(2) has special notice requirements, the NYUTC-LAG believes that provision should apply and not section 7-A-1.9. Paragraph (f) so provides.

I. SECTION 7-A-1.10. OTHERS TREATED AS QUALIFIED BENEFICIARIES.

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

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

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

(B2) 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

(C3) would be entitled to receive or is a permissible recipient of trust income or principal if the trust terminated on that date.

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

(cd) 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. PRESENT NEW YORK LAW.

There is no current New York law that precisely corresponds to the 6th Report's concept of the "qualified beneficiary." However, 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 ("contingent remainderpersons") have a more remote interest in terms of time and certainty.

III. DISCUSSION.

The NYUTC-LAG recommends that section 7-A-1.10, as modified by the NYUTC-LAG, be enacted into law. The substantive modification deletes paragraph (a), which many UTC-enacting states have also done.

Quite simply, the NYUTC-LAG does not believe that non-qualified beneficiaries should be entitled to receive notice that qualified beneficiaries are entitled to receive.²⁷ In effect, no compelling necessity exists for broadening the receipt of notice.

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. The NYUTC-LAG believes 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.

I. SECTION 7-A-1.11. [RESERVED] NONJUDICIAL SETTLEMENT AGREEMENTS.

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

²⁷ It is not clear whether the act of requesting notice would be a one-time request that requires a one-time response, or whether the request would be a standing demand for notice on any future act of the trustee which requires notice to qualified beneficiaries.

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

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

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

~~—— (1) the interpretation or construction of the terms of the trust;~~

~~—— (2) the approval of a trustee's report or accounting;~~

~~—— (3) direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;~~

~~—— (4) the resignation or appointment of a trustee and the determination of a trustee's compensation;~~

~~—— (5) transfer of a trust's principal place of administration; and~~

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

~~(e) Any interested person may request the court to approve a nonjudicial settlement agreement, before or after the agreement is executed, to determine whether the representation as provided in [section 315 of the Surrogate's Court Procedure Act] is adequate, or whether the agreement contains terms and conditions the court could properly approve.~~

II. PRESENT NEW YORK LAW.

This provision purports to authorize a nonjudicial settlement of matters involving an interested person's interest in a trust, provided the settlement does not violate the purpose of the trust and provided it includes terms and conditions that could be judicially approved. To the extent it does so, it codifies existing New York law at least with regard to trustee's accountings.

This provision constitutes a liberalization of New York law, to the extent it provides for judicial approval of a settlement agreement involving beneficiaries who are incapable of entering

into such agreements other than an agreement settling the trustee's account (*see* SCPA 315(8), *Matter of Goldstick*, 177 A.D.2d 225, 581 N.Y.S.2d 165 (1st Dep't 1992), *opinion modified on reargument*, 183 A.D.2d 684, 586 N.Y.S.2d 490 (1st Dep't 1992).

Current New York law requires a trustee to obtain court approval of the trustee's resignation, *see* SCPA §§ 715 and 716, *Matter of Busto's Will*, 173 Misc. 25 (Sur. Ct. Queens County, 1939), *aff'd* 258 App. Div. 980 (2d Dep't, 1940).

III. DISCUSSION.

The Litigation Subcommittee was very troubled by the possibility that this proposal would work to the detriment of beneficiaries under a disability and that it would constitute authority for the parties to re-write the material terms of the agreement to contradict its original intent. Moreover, the failure to make any provision for the process by which nonjudicial settlements would be approved by the court was found to be a fatal flaw.

In sum, the Litigation Subcommittee questioned the necessity and the wisdom of the recommendation of the 6th Report that this section be enacted. Accordingly, the vote of the Subcommittee was to reject the 6th Report's recommendation.

I. SECTION 7-A-1.12 [RESERVED] RULES OF CONSTRUCTION

~~The rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.~~

II. PRESENT NEW YORK LAW.

New York requires specific legislation to extend a wills rule to trusts. *See, e.g.*, EPTL 5-1.4.

III. DISCUSSION.

The Estate Planning Subcommittee is of the firm opinion that section 7-A-1.12, for which a consensus could not be reached in the 6th Report, should not be enacted. Section 7-A-1.12 would automatically apply all wills rules, such as ademption and anti-lapse, to trusts, not just revocable trusts. Instead, Estate Planning Subcommittee feels that application of wills rules to trusts should be separately and thoughtfully considered and specific language enacted if deemed appropriate.

PART 2
JUDICIAL PROCEEDINGS

SUMMARY OF PART

§ 7-A-2.1. Role of Court in Administration of Trust.

§ 7-A-2.2. Jurisdiction over Trustee and Beneficiary.

I. SECTION 7-A-2.1. ROLE OF COURT IN ADMINISTRATION OF TRUST.

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

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

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

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

~~(d) To the extent letters of trusteeship are required by Article 7 of the Surrogate's Court Procedure Act, the provisions of Article 7 shall govern.~~

II. PRESENT NEW YORK LAW.

Numerous sections of the EPTL and SCPA provide for court involvement in the administration of a trust. Some of these sections are listed below:

EPTL 7-2.6— (which will be incorporated into Article 7-A) supreme court granted power to remove trustee.

EPTL 7-1.12— (which will be incorporated into Article 7-A) Statutory Supplemental Needs Trusts are subject to court supervision.

EPTL 11-2.2(a)(1)— a court may instruct the fiduciary in the interpretation or administration of the express terms of any agreement or other instrument or in the administration of the property under the fiduciary's care.

SCPA 209— the surrogate's court is given extensive powers, including the power “to determine any and all matters relating to lifetime trusts.” SCPA § 209(6). In addition, the court is given “all the powers that the supreme court would have in like actions and proceedings. . .”

SCPA 711— surrogate's court supreme court granted power to remove trustee.

SCPA 1502— the surrogate's court may appoint a trustee or successor trustee whenever there is no trustee able to act or all or one of the trustees is unable to act and a successor or co-trustee in his or their place is necessary in order to execute the trust or execute any power created by the trust instrument.

SCPA 1507— in any case in which the power to mortgage, sell, lease or exchange real property does not exist under the provisions of EPTL 11-1.1 or for other reasons it is for the best interests of the trust, the surrogate court may authorize any testamentary trustee to mortgage, sell, lease or exchange real property or any part hereof belonging to the trust.

SCPA 1508— the surrogate court may by order authorize any testamentary trustee to release a claim against the state for compensation on account of the appropriation by the state of any real property or any right, interest or easement therein belonging to the trust.

SCPA 2107— the surrogate court may provide advice and direction (i) as to the propriety, price, manner and time of sale of trust assets; or (ii) in other extraordinary circumstances such as complex valuation issues or tax elections, or where there is conflict among interested parties.

SCPA 2108— a fiduciary may petition the surrogate court for the continuation of a business other than a profession.

The CPLR also has provisions that apply to the administration of a trust.

CPLR § 7701 provides that “A special proceeding may be brought [in supreme court] to determine a matter relating to any express trust [with certain exceptions for non-gratuitous trusts]. CPLR § 7701 further provides “Any party to the proceeding shall have the right to examine the trustees, under oath, either before or after filing an answer or objections, as to any matter relating to their administration of the trust . . .”

CPLR § 8005 relates to the award of commissions by the supreme court.

CPLR § 8110 relates to costs against a trustee as determined by the supreme court.

III. DISCUSSION.

Because the rules for court involvement are extensively provided in various sections of the EPTL, SCPA and CPLR, as illustrated in Part II, the NYUTC-LAG recommends that its section 7-A-2.1 be enacted into law in lieu of the 6th Report's proposed section 7-A-2.1.

I. SECTION 7-A-2.2. 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) For purposes of paragraphs (a) and (b), “principal place of administration” is determined by section 7-A-1.8.

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

II. PRESENT NEW YORK LAW.

Paragraph (a):

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 (Sur. Ct. New York Cnty. 1996), the court had no difficulty in establishing personal jurisdiction over an out-of-state “de facto” trustee under SCPA 210(2)(b).

Paragraph (b):

SCPA 210(2)(b) provides as follows:

The receipt and acceptance of any property paid or distributed out of and as part of the administration of an estate subject to the jurisdiction of the court, other than the payment of taxes under article 26 of the tax law to the commissioner of taxation and finance, shall constitute a submission by such recipient to the jurisdiction of the court as to any matter concerning the payment or distribution, including proceedings for the recovery thereof.

SCPA 1501(2) provides as follows:

The situs of a trust of personal property created by the will or lifetime trust instrument of a non-domiciliary shall be deemed to be in this state if the personal property is in this state at the date of the testator's death with respect to a testamentary trust or at the time of the creation of the lifetime trust with respect to a lifetime trust and is held and administered in this state in accordance with the will or lifetime instrument or, except where the will or lifetime trust instrument or the laws of the domicile of the testator or the domicile at the time the trust was created of the grantor expressly provide otherwise, if such property is brought into this state for administration.

Paragraph (d):

SCPA 202 provides as follows:

Enumerated proceedings not exclusive

The proceedings enumerated in this act shall not be deemed exclusive and the court is empowered in any proceeding, whether or not specifically provided for, to exercise any of the jurisdiction granted to it by this act or other provisions of law, notwithstanding that the jurisdiction sought to be exercised in the proceeding is or may be exercised in or incidental to a different proceeding.

III. DISCUSSION.

The NYUTC-LAG agrees that section 7-A-2.2 be enacted into law. The Reporters added paragraph (c).

PART 3
REPRESENTATION

The EPTL-SCPA Legislative Advisory Committee decided not to recommend UTC

Article 3, which provides rules for representation. As explained by the Committee:

The Committee determined not to enact Article 3 of the Code. Instead, SCPA section 315 should be amended as necessary to render its provisions applicable to notices, consents and agreements as well as to all judicial and nonjudicial proceedings. The Committee is thereby rejecting what would otherwise be an expansion of New York's virtual representation to include representation of a minor child by a parent, or of a principal by an agent. Conversely, the Committee's deference to SCPA section 315 exceeds the UTC approach by allowing representation of permissible appointees by the holder of a special power of appointment. In connection with amending SCPA section 315, the Committee follows the Code's intent by recommending that the following words be deleted from subdivision (5): "if the instrument expressly so provides..." The Committee is of the view that such lateral representation is beneficial and should be the default rule.

**THE LITIGATION SUBCOMMITTEE UNANIMOUSLY AGREES WITH THE
6th REPORT.**

PART 4
**CREATION, VALIDITY, AMENDMENT, MODIFICATION,
AND TERMINATION OF TRUST**

SUMMARY OF PART

- § 7-A-4.1. **Methods of Creating Trust.**
- § 7-A-4.2. **General Requirements for Trust Creation.**
 - § 7-A-4.2-A. **Specific Rules for Creation of Lifetime Trusts.**
 - § 7-A-4.1-B. **Trustee of Passive Trust Not to Take.**
 - § 7-A-4.2-C. **When Trust Interests Not to Merge.**
- § 7-A-4.3. **Trusts Created in Other Jurisdictions.**
- § 7-A-4.4. **Trust Purposes.**
 - § 7-A-4.4-A. **Supplemental Needs Trusts Established for Persons with Severe and Chronic or Persistent Disabilities.**
- § 7-A-4.5. **Charitable Purposes; Enforcement.**
- § 7-A-4.6. **Creation of Trust Induced by Fraud, Duress, or Undue Influence.**
- § 7-A-4.7. **Oral Trusts Not Recognized.**
- § 7-A-4.8. **Trusts for Pets.**
- § 7-A-4.9. **Noncharitable Trust Without Ascertainable Beneficiary.**
 - § 7-A-4.9-A. **Amendment of Trust Other Than by Trust Contributor.**
- § 7-A-4.10. **Modification, ~~or~~ Termination, or Reformation of Trust; Proceedings for Approval or Disapproval.**
- § 7-A-4.11. ~~**Modification or Termination of Noncharitable**~~ **Revocation or Amendment of Irrevocable Trust by Consent.**

§ 7-A-4.12. Modification or Termination Because of Unanticipated Circumstances or Inability to Administer Trust Effectively.

§ 7-A-4.13. Cy Pres.

§ 7-A-4.14. Modification or Termination of Uneconomical Trust.

§ 7-A-4.15. Reformation to Correct Mistakes.

§ 7-A-4.16. Modification to Achieve Settlor's Tax or Supplemental Needs Trust Objectives.

§ 7-A-4.17. Combination and Division of Trusts.

~~§ 7-A-4.18. Exercise of a Power of Appointment; Effect When More Extensive or Less Extensive Than Authorized; Trustee's Authority to Invade Principal in Trust.~~

I. SECTION 7-A-4.1 METHODS OF CREATING TRUST.

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

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

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

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

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

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

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

II. PRESENT NEW YORK LAW.

The law of New York had long followed the common law of trust creation under which a trust is created by the transfer of property to a trustee by a living person or by will. A trust may also be created by a declaration of trust. New York law also recognizes the right of a donee of a power of appointment to exercise a power in further trust. *See* EPTL 10-6.6(a)(2) and case law thereunder.

The common law of trust creation in New York is not completely clear, however. In *Matter of Doman*, 68 A.D.3d 862 (2d Dep't 2009) the court held that a QPRT trust was not invalid because of the passage of six months from the time the trust document was executed and the transfer to the trustee of the interest in the proprietary lease and shares of the co-operative housing corporation that were the subject of the trust. Note that the court states that the trust is not invalid even though "the property which was the subject of the Trust was not delivered into the Trust until six months after the Trust was *created* [emphasis added]" which only goes to

show how frequently the terminology of trust creation is not used carefully. The *Doman* court cites *Brown v. Spohr*, 180 N.Y. 201 (1904) which in addition to setting forth the general rules described in the previous paragraph, upheld the validity of certain trusts even though certain transactions related to the creation of one of the trusts involved took place before the execution of the trust document because “it was plainly the intention of the trustor that all the transactions should be considered as integral parts of the scheme to create a trust for the benefit of” the beneficiary. On the other hand, both cases involved trusts of specified property—in *Doman* the residence that is the only possible res of a QPRT and in *Brown* it was clear that the settlor was creating a trust of \$20,000 for the beneficiary.

A few Article 7 provisions bear on trust creation, specifically Sections 7-1.7 and 7-2.1 (a) and (b).

III. DISCUSSION.

Section 7-A-4.1 has been revised by the Reporters for clarification.

The Reporters recommend that Sections 7-1.7 and 7-2.1 (a) and (b), which bear on trust creation, be repealed as obsolete. These provisions derive from the 1830 statutes which were enacted to deal with concerns no longer relevant in modern times.

I. SECTION 7-A-4.2. GENERAL REQUIREMENTS FOR TRUST CREATION.

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

(1) the settlor **(or a fiduciary properly acting on behalf of the settlor)** has capacity to create a trust;

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

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

(A) a charitable trust;

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

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

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

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

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

~~(c) A power in a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.~~

~~(d) Every lifetime trust shall be in writing and shall be executed and acknowledged by the initial creator and, unless such creator is the sole trustee, by at least one trustee thereof, in the manner required by the laws of this state for the recording of a conveyance of real property or, in lieu thereof, executed in the presence of two witnesses who shall affix their signatures to the trust instrument. Execution of the trust by the initial creator shall not be required if the initial creator executes (in the manner required for such transfer to be effective) a writing that effects any transfer of assets from the initial creator to the trust.~~

~~(e) A lifetime trust shall be valid as to any assets therein to the extent the assets have been transferred to the trust. For purposes of this section, (a) transfer is not accomplished by recital of assignment, holding or receipt in the trust instrument, and (b) in the case of a trust of which the creator is the sole trustee, transfer shall mean in the case of assets capable of registration such as real estate, stocks, bonds, bank and brokerage accounts and the like, the recording of the deed or the completion of registration of the asset in the name of the trust or trustee, and in the case of other assets a written assignment describing the asset with particularity.~~

II. PRESENT NEW YORK LAW.

This section gathers in one place the basic elements of trust creation which are all part of New York law but have never been clearly codified in a single section.

For example, Real Property Law § 11 states “A person other than a minor, a mentally retarded person, or person of unsound mind, seized of or entitled to an estate or interest in real property, may transfer such estate or interest.” There is no corresponding provision applicable to transfers of personal property but there is little doubt that capacity is required for transfers of such property, including transfers in trust. Exactly what level of capacity is required is a matter not addressed by the Code, except with regard to revocable trusts.

Whether or not a purported settlor intends to create a trust is often not an issue: language in a will making a disposition to a trustee of estate property to be held on the terms set forth in the will or the proper execution of a written instrument conveying property to a person described

as “trustee” to be held “in trust” on terms set forth in the instrument leave little doubt that the creation of a trust is intended. Problems arise when the words used by the purported settlor can be described as precatory. New York has numerous cases addressing the issue, all of which turn on the specific facts and circumstances. It is clear that no bright line rules exist. As the Court of Appeals noted in *Spencer v. Childs*, 1 N.Y.2d 103 (1956), even the word “request,” when directed to a trustee named in a will, may be a manifestation of politeness rather than an indication of something other than a binding instruction. The precision of the language also plays a part. If the language does not clearly separate legal and equitable title, set out a term for the trust, or give the trustee active duties of some sort, the language may fail to create a trust because it is too indefinite. See *Matter of Manara*, 5 Misc.3d 556 (Sur. Ct. New York Cnty. 2004). The codification of the intent requirement will not change existing law implementing it.

The need for definite beneficiaries is another basic element of a valid trust and reported New York cases on the issue are conspicuous in their absence. It is highly unlikely that the codification of the requirement will change current law.

The requirement that a trustee have duties and that the trust be “active” rather than “passive” is to some degree required by EPTL 7-1.2 which is carried over in section 7-A-4.2-B. The trustee’s duties need not be demanding or complicated or indeed involve anything more than investing trust property and paying over income to the named beneficiary for the term of the trust, see, *Matter of Fischer*, 307 N.Y. 149 (1954).

The cases finding a trust to fail because it is “passive” are few and far between. As an alternative ground for deciding *Matter of Manara*, *supra*, as she did, the Surrogate stated that even if the testator intended to create a trust it would have been passive deemed the trust to be passive because the language required nothing of a trustee—the testator gave her residuary estate to her nephews “for their education.” In the Surrogate’s view the trustee’s only obligation would be to turn the property over to the nephews, and presumably the language related to education was precatory. In *Baumann v. Baumann*, 257 N.Y. 480 (1931) husband delivered stock certificates to a third person pursuant to a separation agreement which described that person as a “trustee” to secure payments to wife required by the separation agreement. The third person could deal with the stock only in the event of husband’s default. The Court of Appeals concluded the trust was passive and that husband had the right to vote the stock. Finally, as in *Manara* a trust may fail because it is “passive” when the language sets no term for the trust and sets out no terms telling the trustee what is to be done with the property. In *Matter of Gagliardi*, 55 N.Y.2d 109 (1982), decedent took title to real property as trustee for his nephew and his wife “as tenants by the entirety.” The “beneficiaries” then signed a lease with the decedent under which they owed him a monthly rent. The court held that if the “trust” were considered without reference to the lease, EPTL 7-1.1 and 7-1.2 would apply and the “beneficiaries” would hold title to the property because the decedent/trustee retained no interest in the property. The niece and nephew’s use of the property was in no way limited by the “trust” terms. Again, the codification of this requirement will not change New York law.

The requirement that the same person not be sole trustee and sole beneficiary is a statement of the “merger” doctrine: were the same person to be the only trustee and the only beneficiary that person would have fee simple ownership of the trust property. The New York

doctrine of merger as applied to trusts was quite complicated because of the provisions of the pre-1997 version of EPTL 7-1.1 which said that whenever a person is “entitled to actual possession of property and the receipt of income therefrom has a legal estate in such property of the same quality and duration and subject to the same conditions as his beneficial interest.” Since the amendment of EPTL 7-1.1 in that year, New York’s merger doctrine aligns with the traditional view embodied in this provision and no change in New York law will result. For clarification, the Reporters determined to continue EPTL 7-1.1 as section 7-A-4.2-B.

III. DISCUSSION.

Initial changes made in the text of paragraph (a) as it appears in the 6th Report call attention to the formalities required to create a various types of trusts and to add that (a)(1) and (2) can be performed by a fiduciary acting on behalf of a settlor. Otherwise the Estate Planning Subcommittee suggests no other changes.

Paragraph (c) of the 6th Report is strongly opposed by Estate Planning Subcommittee as too great a deviation from established law.

Finally, the Estate Planning Subcommittee concludes that paragraphs (d) and (e) should be part of a separate section setting forth requirements applicable only to lifetime trusts. *See* § 7-A-4.2-A and the Discussion thereunder.

I. SECTION 7-A-4.2-A. SPECIFIC RULES FOR CREATION OF LIFETIME TRUSTS.

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

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

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

document, or (ii) acknowledged by the settlor (or settlor's fiduciary) in the manner required by the laws of this state for the conveyance of real property. If the signature of a trustee is required, the signature of the trustee must be either (i) affixed to the document in the presence of two witnesses, who then affix their signatures to the document, or (ii) acknowledged by the trustee in the manner required by the laws of this state for the conveyance of real property.

~~Execution of the trust by the initial creator shall not be required if the initial creator executes (in the manner required for such transfer to be effective) a writing that effects any transfer of assets from the initial creator to the trust.~~

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

(e) A lifetime trust shall be irrevocable unless it expressly provides that it is revocable.

II. PRESENT NEW YORK LAW.

Current EPTL 7-1.14, 7-1.15, the first sentence of 7-1.16, 7-1.17(a), and 7-1.18 provide the rules for the creation of lifetime trusts.

The initial part of the first sentence of EPTL 7-1.17(a) was amended in 2010 to read as follows: “Every lifetime trust shall be in writing and shall be executed and acknowledged by the **person establishing such trust. . .**”

As explained in the Practice Commentaries:

From this statute's enactment in 1997 until August 30, 2010, it required the “initial creator” of the trust to execute it. EPTL 1-2.2 defines “creator” as the “person who makes a disposition of property.” So although the legislature did not intend the statute to prohibit an executor from making a trust as directed by a testator's will, it did so. It has now amended the statute to delete the words “initial creator” and “such creator” and substitute for them “person establishing such trust” and “such person.” L. 2010, ch. 451, § 1.

The 1997 amendments added 7-1.18 to the EPTL which requires certain formalities for the transfer of property to the trustee of a lifetime trust. The provision prohibits transfer by recitation of assignment, holding, or receipt in the trust instrument and requires that where the creator of the trust is the sole trustee transfer means the registration of assets capable of registration in the name of the trustee and in the case of other assets “a written assignment describing the asset with particularity. The provision requiring registration of certain assets to be held in a self-trusted trust was new; the prohibition on general assignments and recitations in the trust instrument is often said to comport with existing New York common law as exemplified in *Brown v. Spohr*, 180 N.Y. 201 (1904) where the court cites several earlier cases for a statement of the requisites for trust creation which include “(3) a fund or other property sufficiently designated or identified to enable title thereto to pass to the trustee; and (4) the actual delivery of the fund or other property, or of a legal assignment thereof to the trustee, with the intention of passing legal title thereto to him as trustee.” The requirement that property be “sufficiently identified” to enable title to pass would seem to be the basis for not allowing blanket assignments.

III. DISCUSSION.

The Reporters believe that the provisions of current law dealing with the creation of the lifetime trusts should be found in a single section.

Paragraphs (a) and (b) track EPTL 7-1.14 and 7-1.15. Paragraph (c) generally tracks the substance of EPTL 7-1.17(a) unlike the 6th Report's use of "creator" in section 7-A-4.2(d). However, changes include required execution by the settlor or the settlor's fiduciary. In addition, paragraph (c) separates out, and thereby makes cleared, the execution rules for settlors or their fiduciaries and for trustees.

The Estate Planning Subcommittee agrees with the 6th Report's retention of the funding concept in EPTL 7-1.18 but moved it (from the 6th Report's placement in section 7-A-4.2(e) to this section). Specifically, the Subcommittee recommends the funding rules of paragraph (d). These rules make clear that an asset generally becomes a trust asset once the asset has been delivered to the trustee. When the settlor is the sole trustee, the Subcommittee agrees that registration of assets capable of registration must be so registered and that for other assets a written assignment of the particularly-described asset be required. However, the Subcommittee also recommends an alternative to a written assignment, that is, a particularized description of the asset in the trust instrument. The Reporters suggest additional modifications: (1) the written assignment can be made in the trust instrument as well as in another instrument (2) the description of the asset with particularity can also be made in a schedule and (3) the actual affixing of the asset, for example, a \$20 bill, to the trust instrument.

Paragraph (e) tracks the first sentence of EPTL 7-1.16. The Estate Planning Subcommittee believes that this default rule should apply rather than the default rule in the 6th Report that a trust would be revocable. Indeed, if the default rule was changed, two sets of rules would apply depending on when a particular trust was executed.

I. SECTION 7-A-4.2-B. TRUSTEE OF PASSIVE TRUST NOT TO TAKE.

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

II. PRESENT NEW YORK STATE LAW.

This provision is the same as EPTL 7-1.2 with the exception of the updating of the cross reference. The current provision is almost identical to Personal Property Law section 93 which in turn is an almost verbatim amalgamation of Revised Statutes Part II, ch. I, tit. 2 §§ 49 and 50 (1830). Those sections, in turn, enacted a New York version of the Statute of Uses. The differences between the two are no longer of practical significance. The provision destroys passive trusts by vesting title to the property in the beneficiary and not in the trustee. *See, Ward*

v. Saranac Lake Federal Sav. and Loan Ass'n., 48 A.D.2d 337 (3d Dep't 1975) where the owner of Totten trust accounts attempted to convey the accounts to herself as trustee of a revocable trust, the terms of which gave her complete control over the accounts and which directed the bank to name a suitable successor trustee who would have the same control over the account as the decedent who was to "hold" each account until its beneficiary reached the stated age. The Appellate Division held that the successor trustee would have no duties with respect to the accounts and that under EPTL 7-1.2 the property must pass directly to the beneficiaries of the account.

III. DISCUSSION.

Because the section states a fundamental provision of the New York law of trusts and because there is no corresponding provision in the 6th Report, the Reporters recommend that EPTL 7-1.2 be transported into the new Code to make clear the consequences of a passive trust.

I. SECTION 7-A-4.2-C. WHEN TRUST INTERESTS NOT TO MERGE.

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

II. PRESENT NEW YORK LAW.

EPTL 7-1.1 is identical to Section 7-A-4.2-B other than that "creator" has been replaced by "settlor."

III. DISCUSSION.

The Reporters believe that it will be useful to retain EPTL 7-1.1 to provide additional guidance on section 7-A-4.2(a)(5).

I. SECTION 7-A-4.3. TRUSTS CREATED IN OTHER JURISDICTIONS.

(a) A ~~trust not created by will~~ **lifetime** trust is validly created if **it is in writing and** its creation complies with

- (1) the law of the jurisdiction in which the trust instrument was executed, or
- (2) the law of the jurisdiction in which, at the time of creation:
 - (i) the settlor was domiciled, ~~had a place of abode, or was a national; or~~
 - (ii) a trustee was domiciled or had a place of business; or
- (3) any trust property was located.

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

II. PRESENT NEW YORK LAW.

There is no statutory provision applicable to lifetime trusts corresponding to EPTL 3-5.1 which provides choice of law rules governing the formal and intrinsic validity of wills “having relation to another jurisdiction” and of testamentary dispositions in such wills. The validity of testamentary trusts is governed by EPTL 3-5.1.

III. DISCUSSION.

The Reporters believe that, just as New York does not recognize nuncupative wills other than as provided in EPTL 3-2.2, and requires wills created outside of New York to be “in writing” under EPTL 3-5.1(c), lifetime trusts created outside of New York must also be in writing even if the law of another jurisdiction related to the trust allows the creation of oral trusts. The provisions for recognition of lifetime trusts not created under New York law therefore parallel the rules governing the formal validity of wills in EPTL 3-5.1(c). Because lifetime trusts involve both a settlor and a trustee, the provisions refer to the domiciles of both the trustee and the settlor and because every trust, with some statutory exceptions, must have a corpus, the provisions also refer to the law of any jurisdiction where trust property was located at the time of creation of the trust.

I. SECTION 7-A-4.4. TRUST PURPOSES.

A trust may be created only to the extent its purposes are lawful, **and** not contrary to public policy. ~~and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries.~~

II. PRESENT NEW YORK LAW.

EPTL 7-1.4 states: “An express trust may be created for any lawful purpose.” This provision does not lessen the relevance of public policy, however. It appears that most cases dealing with the issue of the validity of a trust with reference to the purpose of the trust relate to restrictions on marriage or provisions that could be construed to encourage divorce. Generally speaking, “A condition calculated to induce a beneficiary to marry, even to marry in a manner desired by the testator, is not against public policy. A condition calculated to induce a beneficiary to live in celibacy or adultery is against public policy.” *Matter of Liberman*, 279 N.Y. 458, 464 (1939). The cases are numerous. For a discussion *see* Bloom and LaPiana, DRAFTING NEW YORK WILLS AND RELATED DOCUMENTS (4th edition), § 503[2][a].

The classic case involving illegality is *Matter of Sage*, 97 Misc.2d 790, 412 N.Y.S.2d 764 (Sur. Ct. Albany Cnty. 1979) where the court concluded that a trustee was not authorized to invade the principal of a trust to reimburse the father of the beneficiary for bribes he had paid to obtain the release of the beneficiary and his spouse from a Brazilian prison. The court held that bribing an official to secure release from prison contrary to law violated New York public policy and could not be a proper use of trust funds. In short, the first sentence of this section will not change existing New York law.

III. DISCUSSION.

Discussions by the City Bar Committees raised the question of how one determines whether something is possible to achieve. Would expert testimony be necessary in some cases? The conclusion was that “possible to achieve” should be deleted.

The Estate Planning Subcommittee determined that the second sentence of section 7-A-4.4 in the 6th Report could indeed change the law of New York in unpredictable ways.²⁸ Many commentators believe that the provision will be relied upon by courts to change the balance between the beneficiaries’ desires and the intent of the settlor in creating the trust, by, for example, making it easier to strike down restrictions on investments, especially directions to retain certain inception assets. Other settlor restrictions, such as a restraint on marriage or adherence to a settlor’s wishes, might also be void as terms that do not benefit beneficiaries. Rather than contribute to the uncertainty of New York law in this area, it was decided to leave the development of the law to the courts.

I. SECTION 7-A-4.4-A. SUPPLEMENTAL NEEDS TRUSTS ESTABLISHED FOR PERSONS WITH SEVERE AND CHRONIC OR PERSISTENT DISABILITIES.

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

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

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

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

(4) “Person with a severe and chronic or persistent disability” means a person (i) with mental illness, developmental disability, or other physical or mental impairment;

²⁸ The benefit of the beneficiary rule also appears in the 6th Report’s version of sections 7-A-8.1 and 7-A-8.14(a). The recommendation that this rule be removed from these sections is discussed in those sections.

- (ii) whose disability is expected to, or does, give rise to a long-term need for specialized health, mental health, developmental disabilities, social or other related services; and**
- (iii) who may need to rely on government benefits or assistance.**

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

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

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

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

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

(v) Notwithstanding subparagraph (iv) of this paragraph, the beneficiary of a supplemental needs trust may be the creator of the trust if such trust meets the requirements of subparagraph two of paragraph (b) of subdivision two of section three hundred sixty-six of the social services law and of the regulations implementing such clauses. Provided, however, that if the trust is funded with the proceeds of retroactive payments made as a result of a court action and due the beneficiary under the federal supplemental security income program, as established under title XVI of the federal social security act, the creation of a supplemental needs trust by the beneficiary under this subparagraph shall not impair nor limit any right under applicable law of a representative payee to receive reimbursement out of such proceeds for expenses incurred on behalf of the beneficiary pending the determination of the beneficiary's eligibility for such federal supplemental security income program, nor any right under applicable law of any state or local governmental entity which provided the beneficiary with interim assistance pending the determination of the beneficiary's eligibility for such federal supplemental security income program to be repaid out of such proceeds for the amount of such interim assistance.

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

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

(1) It shall be presumed that the creator of the trust intended that neither principal nor income be used to pay for any expense which would otherwise be paid by government benefits or assistance for which the beneficiary might otherwise be eligible or

which the beneficiary might be receiving, notwithstanding any authority the trustee may have to make distributions for food, clothing, shelter or health care as provided in clause (ii) of subparagraph five of paragraph (a) of this section;

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

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

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

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

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

(ii) the trust shall no longer be treated as a supplemental needs trust under

this section and the trust shall be construed, and the trust assets considered, without regard to the provisions of this section.

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

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

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

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

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

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

1. The property shall be held, IN TRUST, for the benefit of _____ (hereinafter the “beneficiary”) and shall be held, managed, invested and reinvested by the trustee, who

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

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

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

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

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

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

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

provided, however, that if the mere existence of the trustee's authority to make distributions pursuant to this paragraph shall result in the beneficiary's loss of government benefits or assistance, regardless of whether such authority is actually exercised, this paragraph shall be null and void and the trustee's authority to make such distributions shall cease and shall be limited as provided in paragraphs two and three above, without exception.

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

II. PRESENT NEW YORK LAW.

EPTL 7-1.12 provides the current legislation on supplemental needs trusts.

III. DISCUSSION.

Because of the decision to make the Code as complete a replacement for current Article 7 of the EPTL as possible, the Reporters recommend inclusion of the provision governing supplemental needs trusts in the Code.

I. SECTION 7-A-4.5. CHARITABLE PURPOSES; ENFORCEMENT.

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

~~(a) A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purposes the achievement of which is beneficial to the community.~~

~~—— (b) If the terms of a charitable trust do not indicate a particular charitable purpose or beneficiary, the court may select one or more charitable purposes or beneficiaries. The selection must be consistent with the settlor's intention to the extent it can be ascertained.~~

~~—— (c) The settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust.~~

II. PRESENT NEW YORK LAW.

Article 8 of the EPTL is a separate article which deals with the many of rules for charitable trusts, including rules for charitable purposes and enforcement.

III. DISCUSSION.

The Estate Planning Subcommittee believes that Article 8 should continue to govern the rules for charitable trusts that involve trust purposes and enforcement. At the same time, the Subcommittee believes that it would be useful to update Article 8, including a modern definition for charitable purposes and a statutory rule for standing, which would at least include the “creator,” which is the term used in Article 8.

It should be noted that Article 8 does not deal with several issues that are provided in Article 7-A, including the formal requirements to create a wholly charitable trust or a mixed charitable and noncharitable trust.

I. SECTION 7-A-4.6. CREATION OF TRUST INDUCED BY FRAUD, DURESS, OR UNDUE INFLUENCE.

A trust ~~is void~~ **may be set aside** to the extent its creation was induced by fraud, duress, or undue influence.

II. PRESENT NEW YORK LAW.

Present New York law permits a trust to be set aside a trust to the extent its creation was induced by fraud, duress, or undue influence. *See generally* 106 New York Jurisprudence § 593. In effect, such a trust is voidable not void. As explained in *Matter of Riccelli Enters, Inc. v. State of New York Workers' Comp. Bd.*, 202 N.Y.Misc. Lexis 2241 at 127 (Sup. Ct. 2012): “Petitioners/plaintiffs do not claim that the Trust documents were procured through fraud in the inducement, which would render them voidable.”

Because a testamentary trust is created only if the will is admitted to probate, if probate of the will is successfully challenged, the testamentary trust will not be created. If only the portion of the will creating the trust is excised because, for example, only that portion of the will is found to be the product of undue influence or of an insane delusion, the trust will likewise never be created. In either case there is no trust to “set aside.”

III. DISCUSSION.

The Reporters believe that a trust that was created for improper reasons should be set aside rather than declared void, which is current New York law. Indeed, if a trust is created for improper reasons but no one successfully objects, the trust will continue.

I. SECTION 7-A-4.7. ORAL TRUSTS NOT RECOGNIZED.

Other than a testamentary trust in a nuncupative will created pursuant to section 3-2.2, no oral trust can be created in New York. ~~Unless a trust satisfies the requirements of section 7-A-4.2, a trust will not be deemed to have been created.~~

II. PRESENT NEW YORK LAW.

EPTL 7-1.17(a) requires a writing to create any lifetime trust and EPTL 3-2.1 and 3-2.2 effectively require a writing to create a testamentary trust other than a testamentary trust that is part of a nuncupative will under EPTL 3-2.2.

III. DISCUSSION.

The Estate Planning Subcommittee believes that current New York law should continue, and therefore section 7-A-4.7 provides that as a general matter oral trusts will not be recognized.

I. SECTION 7-A-4.8. TRUSTS FOR PETS.

(a) A trust for the care of a designated domestic or pet animal is valid. ~~The intended use of the principal or income may be enforced by an individual designated for that purpose in the trust instrument or, if none, by an individual appointed by a court upon application to it by an individual, or by a trustee.~~ Such trust shall terminate when the living animal beneficiary or beneficiaries of such trust are no longer alive.

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

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

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

(~~e~~f) A court may reduce the amount of the property transferred if it determines that amount substantially exceeds the amount required for the intended use. The amount of the

reduction, if any, passes as unexpended trust property pursuant to **paragraph (d)** ~~paragraph (de)~~ of this section.

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

II. PRESENT NEW YORK LAW.

EPTL 7-8.1 is New York's present pet trust statute.

III. DISCUSSION.

The Estate Planning Subcommittee believes that the current statute, which was recommended for enactment by the 6th Report as part of Article 7-A, can be improved by the minor changes as set forth in section 7-A-4.8. First, enforcement aspects are set out in separate paragraph (b). Second, because an enforcer may not be an individual, section 7-A-4.8 employs the term person. Third, a court should have the general authority to appoint an enforcer and need not rely only on the application for appointment by a person or the trustee. Fourth, a court should also be authorized to appoint an enforcer if an appointed enforcer is unable or unwilling to act. Finally, unexpended property will pass to the settlor or the settlor's successors in interest, which may or may not include the settlor's estate.

I. SECTION 7-A-4.9. NONCHARITABLE TRUST WITHOUT ASCERTAINABLE BENEFICIARY.

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

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

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

(3) Property of a trust authorized by this section may be applied only ~~for to~~ its intended use **purpose.** ~~except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use.~~ **Except as otherwise provided by the terms of the trust, if the court determines that not all of the trust property is required for its intended purpose, the excess property must be distributed to the settlor or to the settlor's successors in interest.** ~~Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest.~~

II. PRESENT NEW YORK LAW.

New York recognizes honorary trusts for certain purposes but such trusts can only last for 21 years.

III. DISCUSSION.

The Estate Planning Subcommittee agrees with the 6th Report that trusts for noncharitable purposes can be created. It also agrees that a trust for a noncharitable purpose should be allowed to only last 21 years. Longer periods could raise some concerns, such as a trust to last for an extended period for a political purpose.

In addition, the Estate Planning Subcommittee believes that a court should be authorized to appoint an enforcer if an appointed enforcer is unable or unwilling to act.

Finally, the Estate Planning Subcommittee believes that the statute should be couched in terms of “purpose” rather than “use” and that any excess property be distributed as provided in subdivision (3).

I. SECTION 4.9-A. AMENDMENT OF TRUST OTHER THAN BY TRUST CONTRIBUTOR.

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

(b) Any authorized trust amendment by a person other than the trust contributor shall be in writing and executed by the person authorized to amend the trust, and except as

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

II. PRESENT NEW YORK LAW.

EPTL 7-1.17(b) effectively authorizes trust amendment by a person other than the settlor provided there is compliance with certain formalities.

III. DISCUSSION.

The Reporters believe that amendment authority should be continued. They further believe that the formality requirements imposed on trust contributors by section 7-A-6.2(g) should apply.

I. SECTION 7-A-4.10. MODIFICATION, OR TERMINATION, OR REFORMATION OF TRUST; PROCEEDINGS FOR APPROVAL OR DISAPPROVAL.

~~(a) In addition to the methods of termination prescribed by sections 7-A-4.11 through 7-A-4.14, a trust terminates to the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve.~~

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

- 1) The terms of the trust so provide, including by the valid exercise of a power to revoke pursuant to the terms of the trust;
- 2) No purpose of the trust remains to be achieved;
- 3) The purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve;
- 4) All of the trust property has been distributed by the trustee in accordance with the terms of the trust;
- 5) A trust is revoked pursuant to section 7-A-4.11; or
- 6) A court orders a termination in a proceeding brought under sections 7-A-4.12 or 7-A-4.14.

~~(b) A proceeding to approve or disapprove a modification or termination under sections 7-A-4.11 through 7-A-4.16, or trust combination or division under section 7-A-4.17, may be commenced by a trustee or beneficiary. The settlor of a charitable trust may maintain a proceeding to modify the trust under section 7-A-4.13. A proceeding to approve or~~
disapprove a modification or termination under sections 7-A-4.12, 7-A-4.14 and 7-A-4.16, or a reformation under section 7-A-4.15 may be commenced solely by a trustee or beneficiary on notice to the parties interested in the proceeding. The parties interested in such a proceeding shall include the trustee and any person or persons upon whom service of process would be required in a proceeding for the judicial settlement of the account of the trustee, taking into account section three hundred fifteen of the surrogate's court procedure act. In addition, the party commencing any proceeding described in the first

sentence of this paragraph shall notify the settlor in writing that such proceeding has been commenced.

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

II. PRESENT NEW YORK LAW.

Paragraph (a): There is no New York State statute that sets forth the circumstances under which a trust terminates other than by the terms of the trust. However, there is a substantial body of relevant New York judicial decisions that provide general guidance on this issue. *See Matter of Isganaites*, 124 Misc. 2d 1 (Sur. Ct. Kings Cnty. 1983) (where the testamentary purpose of the trust has been achieved, the trust terminates by operation of law); *Kallen v. Kasin*, 200 A.D.2d 557 (2d Dep't 1994) (where the purpose for which the express trust was created cannot be carried out, the trust ceased to exist and the estate of the trustee also ceased); *Matter of Dunbar's Will*, 189 Misc. 687 (Sur. Ct. Erie Cnty. 1947) (a trust provision that offends the public policy of New York State is void, implying that if no other provision of the trust were enforceable, the trust would terminate by operation of law); *Matter of Homer*, 80 Misc. 2d 470 (Sur. Ct. Erie Cnty. 1975) (where the purpose of a trust becomes impossible to accomplish, the trust must be terminated by order of the court). There is New York law to the effect that a court order is required to terminate a trust where the purposes of the trust have become impossible to accomplish.

Paragraph (b): New York law does not provide specific procedural rules in this area. No proceeding is necessary under EPTL 7-1.9 (the creator of the trust, with the consent of all persons beneficially interested in the trust, may revoke the trust in whole or in part). *Cf. Culver v. Title Guarantee and Trust Company*, 296 N.Y. 74 (1946) (where one of the creators of the trust

has died, trust cannot be revoked by remaining creator or creators because all creators must consent to effect partial or total revocation).

III. DISCUSSION.

As explained below, the NYUTC-LAG recommends that section 7-A-4.10 be substantially revised to better reflect and clarify the issues surrounding this area.

The NYUTC-LAG recommends modification of paragraph (a) of the 6th Report in two respects. First, the NYUTC-LAG believes that all instances when a trust terminates should be set forth, not just a partial listing as in the 6th Report. Second, the NYUTC-LAG recommends deletion of the reference to non-automatic termination situations because it is confusing.

The NYUTC-LAG amended the 6th Report's section 7-A-4.10(b) by excluding all references to section 7-A-4.13 (Cy Pres). The NYUTC-LAG believes that in lieu of section 7-A-4.13, New York's current *cy pres* provision under EPTL 8-1.1(c)(1) should be retained, albeit with modifications, which are discussed in conjunction with section 7-A-4.13.

The NYUTC-LAG also amended the 6th Report's section 7-A-4.10(b) to make express that the parties who are interested in proceedings under various proceedings include the trustee and the persons upon whom service of process would be required in a judicial proceeding for the settlement of a trustee's account. In addition, the NYUTC-LAG wanted to make clear that the settlor of the trust, if living and competent, also was entitled to service of process in connection with such a proceeding. However, the NYUTC-LAG believes that, although the settlor should not have the right to commence such a proceeding or to object to the relief requested, the settlor should be notified of the proceeding which may lead to testimony regarding his or her dispositive intent and the purposes of the trust.

The NYUTC-LAG would add a new paragraph (c) to prevent adverse tax consequences on trust modification or termination.

The NYUTC-LAG considered EPTL 7-2.2 ("When Estate of Trustee Ceases) and concluded that they should be repealed as obsolete.

I. SECTION 7-A-4.11. MODIFICATION OR TERMINATION OF NONCHARITABLE REVOCATION OR AMENDMENT OF IRREVOCABLE TRUST INITIATED BY CONSENT.

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

~~all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.~~

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

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

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

- (1) if all of the beneficiaries had consented, the trust could have been modified or terminated under paragraph (a)(1); and**
- (2) the interests of a beneficiary who does not or cannot consent will be adequately protected; and**
- (3) the revocation or amendment will not jeopardize any tax benefits described in section 7-A-4.10(c)(i)-(iii).**

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

~~b) A spendthrift provision (whether by reason of the terms of the trust or by operation of law) is not presumed to constitute a material purpose of the trust.~~

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

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

~~—————(1) if all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and~~

~~—————(2) the interests of a beneficiary who does not consent will be adequately protected.~~

II. PRESENT NEW YORK LAW.

EPTL 7-1.9 currently allows irrevocable trusts to be terminated or modified with the consent of the creator and all living beneficiaries. *In Matter of Perosi*, 98 A.D.3d 230 (2d Dep’t 2012), an agent acting under a durable power was allowed under the “alter ego” theory to amend an irrevocable trust under EPTL 7-1.9 despite the trust’s prohibition on amendment.

No New York case has cited the famous case of *Claflin v. Claflin*, 20 N.E. 454 (Mass. 1899). The *Claflin* doctrine, which bars premature trust termination by the beneficiaries if a settlor’s material purpose exists for trust continuation, has long been the Restatement’s black letter law. *See, e.g.*, Restatement (Third) of Trusts § 65 and Restatement (Second) of Trusts § 337. Judge Radigan in *Matter of Sanders*, 158 Misc.2d 606 (Sur. Ct. Nassau Cnty. 1991)

suggested that a spendthrift provision indicated that the settlor had a material purpose of trust continuation so that trust termination should not be allowed.

III. DISCUSSION.

The NYUTC-LAG agrees with the 6th Report that EPTL 7-1.9 should be continued as law. To that end, the NYUTC-LAG recommends that the substance of EPTL 7-1.9 be enacted as section 7-A-4.11(a), including the use of “creator” rather than “settlor” since the section has a rich body of law based on the use of “creator”, which is defined under EPTL 1-2.2, as a person who makes a disposition of property. In addition, by retaining the substance of EPTL 7-1.9 no adverse tax consequences should result. The addition of “living” in section 7-A-4.11(a) codifies New York case law to the effect that the consent of only living beneficiaries is necessary. Although the NYUTC-LAG believes that *Matter of Perosi* should be overruled, possible adverse tax consequences militated against such change under section 7-A-4.11. Instead, an amendment to New York’s durable power of attorney legislation may be in order to overrule *Matter of Perosi*. Paragraph (c) empowers a court to act if the creator and some beneficiaries consent to a change but not all beneficiaries so consent.

The NYUTC-LAG disagrees with the 6th Report that the material purpose doctrine (the *Clafin* doctrine) as expressed subsection (a) of the 6th Report should be enacted.²⁹ In effect, the NYUTC-LAG does not believe that trust termination should be allowed on the consent of all beneficiaries if a court concludes that there is no material purpose for trust continuation. Rather, the NYUTC-LAG believes that trust termination should be allowed based on the “change of circumstance” standard of section 7-A-4.12(b).³⁰ The NYUTC-LAG also believes that the best approach for modifying administrative terms is for a court to conclude that the modification furthers the purposes of the trust. This approach is reflected in section 7-A-4.12(a).

Based on the foregoing, the NYUTC-LAG believes that the section need only provide for revocation or amendment that involves the creator.

The NYUTC-LAG also recommends that the Litigation Subcommittee consider virtual representation issues under section 7-A-4.11.

I. SECTION 7-A-4.12. MODIFICATION OR TERMINATION BECAUSE OF UNANTICIPATED CIRCUMSTANCES OR INABILITY TO ADMINISTER TRUST EFFECTIVELY.

²⁹ The Executive Committee of TELS and the City Bar Committees raised concerns about how a “material purpose” is to be determined and whether spendthrift or some or all of the interests should or should not be presumed to constitute a material purpose. These problems are eliminated under the NYUTC-LAG’s proposal.

³⁰ Section 7-A-4.12(a) and (b) would also allow a court to modify the administrative and dispositive terms based on a change in circumstances.

~~———(a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.~~

~~(b) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.~~

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

(b) The court may modify the dispositive terms of a trust, other than a wholly charitable trust, or terminate such trust if, because of circumstances not anticipated by the settlor, including changes in law, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

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

II. PRESENT NEW YORK LAW.

New York currently allows for administrative (equitable) deviation based on changed circumstances. *See, e.g., Matter of Smathers*, 19 Misc. 3d 337 (Sur. Ct. Westchester Cnty. 2008) (noncharitable trust); *Matter of Wilson*, 59 N.Y.2d 461 (1983) (charitable trust). However, apart from EPTL 7-1.6, dispositive deviation is not permitted.

III. DISCUSSION.

The NYUTC-LAG generally agrees with the 6th Report's section that a court should be allowed to modify the administrative or dispositive terms of a trust or even terminate a trust due to unanticipated circumstances. However, the NYUTC-LAG believes that administrative and dispositive deviation should be treated separately. Specifically, paragraph (a) would allow for administrative modification not only when there are unanticipated circumstances but also when a court finds another compelling so that the modification would further the purposes of any trust.³¹ In effect, NYUTC-LAG believes that courts should have the flexibility to modify administrative terms not only because unanticipated circumstances have arisen.

Paragraph (b) deals with modifying dispositive terms, including trust termination, in trusts other than wholly charitable trusts which are governed by *cy pres* principles.³² The standard is more restrictive than for administrative modification (deviation) insofar as a court must first find that unanticipated circumstances, including a change in law, have occurred. *Cf.* §7-A-4.16 (dealing with trust modification to achieve tax goals).

With regard to paragraph (c), the NYUTC-LAG believes that its formulation more precisely provides for distribution on trust termination.

EPTL 7-1.6 should be repealed.

I. SECTION 7-A-4.13. CY PRES.

~~(a) Except as otherwise provided in subsection (b), if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful:~~

~~———— (1) the trust does not fail, in whole or in part;~~

~~———— (2) the trust property does not revert to the settlor or the settlor's successors in interest; and~~

~~———— (3) the court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.~~

~~———— (b) A provision in the terms of a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power of the court under~~

³¹ New York law is well-established that a court may order an administrative modification (deviation) in wholly charitable trusts. *See Matter of Wilson*, 59 N.Y.2d 461 (1983) (wholly charitable trust).

³² Dispositive deviation should be allowed in part charitable and noncharitable trusts, *e.g.*, a CLAT.

~~subsection (a) to apply cy pres to modify or terminate the trust only if, when the provision takes effect:~~

~~_____ (1) the trust property is to revert to the settlor and the settlor is still living; or~~

~~_____ (2) fewer than 21 years have elapsed since the date of the trust's creation.~~

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

II. PRESENT NEW YORK LAW.

The doctrine of cy pres is addressed in EPTL 8-1.1(c)(1) as follows:

The supreme court and, where the disposition is made by will, the surrogate's court in which such will is probated have jurisdiction over dispositions referred to and authorized by paragraphs (a) and (b), and whenever it appears to such court that circumstances have so changed since the execution of an instrument making a disposition for religious, charitable, educational or benevolent purposes as to render impracticable or impossible a literal compliance with the terms of such disposition, the court may on application of the trustee or of the person having custody of the property subject to the disposition and on such notice as the court may direct, make an order or decree directing that such disposition be administered and applied in such manner as in the judgment of the court will most effectively accomplish its general purposes, free from any specific restriction, limitation or direction contained therein; provided, however, that any such order or decree is effective only with the consent of the creator of the disposition if he is living.

III. DISCUSSION.

Because New York has a well-developed body of law involving *cy pres*, and because this law is legislated under EPTL Article 8 (Charitable Trusts), the NYUTC-LAG determined that the *cy pres* provision under EPTL 8-1.1(c)(1) should be retained, albeit with some modifications. Section 7-A-4.13 would simply provide that the *cy pres* rules are governed by EPTL 8-1.1(c)(1). In effect, the NYUTC-LAG disagrees with the 6th Report which adopted UTC 413 without any changes.

The NYUTC-LAG recommends that EPTL 8-1.1(c)(1) be amended as set forth below. The bolded portions, which are NYUTC-LAG's recommended changes, are explained below.

(c)(1) ~~The supreme court and, where the disposition is made by will, the surrogate's court in which such will is probated have~~ **Whenever it appears to the court having** jurisdiction over ~~the~~ **the** dispositions referred to and authorized by paragraphs (a) and (b), and whenever it appears to such court that circumstances have so changed since the execution of an instrument making a

disposition for religious, charitable, educational or benevolent purposes as to render impracticable or impossible a literal compliance with the terms of such disposition, ~~the such~~ court may, on application of the settlor, as provided in Article 7-A, the charitable beneficiary, the attorney general, the trustee, or the person having custody of the property subject to the disposition, and on such notice as the court may direct, make an order or decree directing that such disposition be administered and applied, in whole or in part, in such a manner as in the judgment of the court will most effectively accomplish its general purposes consistent with the settlor's intent (which intent shall be presumed to be generally charitable subject to rebuttal), free from any specific restriction, limitation or direction contained therein; provided, however, that any such order or decree is effective only with the consent of the settlor ~~creator of the disposition~~ if he is living and competent. Notwithstanding the foregoing, a provision in the terms of a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power of the court to apply its powers under this paragraph to modify or terminate the trust.

The first change makes clear that the court having jurisdiction over a testamentary or lifetime trust should have *cy pres* authority. Since 1984, surrogate's courts have had jurisdiction over lifetime trusts. *See* SCPA 207.

The next change expands the persons who can apply to the court for *cy pres* treatment, including the settlor. At the same time, the NYUTC-LAG recommends eliminating the necessity for the settlor to consent but requires that the settlor if competent be given notice of the application for *cy pres*.

Following the UTC's lead, the NYUTC-LAG would liberalize the *cy pres* doctrine to allow reformation in "a manner consistent" with the settlor's charitable objectives, which gives a court greater discretion than deciding which alternative most effectively accomplishes the charitable purposes. On the other hand, the NYUTC-LAG would not eliminate the need to find a general charitable intent as under the 6th Report, which approved of this UTC position. Instead a general charitable intent would be presumed but if the presumption is overcome (and there are many New York cases that have found no general charitable intent), then *cy pres* could not be applied.

The final sentence recognizes the validity of a gift over if the specific charitable purpose fails, thereby upholding the settlor's intent. In contrast, the 6th Report, following the UTC, would disregard the gift over provision in most instances, which is a result that, in the view of the NYUTC-LAG, inappropriately disregards the settlor's wishes.

I. SECTION 7-A-4.14. MODIFICATION OR TERMINATION OF UNECONOMICAL TRUST.

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

(b) The court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines **under the circumstances** that the value of the trust property is insufficient to justify the cost of administration. **Upon termination of a trust under this paragraph, the trust property shall be distributed as the court determines will best effectuate the settlor's intention. Nothing in this paragraph shall be deemed to supersede the provisions of section 8-1(c)(2) governing a wholly charitable trust.**

~~(c) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.~~

~~(d)~~ This section does not apply to

(1) an easement for conservation or preservation, **or**

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

II. PRESENT NEW YORK LAW.

EPTL 7-1.19 permits termination of a lifetime or testamentary express trust (other than a wholly charitable trust and a supplemental needs trust) when the expense of administering the same is uneconomical. If, upon such application, the court finds that continuation of the trust is economically impracticable, that the express terms of the disposing instrument do not prohibit its early termination, and that such termination would not defeat the specified purpose of the trust and would be in the best interests of the beneficiaries, the court may make an order or decree terminating the trust and directing the distribution of the trust assets to and among those beneficiaries who at the time are entitled (or entitled in the discretion of the trustee) to the income and/or principal of the trust and those beneficiaries who would be entitled (or entitled in the discretion of the trustee) to the income and/or principal of the trust if it were to terminate

immediately before such order or decree. The distribution of the trust assets are to be made in such manner, proportions, and shares as in the judgment of the court will effectuate the intention of the creator. The section explicitly states that, to the extent its application or the possibility of its application to any trust would reduce or eliminate a charitable deduction otherwise available to any person under the income tax, gift tax, estate tax or generation-skipping transfer tax provisions of the United States Internal Revenue Code, or the laws of any state of the United States or of the District of Columbia, it would not apply to such trust.

EPTL 8-1.1(c)(2) permits a court to terminate wholly uneconomical charitable trusts of \$100,000 or less.

III. DISCUSSION.

The NYUTC-LAG believes that “uneconomical” rather than “uneconomic” should be used in the statute’s heading. *See* EPTL 7-1.19.

The NYUTC-LAG agrees with the 6th Report that the trustee should have the authority to terminate an uneconomical trust of \$100,000 (given the economic realities of administering a trust in New York State) or less without a court proceeding. *See* section 7-A-4.14(a) (first sentence). It should be noted that, pursuant to section 7-A-8.1, a trustee must exercise this authority in good faith and not solely to rid itself of small trusts. The NYUTC-LAG believes that its formulation in the second sentence of paragraph (a), in contrast with the 6th Report’s proposal under paragraph (c), better reflects how property should be distributed on trust termination.

The NYUTC-LAG agrees with the 6th Report that the court should have the discretion to terminate trusts in any amount if it determines trust administration is uneconomical. *See* section 7-A-4.14(b) (first sentence). The second sentence, instead of the 6th Report’s proposal under paragraph (c), is consistent with the second sentence of paragraph (a). The last sentence of paragraph (b) makes clear that EPTL 8-1.1(c)(2) (court’s authority to terminate uneconomical trusts of \$100,000) is still in force.

It should be noted that section 7-A-4.10(c) would prevent trust termination under paragraphs (a) and (b) if adverse tax consequence would result.

Given the NYUTC-LAG’s recommendations for distributions in paragraphs (a) and (b), paragraph (c) of the original proposal should be deleted. New subsection (c) makes clear that the trustee’s or the court’s authority to terminate trusts shall not apply in certain situations.

Because section 7-A-4.14 supplants EPTL 7-1.19, EPTL 7-1.19 should be repealed.

I. SECTION 7-A-4.15. REFORMATION TO CORRECT MISTAKES.

The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor’s intention if it is proved by clear and convincing evidence **what was the settlor’s**

intention and that specific terms of the trust do not carry out that intention because the specific terms both the settlor's intent and were affected by a mistake of fact or law, whether in expression or inducement.

II. PRESENT NEW YORK LAW.

Trust (and will) reformation involves the altering of language of a trust instrument (or will) by the addition or deletion of words. Unlike trust or will construction, which is necessitated when the settlor's (or testator's) intent is questionable and needs to be ascertained, trust and will reformation is generally not allowed in New York, albeit there are a few recent decisions allowing reformation. *See, e.g. Matter of Meyer*, N.Y.L.J., Feb. 26, 2002, at 18, col. 5 (Sur. Ct. New York Cnty.) (allowing reformation due to drafting error).

III. DISCUSSION.

The NYUTC-LAG agrees with the 6th Report that New York should enact a statute that allows reformation of unambiguous trust language to correct a mistake. The group decided, however, that the language needed to be revised to make it clear that the reformation requires that the court find by clear and convincing evidence both what the settlor's intent was and that the trust terms do not carry out that intent because of a mistake.

Although the statute would cause a fundamental change in New York law on reformation, as it eliminates the traditional restriction of a court's reformation power to cases involving ambiguity, the NYUTC-LAG welcomes this change. The guiding principle behind the statute is the importance of effectuating the settlor's intent in lifetime and testamentary trusts. An instrument that is unambiguous on its face does not necessarily effectuate the settlor's intent if the settlor made a clear mistake. The NYUTC-LAG concludes that any concern, including the fear that the abolition of the ambiguity requirement for testamentary trusts somehow destroys the testator's freedom of testation, should be allayed by the rule's high burden of proof requiring clear and convincing evidence both of the settlor's intent as well as of the mistake and the relationship between the mistake and the terms of the trust.

One final point: The NYUTC-LAG also recommends that Article 3 of the EPTL be amended to allow reformation of wills not involving testamentary trusts. It makes no sense for only testamentary trusts to be reformed based on a mistake. Wills generally should be subject to reformation based on mistake. The statute should track the language of section 7-A-4.15.

I. SECTION 7-A-4.16. MODIFICATION TO ACHIEVE SETTLOR'S TAX OR SUPPLEMENTAL NEEDS TRUST OBJECTIVES.

~~To achieve the settlor's tax objectives,~~ The court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention **in order to (a) achieve the**

settlor's tax objectives or (b) to conform such trust to the requirements of section 7-A-4.4-

A. The court may provide that the modification has retroactive effect.

II. PRESENT NEW YORK LAW.

Tax relief is perhaps one of the most common bases for court intervention. Case law provides many examples of courts allowing reformations for tax purposes that do not have significant dispositive effect. *See, e.g., In Matter of Choate*, 141 Misc. 2d 489, (Sur. Ct. New York Cnty. 1988) (allowing reformation for tax reasons). *Cf.* EPTL 11-1.11 authorizing a trustee to amend a trust for certain tax purposes provided the amendment has “no significant dispositive effect.”

A much more recent trend relates to allowing reformation of unambiguous instruments to qualify as a supplemental needs trust. *See, e.g., Matter of Rappaport*, 21 Misc.3d 919 (Sur. Ct. Nassau Cnty. 2008), *Matter of Newman*, 18 Misc.3d 1118(A (Sur. Ct. Bronx Cnty. 2008), *Matter of Hyman*, 14 Misc. 3d 1232A (Sur. Ct. Nassau Cnty. 2007) and *Matter of Longhine*, 15 Misc. 3d 1106A (Sur. Ct. Wyoming Cnty. 2007), *Matter of Kamp*, 7 Misc.3d 615,790 (Sur. Ct. Broome Cnty. (2005). *But see Matter of Rubin*, 4 Misc. 3d 634 (Sur. Ct. New York Cnty. 2004) (rejecting reformation of unambiguous will sought to qualify as supplemental needs trust). These cases go well beyond the usual uses of reformation, and proceed on somewhat the same basis as cases reforming, or modifying to use a less loaded term, trusts in order to accomplish tax objectives. The close link between the reformations in these two circumstances is described in *Longhine, supra*:

Here, in cases involving a SNT and Medicaid or other public benefit planning, courts have created a presumptive intent on the part of the testator or donor to take advantage of public benefits or funds available as the primary means of providing for the care of a disabled individual. (*Matter of Shah*, 95 N.Y.2d 148 [2000]; *Matter of Escher*, 94 Misc.2d 952 [Sur Ct, Bronx County 1978], *aff'd* 75 A.D.2d 531, *aff'd* 52 N.Y.2d 1006 [1981]).

This common-sense presumption is similar to the presumption that a testator will desire to reduce taxes to the greatest extent possible. (*Matter of Kamp*, 7 Misc.3d at 620 citing *Matter of Choate*, 141 Misc.2d 489 [Sur Ct, N.Y. County 1988]).

III. DISCUSSION.

The NYUTC-LAG agrees with the 6th Report that courts should be empowered to “modify” trusts to accomplish a settlor’s tax objectives (and that the modification may have retroactive effect, albeit federal law will determine the efficacy of the retroactive modification). Modification, which is a less demanding standard than reformation under section 7-A-4.15, appropriately facilitates accomplishment of tax objectives unless a court concludes that by a preponderance of the evidence that the modification would be contrary to the settlor’s probable intent.

In light of cases “reforming” trusts in order to create supplemental needs trusts, the NYUTC-LAG decided to expand a court’s authority to “modify” a trust to accomplish a settlor’s supplemental needs trust objectives. However, modification (including a court’s decision that the modification will have retroactive effect) would not be available if the preponderance of the evidence shows that such modification would be contrary to the settlor’s probable intention.

I. SECTION 7-A-4.17. COMBINATION AND DIVISION OF TRUSTS.

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

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

(c) **Unless the court otherwise directs, the trusts established under this section by the division of an existing trust shall be deemed to have been created as of the date the divided trust was created; provided that the separate trusts created under paragraph (a) of this section may be deemed created upon the date or dates provided in the instrument or instruments required by paragraph (g) of this section.**

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

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

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

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

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

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

(hj) Unless the terms of the trust that is **divided into separate trusts** 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. PRESENT NEW YORK 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. Subparagraph (1) of 7-1.13(a) allows the trustee to divide a trust to accomplish certain tax related ends “without prior court approval or the consent of the persons interested”; subparagraph (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 subparagraph (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.

III. DISCUSSION.

The NYUTC-LAG agrees that EPTL 7-A-4.17 should be enacted into law and that EPTL 7-1.13 be repealed. However, on review the Reporters determined that additional provisions from EPTL 7-1.13 should be included in 7-A-4.17 in addition to paragraph (j) which was added to this section by the 6th Report as paragraph (b).

The section would liberalize existing New York state law 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 (but not combine trusts) 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 trusts created by the division. Section 7-A-4.17 would provide trustees with greater flexibility while still protecting qualified beneficiaries with the requirement that they be notified of any division or combination of trusts.

As already noted, the Reporters determined that additional provisions of EPTL 7-1.13 should be included in 7-A-4.17.³³ The Reporters further believe that many of these additional provisions should also apply when trusts are to be combined. Consistent with the overall approach in Article 7-A, the Reporters believe “qualified beneficiaries” should be substituted in section 7-A-4.17 for “all persons interested in the trust,” which is used in EPTL 7-1.13.

EPTL 7-1.13(a)(3) is included as paragraph (b), which also applies when trusts are sought to be combined. The Reporters believe that the statute should expressly give the trustee (or

³³ Although the 6th Report recommended repeal of EPTL 7-1.17, it provided that “no inference is to be drawn by reason of the failure to include in this new section provisions contained in EPTL 7-1.13.”

qualified beneficiary) seeking to divide a trust or combine trusts the option of doing so by court order or decree after a fully noticed proceeding.

EPTL 7-1.13(b) is included, with modifications, as paragraph (c). New paragraph (d) deals with combination of trusts and allows the trustee to select the date on which the new trust is created, subject to the court directing otherwise.

EPTL 7-1.13(d) is included, with modifications, as paragraph (e). This section requires that the division of the property of the original trust shall be fairly representative of appreciation and depreciation of the property. The existing provision carves out exceptions when two or more persons have contributed property to the trust to be divided or one person has contributed property at two more different times. In those situations, the division may be made by tracing property to the original contribution. These exceptions will be preserved in a new paragraph (f).

The Reporters believe that the statute should include rules governing the creation of the trust instruments setting forth the terms of the new trusts resulting from the division of a trust or the combination of separate trusts under this section. Paragraph (g) carries forward the provisions of EPTL 7-1.13(c), modified to reflect the authority to combine trusts that is included in section 7-A-4.17 but not in EPTL 7-1.13. In addition, the filing requirement has been modified to reflect the fact that the authority granted to trustees under this section is not limited to testamentary trusts but includes trustees of lifetime trusts as well. If the trustee proceeds under section 7-A-4.17(b) the division of the trust will be the subject of a court proceeding and a court will indeed have jurisdiction over the trust. If, however, the trustee of a lifetime trust or trusts proceeds under section 7-A-4.17(a) it is possible that no court has ever taken jurisdiction of the trust and section 7-A-4.17(d) therefore incorporates the language of EPTL 10-6.6(j)(6) which dispenses with filing the instrument exercising the decanting power by the trustee of a lifetime trust which has never been the subject of a court proceeding.

The Reporters believe that the provisions of EPTL 7-1.13(g) should be included as paragraph (h) in order to make sure that there is clear authority to act under this section for tax-related reasons.

EPTL 7-1.13(k) is included as paragraph (i) to clarify that a trustee's authority to make a division in order to administer one of the new trusts as a unitrust and the other under the traditional principal and income regime is included in the authority granted in this section unless its exercise is expressly prohibited by the terms of the original trust.

. The NYUTC-LAG agrees that Paragraph (j), which was added as paragraph (b) by the 6th Report, should be enacted.

~~I. SECTION 7-A-4.18. EXERCISE OF A POWER OF APPOINTMENT; EFFECT WHEN MORE EXTENSIVE OR LESS EXTENSIVE THAN AUTHORIZED; TRUSTEE'S AUTHORITY TO INVADE PRINCIPAL IN TRUST.~~

~~—— (a) An exercise of a power of appointment is not void because its exercise is:~~

~~————— (1) More extensive than was authorized but is valid to the extent authorized by the instrument creating the power.~~

~~————— (2) Less extensive than authorized by the instrument creating the power, unless the donor has manifested a contrary intention.~~

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

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

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

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

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

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

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

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

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

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

~~————— (d) An exercise of the power to invade trust principal under paragraphs (b) and (c) of this section shall be considered the exercise of a special power of appointment as defined in section 10-3.2 of the Estates, Powers and Trusts Law.~~

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

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

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

~~————— (h) An authorized trustee exercising the power under this section has a fiduciary duty to exercise the power in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under the prevailing circumstances. The authorized trustee may not exercise the power under this section if there is substantial evidence of a contrary intent of the creator and it cannot be established that the creator would be likely to have changed such intention under the circumstances existing at the time of the exercise of the power. The provisions of the invaded trust alone are not to be viewed as substantial evidence of a contrary intent of the creator unless the invaded trust expressly prohibits the exercise of the power in the manner intended by the authorized trustee.~~

~~————— (i) Unless the authorized trustee provides otherwise:~~

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

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

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

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

~~————— (2) A copy of the instrument exercising the power and a copy of each of the invaded trust and the appointed trust shall be delivered (A) to the creator, if living, of the invaded trust,~~

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

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

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

_____ (5) The receipt of a copy of the instrument exercising the power shall not affect the right of any person interested in the invaded trust to compel the authorized trustee who exercised the power of appointment pursuant to paragraph (b) or (c) of this section to account for such exercise and shall not foreclose any such interested person from objecting to an account or compelling a trustee to account.

_____ (6) A copy of the instrument exercising the power shall be kept with the records of the invaded trust and the original shall be filed in the court having jurisdiction over the invaded trust. Where a trustee of an inter vivos trust exercises the power and the trust has not been the subject of a proceeding in the surrogate's court, no filing is required.

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

_____ (1) Nothing in this section is intended to create or imply a duty to exercise a power to invade principal, and no inference of impropriety shall be made as a result of an authorized trustee not exercising the power conferred under paragraph (b) or (c) of this section.

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

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

_____ (1) To reduce, limit or modify any beneficiary's current right to a mandatory distribution of income or principal, a mandatory annuity or unitrust interest, a right to withdraw a percentage of the value of the trust or a right to withdraw a specified dollar amount, provided that such mandatory right has come into effect with respect to the beneficiary. Notwithstanding the foregoing, but subject to the other limitations in this section, an authorized trustee may exercise a power authorized by paragraph (b) or (c) of this section to appoint to an appointed trust that is a supplemental needs trust that conforms to the provisions of section 7-1.12 of the Estates, Powers and Trusts Law;

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

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

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

~~————— (5) To jeopardize (A) the deduction or exclusion originally claimed with respect to any contribution to the invaded trust that qualified for the annual exclusion under section 2503(b) of the Internal Revenue Code, the marital deduction under section 2056(a) or 2523(a) of the Internal Revenue Code, or the charitable deduction under section 170(a), 642(c), 2055(a) or 2522(a) of the Internal Revenue Code, (B) the qualification of a transfer as a direct skip under section 2642(c) of the Internal Revenue Code, or (C) any other specific tax benefit for which a contribution originally qualified for income, gift, estate, or generation skipping transfer tax purposes under the Internal Revenue Code.~~

~~————— (o) An authorized trustee shall consider the tax implications of the exercise of the power under paragraph (b) or (c) of this section.~~

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

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

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

~~————— (r) Unless the invaded trust expressly provides otherwise, this section applies to:~~

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

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

~~————— (s) For purposes of this section:~~

~~————— (1) The term “appointed trust” means an irrevocable trust which receives principal from an invaded trust under paragraph (b) or (c) of this section including a new trust created by the creator of the invaded trust or by the trustees, in that capacity, of the invaded trust. For purposes of creating the new trust, any requirement that the instrument be signed by the creator shall be deemed satisfied by the signature of the trustee of the appointed trust.~~

~~————— (2) The term “authorized trustee” means, as to an invaded trust, any trustee or trustees with authority to pay trust principal to or for one or more current beneficiaries other than (i) the creator, or (ii) a beneficiary to whom income or principal must be paid currently or in the future,~~

or who is or will become eligible to receive a distribution of income or principal in the discretion of the trustee (other than by the exercise of a power of appointment held in a non-fiduciary capacity).

_____ (3) References to sections of the “Internal Revenue Code” refer to the United States Internal Revenue Code of 1986, as amended from time to time, or to corresponding provisions of subsequent internal revenue laws, and also refer to corresponding provisions of state law.

_____ (4) The term “current beneficiary or beneficiaries” means the person or persons (or as to a class, any person or persons who are or will become members of such class) to whom the trustees may distribute principal at the time of the exercise of the power.

_____ (5) The term “invade” shall mean the power to pay directly to the beneficiary of a trust or make application for the benefit of the beneficiary.

_____ (6) The term “invaded trust” means any existing irrevocable intervivos or testamentary trust whose principal is appointed under paragraph (b) or (c) of this section.

_____ (7) The term “person or persons interested in the invaded trust” shall mean any person or persons upon whom service of process would be required in a proceeding for the judicial settlement of the account of the trustee, taking into account section 315 of the Surrogate’s Court Procedure Act.

_____ (8) The term “principal” shall include the income of the trust at the time of the exercise of the power that is not currently required to be distributed, including accrued and accumulated income.

_____ (9) The term “unlimited discretion” means the unlimited right to distribute principal that is not modified in any manner. A power to pay principal that includes words such as best interests, welfare, comfort, or happiness shall not be considered a limitation or modification of the right to distribute principal.

II. PRESENT NEW YORK LAW.

New York’s decanting statute is provided in EPTL 10-6.6(b)-(t).

III. DISCUSSION.

The Reporters believe that EPTL 10-6.6 (b)-(t) should be included in Part 8 of the Code dealing with duties and powers of trustees. It will appear there as section 7-A-8.19. EPTL 10-6.6(a), as set forth in the 6th Report as section 7-A-4.18(a), will not be included and will remain in Article 10, because it does not relate to decanting.

PART 4A BANK ACCOUNTS IN TRUST FORM

SUMMARY OF PART

§ 7-A-4A.1. Definitions.

§ 7-A-4A.2. Terms of a trust account.

§ 7-A-4A.3. Payment to beneficiary.

§ 7-A-4A.4. Effect of payment.

§ 7-A-4A.5. Rights not affected.

§ 7-A-4A.6. Joint depositors.

§ 7-A-4A.7. Multiple beneficiaries.

§ 7-A-4A.8. Application.

§ 7-A-4A.1. DEFINITIONS.

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

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

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

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

§ 7-A-4A.2. TERMS OF A TRUST ACCOUNT.

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

(1) The trust can be revoked, terminated or modified by the depositor during his lifetime only by means of, and to the extent of, withdrawals from or charges against the

trust account made or authorized by the depositor or by a writing which specifically names the beneficiary and the financial institution. The writing shall be acknowledged or proved in the manner required to entitle conveyances of real property to be recorded, and shall be filed with the financial institution wherein the account is maintained.

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

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

(4) If the beneficiary survives the depositor, and the depositor's will contains no provision revoking, terminating or modifying the trust account under paragraph two, the trust shall terminate and title to the funds shall vest in the beneficiary free and clear of the trust.

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

§ 7-A-4A.3. PAYMENT TO BENEFICIARY.

(a) If the beneficiary survives the depositor under the circumstances provided in paragraph four of section 7-A-4A.2, the funds shall be paid to the beneficiary upon his order, if, at the time of his demand for payment of all or part of the funds, he is eighteen or more years of age.

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

§ 7-A-4A.4. EFFECT OF PAYMENT.

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

§ 7-A-4A.5. RIGHTS NOT AFFECTED.

This part does not affect:

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

§ 7-A-4A.6. JOINT DEPOSITORS.

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

§ 7-A-4A.7. MULTIPLE BENEFICIARIES.

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

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

§ 7-A-4A.8. APPLICATION.

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

PART 5

**CREDITOR'S CLAIMS; RIGHTS OF BENEFICIARIES AND CREDITORS;
SPENDTHRIFT AND DISCRETIONARY TRUSTS**

SUMMARY OF PART

- § 7-A-5.1. ~~Beneficiary's Creditor or Assignee. When Trust Interest Inalienable; Exceptions.~~**
- § 7-A-5.2. ~~Spendthrift Provisions~~When Trust Principal Interest Inalienable.**
- § 7-A-5.2-A When proceeds of Life Insurance Policy Inalienable.**
- § 7-A-5.3. Special Creditor Exceptions to Restraints on Involuntary Alienation.**
- § 7-A-5.4.3. Discretionary Trusts; Effect of Standard.**
- § 7-A-5.5.4. ~~Creditor's Claim against Settlor~~ Trust Contributor to a Revocable Trust.**
- § 7-A-5.5-A. Creditor Claims to Contribution of Property by Trust Beneficiary.**
- § 7-A-5.6.5. ~~Overdue Distribution.~~**
- § 7-A-5.7.6 Personal Obligations of Trustee.**

**I. SECTION 7-A-5.1. RIGHTS OF BENEFICIARY'S CREDITOR OR ASSIGNEE
WHEN TRUST INCOME INTEREST INALIENABLE; EXCEPTIONS.**

~~(a) Notwithstanding any law to the contrary, a discretionary interest in a trust is neither a property right nor an enforceable right.~~

~~(b) Whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if:~~

~~(1) the discretion is expressed in the form of a standard of distribution; or~~

~~(2) the trustee has abused the discretion.~~

(a) The right of a beneficiary a trust to receive income from property and apply it to the use of or pay it to any person may not be transferred by assignment or otherwise unless a

power to transfer such right, or any part thereof, is conferred upon such beneficiary by the instrument creating or declaring the trust. The preceding sentence shall not apply to a beneficiary's income interest with respect to property attributable to that trust beneficiary, or to proceeds of a life insurance policy as provided in section 7-A-5.2-A.

(b) Notwithstanding paragraph (a):

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

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

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

(4) The provisions of this paragraph do not apply to sections 7-A-5.3 and 7-A-5.2-A.

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

(d) The beneficiary of an express trust to receive the income from property and apply it to the use of or pay it to any person is not precluded by anything contained in this section from transferring or assigning any part or all of such income to or for the benefit of persons whom the beneficiary is legally obligated to support.

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

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

II. PRESENT NEW YORK LAW.

Voluntary alienation of income interest

As provided in EPTL 7-1.5, which is set forth in substance as section 7-A-5.1, the general rule in New York is that the income interest of a trust beneficiary is not assignable, subject to the following exceptions:

1. The testator expressly created a right of assignment by the income beneficiary.

2. The income beneficiary of a trust may in any event gratuitously assign all income payable to him, in excess of \$10,000 annually, to certain members of the assignor's family or certain fiduciaries of such persons for the entire or a lesser period, during which the beneficiary is entitled to the income. The transferee may further assign his interest to the same limited group of family members provided it is without consideration. Upon the death of the transferee, the future assigned income is subject to disposition by will or intestacy as an asset of the transferee's estate.
3. All or part of the trust income may be assigned to, or for the benefit of, persons whom the income beneficiary is legally obligated to support.

A settlor can change these default rules. For example, a settlor could bar all voluntary assignments.

Note on Annuities and Unitrusts

Annuities have been held not subject to the anti-alienation rules on the basis that the source of payment is not limited to income. *See Matter of Fowler*, 263 A.D. 255 (3d Dep't 1942), *aff'd*, 288 N.Y. 697 (1942) (predecessor section). By extension, the same should generally apply for unitrusts, i.e., unitrust interests are alienable under the general rule of EPTL 7-1.5(a). However, if the unitrust amount under EPTL 11-2.4, is treated as the right to receive income for purposes of EPTL 7-1.5, the general bar of EPTL 7-1.5(a)(1) would be applicable.

Note of life insurance trusts

EPTL 7-5.1(a)(2) provides a different default rule for certain life insurance policies held in trust or otherwise by agreement: alienation is allowed as the default.

Rules for Involuntary alienation

Creditors' rights involving trust income interests are generally provided under the CPLR as follows:

CPLR 5201. Debt or property subject to enforcement; proper garnishee

(a) Debt against which a money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.

(b) Property against which a money judgment may be enforced. A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment. A money judgment entered upon a joint liability of two or more persons may be enforced against individual property of those persons summoned and joint property of such persons with any other persons against whom the judgment is entered.

CPLR 5205. Personal property exempt from application to the satisfaction of money judgments

(d) Income exemptions. The following personal property is exempt from application to the satisfaction of a money judgment, except such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents:

1. ninety per cent of the income or other payments from a trust the principal of which is exempt under subdivision (c); provided, however, that with respect to any income or payments made from trusts, custodial accounts, annuities, insurance contracts, monies, assets or interest established as part of an individual retirement account plan or as part of a Keogh (HR-10), retirement or other plan described in paragraph two of subdivision (c) of this section, the exception in this subdivision for such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents shall not apply, and the ninety percent exclusion of this paragraph shall become a one hundred percent exclusion;

Creditors can rely on CPLR 5226 to secure payment on an installment basis of excess trust income.

In addition, EPTL 7-3.4, which overlaps with CPLR 5205(d), provides as follows:

EPTL 7-3.4 Excess income from trust property subject to creditors' claims

Where a trust is created to receive the income from property and no valid direction for accumulation is given, the income in excess of the sum necessary for the education and support of the beneficiary is subject to the claims of his creditors in the same manner as other property which cannot be reached by execution.

A significant difference between EPTL 7-3.4 and CPLR 5205(d)(1) is that under EPTL 7-3.4, excess income is based on the beneficiary's station in life so that there may be no excess if the beneficiary is wealthy and enjoying a very comfortable station in life. Since CPLR 5205(d)(1) only exempts reasonable amounts, EPTL 7-3.4 has been rendered functionally obsolete for wealthy beneficiaries. Under EPTL 7-3.4, a judgment debtor's station in life must be considered thereby giving the creditor less ability to reach the income beneficiary's income interest than under CPLR 5205(d)(1). Also, EPTL 7-3.4 applies only if the creditor's legal remedies are exhausted.

The rules for special creditors are provided under section 7-A-5.3.

III. DISCUSSION.

The basic issue regarding voluntary alienation of an income interest is what should be the default rule. A strong argument can be made that the default rule should allow voluntary alienation by the income beneficiary, which would honor the freedom of alienation. Indeed, this

is the default rule in the UTC and in virtually every other non-UTC state in this country. *See* Restatement (Third) of Trusts § 51 and comment (a) thereto. The Estate Planning Subcommittee believes that the default rule should be voluntary alienation by a trust beneficiary.

On the other hand, New York has always treated rules for voluntary assignment in a unique way. New York's current default rule prohibits voluntary alienation other than in certain gratuitous situations. After much reflection and discussion at City Bar meetings and at TELS Roundtable, the Reporters have been persuaded to follow the 6th Report: New York's current rule under EPTL 7-1.5 should be continued. Indeed, one might argue that the default rule is what a settlor would have in mind when creating a trust. Moreover, continuation of New York's rule will prevent two sets of rules applying depending on when a trust was created.

Paragraphs (a)–(c) essentially continue EPTL 7-1.5, albeit with the exception for self-settled trusts, and for life insurance proceeds trusts which are separately provided in section 7-A-5.2-A.

Paragraph (d) makes clear that the effect of a voluntary assignment or transmission of a beneficiary's interest is that the assignee or successor in interest becomes a beneficiary.

Paragraph (e) provides New York's makes clear that New York has mandatory rules on involuntary alienation. In effect, limiting the rights of creditors to reach income interests cannot be altered by the settlor. For example, a trust provision that bars creditors from reaching an income interest cannot override New York's 10% rule under CPLR § 5205(d).

The Estate Planning Subcommittee agrees with the 6th Report that EPTL 7-3.4 be repealed as unnecessary.

I. SECTION 7-A-5.2. SPENDTHRIFT PROVISIONS WHEN TRUST PRINCIPAL INTEREST INALIENABLE.

~~—— (a) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.~~

~~—— (b) A term of a trust providing that the interest of a beneficiary is held subject to a "spendthrift trust," or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.~~

~~(c) All interests in a trust (whether an interest in income or principal) shall be conclusively deemed to be subject to a valid spendthrift provision unless the terms of the trust provide that the interest: (i) may be the subject of a voluntary transfer; or (ii) may be the subject of an involuntary transfer.~~

~~(d) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision (whether it is explicitly included in the terms of a trust or deemed to be included by reason of the default rule contained in subsection (c)) and, except as otherwise provided in subsection (e) of this section or section 5205 of the Civil Practice Law and Rules, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.~~

~~(e) Notwithstanding any provision to the contrary in this section, a beneficiary may make a transfer in accordance with subsections (b),(c) and/or (d) of section 7-1.5 of the Estates, Powers and Trusts Law.~~

~~(f) This section shall be effective with respect to trusts created after the date it was enacted.~~

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

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

(c) Whenever a trust is created,

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

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

II. PRESENT NEW YORK LAW.

Voluntary alienation of principal interest

The default rule in New York is that the principal interest may be spendthrifted. *See Matter of Vought*, 25 N.Y.2d 163 (1969). In effect, the settlor must provide that the principal interest be spendthrifted, as was the case in *Matter of Vought*. Otherwise the principal interest is freely alienable.

CPLR 5205. Personal property exempt from application to the satisfaction of money judgments

(c) Trust exemption.

1. Except as provided in paragraphs four and five of this paragraph, all property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor, is exempt from application to the satisfaction of a money judgment.

Involuntary alienation of principal interest

CPLR 5205. Personal property exempt from application to the satisfaction of money judgments

(c) Trust exemption.

1. Except as provided in paragraphs four and five of this paragraph [minor exceptions for QDROs and fraudulent conveyances], all property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor, is exempt from application to the satisfaction of a money judgment.

2-3 [Provide exemptions similar for retirement benefits similar to EPTL 7-3.1]

The default rule is that a creditor may reach a principal beneficiary's entire interest in trust. *See In re Dolard*, 275 F. Supp. 1001 (C.D. Cal. 1967); *Sherman v. Kirshman*, 261 F. Supp. 858 (S.D.N.Y. 1966). As explained in *Sherman v. Kirshman*:

New York Civil Practice Law and Rules, Sec. 5205(d) (now (c)) precludes a creditor from reaching and disrupting trust assets in order to satisfy a judgment of record. However, this does not prevent a judgment creditor from seizing the beneficiary's remainder interest under the trust. *See Bergmann v. Lord*, 194 N.Y. 70, 86 N.E. 828 (1908); *Matter of Owen's Estate*, 44 Misc.2d 842, 254 N.Y.S.2d 974 (1964); *Carolan v. U.S. Trust Co.*, June 29, 1966 N.Y.L.J., p. 9 Colo. 6-7 (Sup.Ct.1966); 2 Scott, Trusts, 1966 Supplement, sec. 155, pp. 40-41. Respondent trustee is directed to execute and deliver to plaintiff a recordable instrument wherein acknowledgment is made of the seizure and assigning defendant's remainder interest under the trust to plaintiff.

There is also authority that a creditor may reach the trust principal when the trust terminates on the basis that the CPLR 5205(c) exemption no longer applies. *See Laborers Union Local 1298 v. Frank L. Lyon & Sons, Inc.*, 66 Misc. 2d 1042, 323 N.Y.S.2d 229 (Sup. Ct. Nassau Cnty. 1971); *Matter of Owen*, 44 Misc. 2d 842, 254 N.Y.S.2d 974 (Sur. Ct. New York Cnty. 1964). As explained (Weinstein, Korn & Miller, New York CPLR Practice P 5205.22 (LexisNexis Matthew Bender):

The protection afforded by CPLR 5205(c) is effective only as to those portions of the principal remaining in the trust. Any portion of the principal that is distributed falls under the protection of CPLR 5205(d)(1) and is 90% exempt. If, however, the distribution exhausts the principal, the exempt trust ceases to exist, and the entire distribution will be subject to enforcement by judgment creditors. This result occurs because the remainder interest in the corpus of a trust is assignable and transferable under EPTL 7-1.5; thus such interest may be reached by creditors under CPLR 5201(b).

CPLR 5205(d)(1) is not limited to income. Annuities in trusts and unitrust interests can be subject to the rights of general creditors at least to the extent of 10% of the payment. Because EPTL 7-3.4 applies only to trust income, it would not appear applicable to annuities in trusts or unitrusts. However, it might apply to unitrust amounts under the statutory unitrust regime of EPTL 11-2.4. CPLR 5205(d)(1) can also apply to discretionary distributions. *See the discussion of Present New York Law under section Proposed section 7-A-5.4.*

The rules for special creditors are provided under section 7-A-5.3.

Creditors' rights are provided by law, including CPLR 5201(b), 5205(c)(1), and 5205(d)(1), which are set forth and discussed under section 7-A-5.1. New York case law provides exceptions for certain special creditors.

III. DISCUSSION.

The basic issue regarding voluntary alienation of a principal interest is what should be the default rule. A strong argument can be made that the default rule should allow voluntary alienation by the principal beneficiary, which would honor the freedom of alienation. Indeed, this is the current default rule in New York. The Estate Planning Subcommittee thought that the default rule should be voluntary alienation by a trust beneficiary.

After much reflection and discussion at City Bar meetings and at TELS Roundtable, the Reporters have been persuaded to follow the 6th Report³⁴: The default rule should be that the

³⁴ This rule is in Section 7-A-5.2(c) as proposed by the 6th Report. The Discussion of the definition of "Spendthrift Provision" explains why paragraphs (a) and (b) of section 7-A-5.2(c) as proposed by the 6th Report were rejected by the Reporters.

principal interest may not be alienated based on the argument that this is the default rule that a settlor would have in mind when creating a trust.

Unfortunately, two sets of rules are necessary as the current default rule that allows voluntary alienation cannot be retroactively changed. Paragraph (a)(1) thus continues existing New York law for preexisting trusts. For trusts created on or after the effective date of this Article, Paragraph (a)(2) reverses the default rule: the principal interest cannot be voluntarily alienated.

Paragraph (b) makes clear that the effect of a voluntary assignment or transmission of a beneficiary's principal interest is that the assignee or successor in interest becomes a beneficiary.

Paragraph (c) makes clear that New York has mandatory rules on involuntary alienation. In effect, limiting the rights of creditors to reach principal interests cannot be altered by the settlor. For example, a trust provision that bars creditors from reaching a distribution to the principal beneficiary cannot override New York's 10% rule under CPLR § 5205(d).

I. SECTION 7-A-5.2-A WHEN PROCEEDS OF LIFE INSURANCE POLICY INALIENABLE.

The proceeds of a life insurance policy which, under a trust or other agreement, are upon the death of the insured left with the insurance company may not be (a) transferred, (b) subject to commutation or encumbrance or (c) subject to legal process except in an action for necessities, if provisions to such effect were incorporated in such trust or other agreement.

II. PRESENT NEW YORK LAW.

EPTL 7-1.5(a)(2) is identical to the language in Section 7-A-5.2-A.

III. DISCUSSION.

The Reporters thought it best to separate this rule for life insurance from the rule from Sections 7-A-5.1 and 7-A-5.2.

I. SECTION 7-A-5.3. SPECIAL CREDITOR EXCEPTIONS TO RESTRAINTS ON INVOLUNTARY ALIENATION.

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

(b) A spendthrift provision is unenforceable against:

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

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

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

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

II. PRESENT NEW YORK LAW.

Article 52 of the CPLR, including CPLR 5205(c) and CPLR 5241, and case law provide New York's current rules for special creditors.

Rights of spouses, former spouses and child support claimants

CPLR 5205(c) provides in part as follows:

CPLR 5205. Personal property exempt from application to the satisfaction of money judgments

(c) Trust exemption.

1. Except as provided in paragraphs four and five of this subdivision, all property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor, is exempt from application to the satisfaction of a money judgment.

4. This subdivision shall not impair any rights an individual has under a qualified domestic relations order as that term is defined in section 414(p) of the United States Internal Revenue Code of 1986, as amended or under any order of support, alimony or maintenance of any court of competent jurisdiction to enforce arrears/past due support whether or not such arrears/past due support have been reduced to a money judgment.

CPLR 5241 provides for income execution for support enforcement.

In Matter of Smith v. ABC Co. Inc. 2005 N.Y. Misc. LEXIS 3467 (Fam Ct. 2005), CPLR § 5241 was held applicable to trust income.

In *Matter of Chusid*, 60 Misc. 2d 462 (Sur. Ct. 1969), dependent children were allowed to receive distributions of trust principal to their father even though they had not established their claim as creditors in another forum.

Creditor rights if necessities furnished.

New York law allows creditors who furnished necessities to beneficiaries to reach their interest. *See Sherman v. Skuse*, 166 N.Y. 345 (1901); *Matter of Berrien*, 147 Misc. 788 (Sur. Ct. 1933). *See also* Mental Hygiene Law § 43.03(a) (fiduciary liable for services provided patient in mental hygiene facility).

Matter of Escher, 52 N.Y.2d 1006 (1981), EPTL 7-1.12(SNTs) and Medicaid regulations may limit creditor relief.

EPTL 7-3.5 is designed to assist creditors who furnished necessities to obtain redress:

EPTL 7-3.5. Rights of creditors to obtain information concerning beneficiaries

(a) Any person who has furnished necessities to a beneficiary of any trust may apply to the court having jurisdiction of the trust for an order directing the trustee thereof to furnish to the applicant the true and full name and residence address of any such beneficiary. As used in this section, the term "necessaries" means goods furnished and services performed suitable to the condition in life of the person to whom they are furnished or for whose benefit they are performed, and which meet his actual needs at the time such necessities are provided.

(b) The application shall be made by a verified petition which states (1) the name and address of petitioner, (2) the nature and extent of the necessities provided, (3) the person by whom and the circumstances under which they were provided, (4) the amount of the indebtedness claimed to exist, (5) the name of the person to whom or for whose benefit such necessities were provided, (6) a description of the trust of which the person to whom such necessities were provided is a beneficiary and (7) the name of the trustee administering such trust.

(c) Such petition shall also show the efforts made by the petitioner to locate the beneficiary and that more than ten days have elapsed since petitioner requested in writing that the trustee furnish

the address of any such beneficiary. The petition may contain such other information as is relevant to the inquiry.

(d) The proceeding may be initiated by citation or order to show cause served on the trustee personally or in such manner and at such time as the court may direct. A copy of the petition shall be served with the process.

(e) Upon the return of the process the court, if satisfied that the allegations of the petition are true and that the petitioner is entitled to the relief sought, may make an order directing the trustee to furnish to petitioner the true and full name and residence address of any beneficiary to whom necessities were provided. The order may fix the time within which such name and address shall be furnished. Failure to comply with an order so made shall be punishable as a contempt of court.

Creditor rights if beneficiary's interest is protected or enforced

New York law allows creditors who rendered services to protect or enforce beneficiary rights to reach beneficiary's interest. *See Williams v. Bischoff*, 187 N.Y. 286 (1907); *Vorhaus v. Blair*, 14 Misc.2d 543 (Sup. Ct. 1958)

Governmental claims

Where a federal tax statute gives the United States Government a lien on all the property of an individual, state exemption statutes are inapplicable and the Government may reach the entire interest of the income beneficiary subject to the prior lien of judgment creditors. In *Matter of Rosenberg*, 269 N.Y. 247, 251, 199 N.E. 206, 207 (1935), the court found:

However that may be, it is certain that no policy of this State may interfere with the power of Congress to levy and collect taxes on income. (*Burnet v. Harmel*, 287 U.S. 103, 110; *United States v. Snyder*, 149 U.S. 210, 214.) Cases where State exemptions have been applied to the collection of judgments in favor of the United States have been in every instance predicated on the statutory adoption of State exemptions. (*Fink v. O'Neil*, 106 U.S. 272; *Custer v. McCutcheon*, 283 U.S. 514.)

Note on Governmental Claims:

The exception for governmental claims need not be limited to taxes if a federal or state statute so provides. Indeed, the spendthrift override result can obtain for non-governmental claims if provided by statute.

III. DISCUSSION.

The Estate Planning Subcommittee disagrees with the 6th Report's rejection of this section, preferring instead to provide statutory guidance on the rights of special creditors consistent with current New York law. The Reporters have attempted to provide these exceptions. Paragraph (c) confirms that other applicable law may apply. *See, e.g.*, Mental Hygiene Law § 43.03(a) and *Matter of Chusid*, 60 Misc. 2d 462 (Sur. Ct. 1969).

EPTL 7-3.5 should be repealed as obsolete.

**I. SECTION EPTL 7-A.5.43: DISCRETIONARY TRUSTS; EFFECT OF
STANDARD.**

~~(a) Notwithstanding any law to the contrary, a discretionary interest in a trust is neither a property right nor an enforceable right.~~

~~(b) Whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if:~~

~~(1) the discretion is expressed in the form of a standard of distribution; or~~

~~(2) the trustee has abused the discretion.³⁵~~

~~If the trustee's or co-trustee's discretion to make distributions for the trustee's or co-trustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest.~~

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

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

³⁵ This deleted language is contained in the 6th Report under Proposed 7-A-5.1.

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

II. PRESENT NEW YORK LAW.

Regarding paragraph (a), and the right of a beneficiary to assign a discretionary interest, there do not appear to be any case law on the issue.

Regarding paragraph (b) and the claims of creditors to discretionary trust interests, *Vanderbilt Credit Corp v. Chase Manhattan Bank, N.A.*, 473 N.Y.S.2d 242, 246 (App. Div. 2d Dep't 1984) explained as follows:

Where there is a discretionary trust, the law is clear that a creditor of a beneficiary, who is not the settlor, cannot compel the trustee to pay any part of the income or principal to the beneficiary (see *Matter of Sand v Beach*, 270 NY 281; *Hamilton v Drogo*, 241 NY 401; *Matter of Duncan*, 80 Misc. 2d 32; *Matter of Owen*, 44 Misc. 2d 842; 2 Scott, Trusts [3d ed], § 155). However, once the trustee determines to make a distribution, creditors can generally reach 10% of the payment based on CPLR 5205(d)(1). See *Matter of Sand v Beach*, 270 NY 281 [1936] and *Hamilton v Drogo*, 241 NY 401 [1926].

Regarding paragraph (c), the rights of beneficiaries to seek redress when a trustee has abused its discretion is well-established. See, e.g., *Kemp v. Peterson*, 6 N.Y.2d 40 (1961).

III. DISCUSSION.

The Estate Planning Subcommittee believes that a trust beneficiary should not be permitted to assign his or her discretionary trust interest because the settlor intended the beneficiary, not an assignee, to be the permissible recipient. Paragraph (a) is to that effect. However, the discretionary trust beneficiary should be able to sue the trustee for abusing trustee discretion or failing to properly comply with a standard for distribution as provided in paragraph (c).

Pursuant to paragraph (b), New York law on creditors' rights is continued. As such, the Estate Planning Subcommittee disagrees with the 6th Report's provision to bar creditors from reaching a beneficial interest where the trustee can distribute property to himself or herself, subject to an ascertainable standard. Article 52 of the CPLR provides rules for creditors' rights, including CPLR 5205(c), which would generally bar creditors from reaching trust property, whether or not a standard was imposed, unless the debtor contributed the property. Section 7-A-5.5-A addresses creditors' rights and would apply if the debtor as trustee had discretionary interests in his or her favor.

I. SECTION 7-A-5.5. CREDITOR'S CLAIM AGAINST SETTLOR TRUST CONTRIBUTOR TO A REVOCABLE TRUST.

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

(1) During the lifetime of the ~~settlor~~ **trust contributor**, the property of a trust **over which the trust contributor has the power to revoke** is subject to claims of the ~~settlor's trust contributor's~~ **trust contributor's** creditors.

~~(2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount under the terms of the trust (including any standard contained in the trust) that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.~~

(23) After the death of a **trust contributor settlor**, and subject to the ~~settlor's trust contributor's~~ **trust contributor's** right to direct the source from which liabilities will be paid, the property of a trust over which ~~at immediately before the trust contributor's settlor's death~~ **the trust contributor has the power to revoke** is subject to claims of the ~~settlor's trust contributor's~~ **trust contributor's** creditors, costs of administration of the ~~settlor's trust contributor's~~ **trust contributor's** estate, and the expenses of the ~~settlor's trust contributor's~~ **trust contributor's** funeral and disposal of remains, ~~and statutory exemptions pursuant to section 5-3.1 of the Estates, Powers and Trusts Law~~ to the extent the settlor's probate estate is inadequate to satisfy **those claims, costs, and expenses**.

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

~~(b) For purposes of this section:~~

~~———— (1) during the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and~~

~~(2)(b) Upon the lapse, release, or waiver of the power of withdrawal, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, or section 2503(b) of the Internal Revenue Code of 1986, in each case as in effect on [the effective date of this [Code] [Article]] [, or as later amended].~~

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

II. PRESENT NEW YORK LAW.

EPTL 10-10.6 provides as follows:

10-10.6 Effect of reserved unqualified power to revoke

Where a creator reserves an unqualified power of revocation, he remains the absolute owner of the property disposed of so far as the rights of his creditors or purchasers are concerned.

Based on EPTL 13-3.6, a revocable trust that was intended to defraud creditors may be set aside and the property used to pay estate obligations. *See Matter of Granwell*, 20 N.Y.2d 91 (1967).

A power to revoke is not a power of appointment. *See* EPTL 10-3.1(b).

A power of withdrawal is not excluded as a power of appointment and to the extent presently exercisable in favor of the powerholder should be subject to creditor claims under EPTL 10-7.2.

III. DISCUSSION.

Paragraph (a)(1) allows the creditors of a trust contributor, which is defined in section 7-A-1.3(25), to reach property in a revocable trust during the trust contributor's lifetime unless the trust is revocable with the consent of a person having a substantial adverse interest. *See* § 7-A-1.3(18) (defining revocable in the context of revocable trusts). Unlike the 6th Report, the Reporters believe that creditors should be able to reach trust property unless revocation by a creator requires the consent of an adverse person.

Paragraph (a) is departure from present New York law in EPTL 10-6.6 (which is based on the forerunner statute enacted in 1830) under which a creator's creditors can only reach property if the creator had an "unqualified" power to revoke. A power to revoke with the consent of a trustee or another person not having a substantial adverse interest would seem to make the power qualified. Such easy avoidance of creditors' rights is inappropriate in modern times.

Paragraph (a)(2) generally follows the 6th Report but would not allow property in a revocable trust to be reached to satisfy rights under EPTL 5-3.1 because that section only applies to property in the probate estate.

Paragraph (b) effectively makes paragraph (a) prospective.

Based on the Estate Planning Subcommittee's view, the Reporters deleted the 6th Report's treatment of creditor rights in irrevocable trusts; instead such rights are handled under section 7-A-5.5-A(a), which modernizes and replaces EPTL 7-3.1(a).

The Reporters deleted the 6th Report's treatment of withdrawal powers. Because a power of withdrawal is treated as power of appointment, the rights of creditors are already provided in EPTL 10-7.2. Accordingly, paragraph (c) cross-references to that section.

The effect of a lapse, release or waiver of a power of withdrawal is treated the same as under the 6th Report but as part of section 7-A-5.5-A (Creditor Claims to Contribution of Property by Trust Beneficiary).

I. SECTION 7-A-5.5-A. CREDITOR CLAIMS TO CONTRIBUTION OF PROPERTY BY TRUST BENEFICIARY.

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

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

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

(d) (1) Paragraph (a) does not apply to all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either an individual retirement account plan which is qualified under section 408 or section 408A of the Internal Revenue Code, or a Keogh (HR-10), retirement or other plan established by a corporation, which is qualified under section 401 of the Internal Revenue Code, even though the individual making any contribution is (i) in the case of an individual retirement account plan, an individual who is the settlor of and depositor to such account plan, or (ii) a self-employed individual, or (iii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iv) a shareholder of the corporation sponsoring the retirement or other plan.

(2) All trusts, custodial accounts, annuities, insurance contracts, monies, assets, or interests described in subparagraph one of this paragraph shall be conclusively presumed to be spendthrift trusts under this section and the common law of the state of New York for

all purposes, including, but not limited to, all cases arising under or related to a case arising under sections one hundred one to thirteen hundred thirty of title eleven of the United States Bankruptcy Code, as amended.

(3) This section shall not impair any rights an individual has under a qualified domestic relations order as that term is defined in section 414(p) of the Internal Revenue Code.

(4) Additions to an asset described in subparagraph one of this paragraph shall not be exempt from application to the satisfaction of a money judgment if (i) made after the date that is ninety days before the interposition of the claim on which such judgment was entered, or (ii) deemed to be fraudulent conveyances under article ten of the debtor and creditor law.

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

(f) Paragraph (a) shall not apply by reason of the trustee's authority to pay trust income or principal to the trust contributor pursuant to section 7-A-8.18. Nor shall paragraph (a) apply where the trustee is authorized under the trust instrument or any

other provision of law to pay or reimburse the trust contributor for any tax on trust income or trust principal that is payable by the creator under the law imposing such tax or to pay any such tax directly to the taxing authorities. No creditor of a trust contributor shall be entitled to reach any trust property based on the discretionary powers described in this paragraph.

II. PRESENT NEW YORK LAW.

EPTL 7-3.1(a) provides the basic rule: “A disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator.” EPTL 7-3.1(b) generally excepts dispositions in the pension and IRA areas from the reach of creditors. EPTL 7-3.1(c) voids trigger trusts. EPTL 7-3.1(d) bars creditors from reaching trust property based on certain discretionary trust powers involving taxes.

III. DISCUSSION.

The Reporters recommend the modernization of EPTL 7-3.1, which should be repealed. Paragraph (a) restates the substance of EPTL 7-3.1(a). Paragraph (b) adopts the 6th Report’s treatment of the lapse, release or waiver of a power of withdrawal by treating such actions as contributions but only for the amount in excess of the 5/5 amount or the gift tax annual exclusion amount. (CPLR (c) should also be amended to reflect this exception). Paragraph (c) makes clear that the donor-spouse will not be treated as a beneficiary of a power of appointment or QTIP trust created under section 2523 of the Internal Revenue Code. Paragraphs (d)–(f) adopt the substance of EPTL 7-3.1(b)–(d).

I. SECTION 7-A-5.65. OVERDUE DISTRIBUTION.

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

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

II. PRESENT NEW YORK LAW.

There do not appear to be any cases in what has been called “a little-developed area.” *See* Restatement (Third) of Trusts § 58, cmt. d–d2.

III. DISCUSSION.

The Estate Planning Subcommittee disagrees with the 6th Report’s recommendation that a creditor should be able to reach an overdue distribution. Instead, a creditor should be able to compel the trustee to distribute the overdue distribution to the beneficiary, which should have been done by the trustee. Once the property is in the hands of the beneficiary, creditors will be able to reach the property, on the priority basis established for creditors rather than allowing the first creditor to reach the property from the trustee.

I. SECTION 7-A-5.7.6-PERSONAL OBLIGATIONS OF TRUSTEE.

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

II. PRESENT NEW YORK LAW.

There is no direct statement of this principle 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.

III. DISCUSSION.

The NYUTC-LAG recommends that section 7-A-5.7 be enacted.

PART 6
REVOCABLE TRUSTS

SUMMARY OF PART

- § 7-A-6.1. **Capacity of ~~Settlor~~ Trust Contributor of Revocable Trust.**
- § 7-A-6.2. **Revocation or Amendment of Revocable Trust.**
- § 7-A-6.3. **~~Settlor's Powers~~; Rights Duties in Revocable Trusts; Powers of Withdrawal.**
- § 7-A-6.4. **~~Limitation on Action Contesting Validity of Revocable Trust; Distribution of Trust Property.~~ [Reserved]**

I. SECTION 7-A-6.1. CAPACITY OF ~~SETTLOR~~ TRUST CONTRIBUTOR OF REVOCABLE TRUST.

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

II. PRESENT NEW YORK LAW.

EPTL 3-1.1: "Every person eighteen years of age or over, of sound mind and memory, may by will dispose of real and personal property and exercise a power to appoint such property."

Case Law:

Capacity to make a Will: The capacity that is required to make a will is less than the capacity required to execute other legal documents. "[T]he court must look to the following factors: (1) whether the Testator understood the nature and consequences of executing a will; (2) whether the Testator knew the nature and extent of the property she was disposing of; and (3) whether the Testator knew those who would be considered the natural objects of her bounty

and her relations with them.” *Matter of Kumstar*, 66 N.Y.2d 691, 691 (1985), quoting *Matter of Slade*, 106 A.D.2d 914, 915 (4th Dep’t 1984). “Less capacity is required to enable one to make a will than to make other contracts.” *Matter of Coddington’s Will*, 281 A.D. 143 (3d Dep’t 1952).

Capacity to make a Lifetime Trust: “[I]n order to determine the mental capacity standard, this Court must first determine whether the documents executed are more comparable to a will, therefore requiring a minimal mental capacity, or whether they are more similar to a contract and, therefore, requiring a higher mental capacity.” *Matter of Donaldson*, 38 Misc. 3d 841, 843–844 (Sur. Ct. Richmond Cnty. 2012). In *Donaldson*, Surrogate Gigante applied the contract standard of capacity to create a lifetime trust “which focuses on whether the person was able to understand the nature and consequences of a transaction and make a rational judgment concerning it.” *Id.*

In *Matter of ACN*, 133 Misc. 2d 1043 (Sur. Ct. New York Cnty. 1986), where the mental capacity to create a charitable remainder unitrust was at question, Surrogate Lambert stated (133 Misc.2d at 1047): “A will, by nature, is a unilateral disposition of property whose effect depends upon the happening of an event in futuro. A contract is a bilateral transaction in which an exchange of benefits, either present or deferred, is exchanged. A charitable remainder unitrust is a bilateral transaction between the settlor and trustee in which the settlor transfers a present interest in property in return for an annual fixed percentage of income based on the fair market value of the corpus (and a tax deduction). As such, it is more analogous to contract than to a will.” Citing *Ortelere v. Teachers’ Retirement Bd.*, 25 N.Y.2d 196, 202 (1969), Surrogate Lambert stated (133 Misc.2d at 1047): “Thus, in New York, the test for contractual incapacity includes not only those who do not understand the nature and consequences of their actions, but those “whose contracts are merely uncontrolled reactions to their mental illness.” See also *Matter of Tisdale*, 171 Misc.2d 716 (Sur. Ct. New York Cnty. 1997), where Surrogate Roth examines the relationship between revocable trusts and wills in the context of the right to a jury trial and determines that a revocable trust has little in common with instruments other than wills.

Capacity to make a Gift: See *Matter of Rinchiuso* 20 A.D.2d 254 (4th Dep’t. 1964); *Matter of Kiley* 197 Misc. 36 (Sur. Ct. Westchester Cnty. 1949).

III. DISCUSSION.

The Estate Planning Subcommittee agrees with the 6th Report that wills capacity for a settlor should be used in the context of revocable trust. The Estate Planning Subcommittee also agreed with the 6th Report that where the settlor irrevocably relinquishes the right to revoke or amend the trust, the capacity standard to make a gift should be used instead of the capacity standard to make a will.³⁶ The second sentence so provides.

³⁶ The 6th Report explained (but did not add a provision to that effect): “The Committee decided that in any case where the settlor irrevocably relinquishes control during life (*e.g.*, by surrendering the power to revoke), the capacity standard applicable in the case of an inter vivos gift should be used instead.”

I. SECTION 7-A-6.2 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 [Article]].~~

(a) If a revocable trust **has more than one settlor trust contributor: was 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 trust contributor~~ **trust contributor** may revoke or amend the trust with regard the portion of the trust property attributable to that ~~settlor's~~ **trust contributor's** contribution; and

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

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

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

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

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

~~(d) The settlor may amend a revocable trust provided that the formalities required for the formation of the trust in section 7-A-4.2(d) are satisfied.~~

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

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

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

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

(g) Written notice of such amendment or revocation by the trust contributor shall be delivered to at least one other trustee within a reasonable time if the trust contributor is not the sole trustee but failure to give such notice shall not affect the validity of the amendment or revocation or the date upon which the amendment or revocation shall take

effect. No trustee shall be liable for any act reasonably taken in reliance on an existing trust instrument prior to actual receipt of notice of amendment or revocation thereof.

Absent written consent, no trustee shall be liable for the failure to comply with an amendment that expands, restricts or otherwise modifies the trustee's duties, powers, obligations, or compensation for a period of 60 days after receipt of notice of amendment.

(h) Cross reference. *See* section 7-A-4.2-A(e) (lifetime trust is irrevocable unless the terms of the trust expressly provide that the trust is revocable).

II. PRESENT NEW YORK LAW.

Applicable New York statutes:

EPTL 7-1.16.

A lifetime trust shall be irrevocable unless it expressly provides that it is revocable. In addition to the method set forth in 7-1.17, a revocable lifetime trust can be revoked or amended by an express direction in the creator's will which specifically refers to such lifetime trust or a particular provision thereof.

EPTL7-1.17

(a) Every lifetime trust shall be in writing and shall be executed and acknowledged by the person establishing such trust and, unless such person is the sole trustee, by at least one trustee thereof, in the manner required by the laws of this state for the recording of a conveyance of real property or, in lieu thereof, executed in the presence of two witnesses who shall affix their signatures to the trust instrument.

(b) Any amendment or revocation authorized by a trust shall be in writing and executed by the person authorized to amend or revoke the trust, and, except as otherwise provided in the governing instrument, shall be acknowledged or witnessed in the manner required for the creation of a lifetime trust, and shall take effect as of the date of such execution. Written notice of such amendment or revocation shall be delivered to at least one trustee within a reasonable time if the person executing such amendment or revocation is not the sole trustee, but the failure to give notice shall not affect the validity of the amendment or revocation or the date upon which the same shall take effect. No trustee shall be liable for any act reasonably taken in reliance on an existing trust instrument prior to actual receipt of notice of amendment or revocation thereof.

Case Law:

- a. *Matter of Pozarny*, 177 Misc.2d 752, 677 N.Y.S.2d 71 (Sur. Ct., Erie Cnty. 1998).
Revocable living trust, which was created through use of preprinted loose-leaf forms, was

not established in compliance with statutory requirements, and thus was not a valid receptacle to receive assets from a pour-over Will of the settlor. The loose-leaf nature of the trust instrument, which permitted free removal and substitution of pages, made it impossible to determine whether and how often the trust instrument may have been altered, and prevented its compliance with statutory requirements.

- b. *Matter of Abrams*, N.Y.L.J., September 1, 1999 (Sur. Ct., New York Cnty.). If the trust specifies how the revocation or amendment must be made, the terms of the trust govern.
- c. *Matter of Goetz*, 8 Misc. 3d 200, 793 N.Y.S.2d 318 (Sur. Ct., Westchester Cnty. 2005). The trust instrument is the first authority on how amendments to lifetime trusts may be made.
- d. *Whitehouse v. Gahn*, 84 A.D.3d 949, 922 N.Y.S.2d 546 (2d Dep't 2011). Where a trust gives the settlors together the right to amend the trust, the surviving settlor may not do so unilaterally.

III. DISCUSSION.

The Estate Planning Subcommittee determined not to modify the long-standing rule of New York law, codified in EPTL 7-1.16, that a trust is presumed to be irrevocable unless the trust terms expressly provides that it is revocable, and therefore recommends that proposed EPTL 7-A-6.2(a) as proposed by the 6th Report be deleted. Paragraph (h) refers to section 4.2-A(e), which transports EPTL 7-1.16 into Article 7-A. The discussion below refers to the section with paragraphs re-lettered to reflect the deletion of paragraph (a) as proposed by the 6th Report.

The Estate Planning Subcommittee (hereinafter “Subcommittee”) agrees that paragraph (a) be enacted into law. The Reporters believe that “trust contributor” should be substituted for “settlor” throughout the section to ensure that all persons who contribute to a trust and retain a power of revocation are covered. In most cases the only trust contributor will be the initial settlor. *See* §7-A-1.3(26)(defining trust contributor to include most settlors).

The Subcommittee believes that the amendment or revocation of a revocable trust should require a writing, which is present New York law. While the Subcommittee agrees that an amendment or revocation can be made by substantial compliance with a method provided in the trust, *see* paragraph (b)(1), a writing should be required. The Subcommittee also recommends that, as proposed in the 6th Report, subparagraph (b)(2)(B) (allowing a revocation of a trust by any method manifesting clear and convincing evidence of the settlor’s intent), be deleted. The Subcommittee believes that the provision could lead to increased litigation and make it more likely that the intent of the settlor could be undone. The Subcommittee believes that formalities for revocation similar to those in EPTL 7-1.17(a) should continue to be required. Therefore, EPTL 7-1.17(a) is in substance proposed section 7-A-4.2A(c), which in turn is incorporated into paragraph (b)(2)(B)..

The Subcommittee recommends that the words “or codicil” be deleted from subparagraph (b)(2)(A), as the term “will” includes a codicil to the will. *See* EPTL 1-2.19(b). The Subcommittee was concerned that revocation or amendment of a revocable trust by a provision in the Will devising property that would otherwise have passed according to the terms of the trust without making reference to the trust itself would make it too difficult to determine what the

settlor of the trust actually intended. To avoid confusion, the Subcommittee recommends that the Code include the substance of EPTL 7-1.16 by requiring that a specific reference to the revocable trust or a particular provision thereof be required for a revocation or amendment by a provision in the trust contributor's will.

After much discussion at City Bar meetings and at the TELS Round Table in the fall of 2015, the Reporters believe that the mere execution of a will should not revoke a trust or a trust provision as clients and lawyers likely believe that the revocation would not be effective until death occurs. Hence, the word "execution" has been deleted from the 6th Report's proposed statute, which is consistent with EPTL 7-1.16's failure to use will execution. As a result, the rule for revoking revocable trusts is different from that in the wills area where the execution of a later will has the immediate effect of revoking a prior will.

The Subcommittee added paragraph (c) to make clear how trust property will be distributed on revocation.

The Subcommittee also added "by law" to paragraph (d) to permit a revocation, amendment or distribution of trust property by an agent under a power of attorney if expressly authorized by law (*e.g.*, if the General Obligations Law is amended to so provide).

Based on the definition of guardian in proposed the Subcommittee recommended the enactment of paragraph (e).

As proposed by the 6th Report, paragraphs (b) and (c) would permit a settlor to revoke or amend a revocable trust without informing the trustee, and paragraph (f) provides that a trustee who was unaware of any revocation or amendment 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. The Subcommittee concluded that these three provisions require the enactment of provisions similar to those in EPTL 7-1.17(b) requiring notice to the trustee.

Paragraph (g) therefore incorporates the notice provisions of EPTL 7-1.17(b) with one modification. Because the Subcommittee was concerned that the settlor may expand, restrict or otherwise modify the trustee's duties, powers or compensation without the trustee's consent, the modification protects a trustee from liability for the failure to comply with any amendment that expands, restricts or otherwise modifies the trustee's duties, powers, obligations or compensation for a period of 60 days after receipt of the notice of amendment, thus permitting the trustee sufficient time to resign from office.

I. SECTION 7-A-6.3 SETTLOR'S POWERS; RIGHTS AND DUTIES IN REVOCABLE TRUSTS; POWERS OF WITHDRAWAL.

(a) While a trust is revocable **and the person having the power to revoke the trust is the only present beneficiary**, rights of **all other** ~~the~~ beneficiaries are subject to the control of,

~~and~~ the duties of the trustee are owed exclusively to, **and the trustee is exclusively accountable to, the settlor the person having the power to revoke.**

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

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

~~(b) During the period the power may be exercised, the holder of a power of withdrawal has the rights of a settlor of a revocable trust under this section to the extent of the property subject to the power.~~

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

II. PRESENT NEW YORK LAW.

Section 7-A-6.3(a) codifies New York case law. The seminal case is *Matter of Central Hanover Bk & Tr.(Momand)*, 176 Misc. 183 (Sur. Ct. New York Cnty. 1941), *aff'd*. 263 App.Div. 801, 32 N.Y.S.2d 128 (1st Dep't 1941), *aff'd*. 288 N.Y. 608, 42 N.E.2d 610 (1942). The Surrogate upheld a provision in a lifetime trust limiting the right to demand an accounting to the "immediate beneficiary," defined as the "life tenant or beneficiary for the time being." The trust contributor was the only life beneficiary. (The "creator" in these cases is the "trust

contributor” under the Code. That term will be used in this discussion to refer to a person contributing property to a trust.) The remainder beneficiaries were the trust contributor’s issue surviving her per stirpes, and if none, as the trust contributor shall appoint by will with the trust contributor’s sisters and their issue as the takers in default of exercise of the power of appointment. The Surrogate held that the provision did not violate the prohibition on the exoneration of executors and testamentary trustees for failure to exercise “reasonable care, diligence and prudence” contained in DEL 125 (the predecessor to EPTL 11-1.7). The public policy expressed by the statute “has no application to inter vivos trusts” because the trust contributor may retain the right to revoke a lifetime trust without the consent of any remainder beneficiary and may reserve the right to income for life and retain a power of appointment over the principal. Such trusts are gifts by the trust contributor and since the beneficiaries “have no right to demand that any gift be made, it would seem that they can hardly be said to have any right to control the action of the settlor with respect to exonerating the trustee for any act performed by him during the lifetime of the grantor or in limiting the number of persons authorized to object to the acts of the trustee.” The beneficiaries other than the trust contributor, therefore, have to right to object to the trustee’s actions “performed during [the trust contributor’s] lifetime.”

Momand has been cited with approval many times. Recent cases in the Appellate Divisions involving accountings by trustees of revocable trusts include:

Matter of Kalik, 117 A.D.3d 590, 986 N.Y.S.2d 109 (1st Dep’t 2014): “Plaintiff lacks standing to object to the part of the accounting that covers the period when his father, the grantor, was alive, *i.e.*, the period when the trust was revocable [citing *Malasky* and *Momand*].”

Matter of Malasky, 290 A.D.2d 631, 736 N.Y.S.2d 151 (3d Dep’t 2002): Beneficiaries of joint revocable trust have no standing to object to trustees’ accountings for the period ending with the death of the first settlor to die during which period they had no pecuniary interest in the trust. A provision in the trust limiting the trustee’s obligation to account to rendering an accounting to the income beneficiaries who are sui juris was held void because it violates public policy prohibiting any attempt to “completely excuse the obligation of a trustee to account.”

Matter of Andrews, 289 A.D.2d 910, 753 N.Y.S.2d 640 (3d Dep’t 2001): Trustee of revocable trust of which grantor was the sole beneficiary during his life is accountable only to grantor for the period from the inception of the trust to the grantor’s death.

III. DISCUSSION.

New York courts have long held that where the only beneficiary is the creator, equivalent to the trust contributor under this Code, the trustee is required to account only to the creator for the period from the inception of the trust to the creator’s death so long as the creator is the only beneficiary during that period and the creator maintains some control over the identity of the remainder beneficiary (for example, by retaining a power of appointment). The principle has been applied to revocable trusts, including in the three Appellate Division cases cited above.

Paragraph (a) codifies this principle as it applies to revocable trusts by making the trustee's duties run only to the person who holds the power to revoke so long as that person is the only present beneficiary of the trust. The codification of this principle is all the more appropriate because of the 1997 changes to current EPTL 7-1.1 which made it possible for the sole beneficiary for life to be the sole trustee. This change in our law made the revocable lifetime trust an all but perfect will substitute. The creator remains in complete control of the trust property during life and need not share any information about the trust property with a co-trustee, making the beneficiary/trustee's dealings with the trust property as private as her dealings with her probate property. The only difference between disposing of the probate property by will and disposing of property held in a revocable trust at the creator's death is that unlike the beneficiaries of a will who have only expectation interests while the testator is alive, and therefore have nothing recognized as a property interest in the testator's probate property, the beneficiaries of a revocable trust have future interests in the trust property. As noted above, New York has long recognized the validity of a provision which make a trustee's duties unenforceable by anyone other than the creator during the period in which the creator is the sole beneficiary so long as the creator has some control over the other beneficial interests in the property. By codifying that principle as it applies to revocable trusts the law goes as far as it can to making a revocable lifetime trust a perfect will substitute without formally eliminating the other beneficiaries' interests.

Paragraphs (b) and (c) provide rules for two situations in which it is appropriate for beneficiaries other than the person with power to revoke to have standing to object to the actions of the trustee. The first is after the death of the person with the power to revoke. The persons who then become present beneficiaries (whether of the continuing trust or as owners of the trust property in fee simple when the trust terminates at the death of the person with the power to revoke) may seek to compel the trustee to account and have standing to object to the account on the grounds that the trustee violated its duties to the person who had the power to revoke and as a result the interest of the objectants in the trust was impaired. An example of such a situation is a revocable trust the trustee of which is also the executor of the will of the person who had the power to revoke. That person is unlikely to question as personal representative of the decedent the way in which he or she performed duties as trustee. While a court could presumably grant limited letters to pursue an action against the trustee on behalf of the estate, allowing those persons who have an interest in the property of the trust do so avoids the need to do so.

The second situation involves persons who become present beneficiaries of the trust because the person with the power to revoke no longer has capacity to exercise the power to revoke. While those persons are present beneficiaries, the trustee's duties are owed to them as well. For example, parent creates a revocable trust of which parent is the sole beneficiary for life unless parent lacks capacity to revoke the trust at which time parent's children also become present beneficiaries. The children may compel an accounting by the trustee for the period they are present beneficiaries and having standing to file objections to that accounting.

Paragraph (d) applies this principle to the holder of a non-lapsing power to withdraw property from the trust. By definition the person holding a power to revoke is the creator of the trust; a power to withdraw held by person contributing property to the trust is a power to revoke to the extent that person is taking back what was property to which he had title. The power to withdraw, however, is equivalent to the power to revoke. The person holding such a power is

withdrawing from the trust property that for tax purposes has been the subject of a completed gift of which she is donee. This provision, modelled on the corresponding provision of the Massachusetts Uniform Trust Code (M.G.L.A. 203E § 603(b)), is limited to non-lapsing powers to withdraw. Lapsing power to withdraw, such as the Crummey powers widely used in irrevocable insurance trusts, often exist for a short period of time (as short as 30 days). Making the trustee's duties run to the powerholder for such a short period of time and often with respect to only a small fraction of the trust property was judged to create too many practical difficulties.

I. SECTION 7-A-6.4. [RESERVED] ~~LIMITATION ON ACTION CONTESTING VALIDITY OF REVOCABLE TRUST; DISTRIBUTION OF TRUST PROPERTY.~~

~~(a) A person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of:~~

~~_____ (1) three years after the settlor's death; or~~

~~_____ (2) 120 days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding.~~

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

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

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

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

II. PRESENT NEW YORK LAW

There is no present law on the subject because the concept itself is alien to New York law. Under current law, only a guardian of the property of the settlor of a revocable trust would have standing to challenge the validity of the trust and the law imposes no artificial time limit on that challenge. Upon the settlor's death, the trust may become irrevocable but it also remains part of the decedent's gross taxable estate and subject to the pour-over provisions of a Will.

3-42 Warren's Heaton on Surrogate's Court Practice § 42.09 discusses the "Contest as to Validity of Inter Vivos Trust Litigation." And its silence on the topic of limitations is significant in this regard because there is no present need for such a limitation. Most challenges arise in the post-mortem setting and the practicalities of such litigation do not give rise to any concern about limitation periods.

II. DISCUSSION

As approved by the 6th Report, section 7-A-6.4 establishes a statute of limitations to contest the validity of a revocable trust that became irrevocable upon the death of the settlor. In effect, this section would provide finality to the question of when a contest of a revocable trust

may be brought. Because the proposal represents such a radical change in current New York law, and because there is no demonstrable need to make such a change, and because of the ambiguities of the section, the Litigation Subcommittee recommended that this section be rejected.

The Subcommittee discussed the following problems with the proposed section:

- 1) who has standing to commence such a proceeding; (*see, e.g., Matter of Davidson*, 177 Misc. 2d 928 (Sur. Ct. New York Co. 1998);
- 2) or, who is the contestant contemplated by the proposal;
- 3) who is to receive notice pursuant to section 7-A-6.4(a)(2); and
- 4) what policy considerations or goals were intended to be satisfied by this proposal?

These ambiguities were considered by the Subcommittee as reason to be concerned about the proposed section. A major consideration in the Subcommittee's rejection of the section arises from the dangers posed by the 120 day notice provision in subparagraph (a)(2). Clearly, it is hard to imagine the three-year rule *post mortem* as being problematic in most instances, but the possibilities arising from this 120 day rule lead one to conclude that there will be more litigation rather than less because of this statute.

The UTC Comments note that only a “small amount” of trusts are ever contested. While this may be true, the Subcommittee found that a reason not to change the current law instead of a reason to change it.

It should be noted that the Fourth Report of the EPTL-SCPA Legislative Advisory Committee recommended the addition to the SCPA of several provisions governing the litigation of the validity of a revocable lifetime trust after the death of the creator. Those provisions did not include any time limit on beginning such an action but did provide rules for who may bring such a proceeding and for who must be cited in such a proceeding. Those provisions were not enacted. The Reporters believe that those provisions should be reconsidered, but in their absence, the enactment of 7-A-6.4 would indeed leave too many unanswered questions.

PART 7
OFFICE OF TRUSTEE

SUMMARY OF PART

- § 7-A-7.1. Accepting or Declining Trusteeship of a Lifetime Trust.**
- § 7-A-7.2. Trustee's Bond.**
- § 7-A-7.3. Co-trustees.**
- § 7-A-7.4. Vacancy in Trusteeship; Appointment of Successor.**
- § 7-A-7.4-A. Suspension of Powers of Trustee in War Service.**
- § 7-A-7.5. Resignation of Trustee.**
- § 7-A-7.6. Removal of Trustee.**
- § 7-A-7.7. Delivery of Property by Former Trustee.**
- § 7-A-7.8. Compensation of Corporate Trustee.**
- § 7-A-7.9. Reimbursement of Expenses.**
- § 7-A-7.10. Accounting by Trustee in Supreme Court.**

I. SECTION 7-A-7.1. ACCEPTING OR DECLINING TRUSTEESHIP OF A LIFETIME TRUST.

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

- (1) by complying with the execution requirements of section 7-A-4.2-A(c), or**
- (2) by substantially complying with a method of acceptance provided in the terms of the trust; or**

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

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

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

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

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

II. PRESENT NEW YORK LAW.

Section 7-A-7.1 in the 6th Report codifies New York governing acceptance of the trusteeship of a lifetime trust, *see Sankel v. Spector*, 33 A.D.3d 167 (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.

III. DISCUSSION.

The NYUTC-LAG recommends that section 7-A-7.1, as modified by the NYUTC-LAG, be enacted into law.

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. Because acceptance by a trustee may occur when the trustee complies with the execution formalities of section 7-A-4.2(d), the NYUTC-LAG recommends that this method of accepting the trusteeship of a lifetime trust be added to paragraph (a). In addition, the NYUTC-LAG recommends that knowledge of the event that triggers the designation should also be required under paragraph (b) since a trustee may know of the designation but not know that the event triggering the designation has occurred.

I. SECTION 7-A-7.2. TRUSTEE’S BOND.

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

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

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

II. PRESENT NEW YORK 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 unless the will provides otherwise. 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 (Sur. Ct. Bronx Cnty. 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."

Banking Law § 2(2) and SCPA 103(9) provide definitions for "trust company" and "corporate trustee." 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 require such security as the court may deem proper.

III. DISCUSSION.

The NYUTC-LAG recommends that section 7-A-7.2, as modified, be enacted into law. First, paragraph (a) should be amended to add the words "Except as provided in surrogate's court procedure act section seven hundred ten, subdivision 2" to deal with nondomiciliaries. Second, paragraph (a) should be amended to except paragraph (c). Third, paragraph (c) would be replaced by a new paragraph (c) that would allow a settlor to expressly require a trust company or bank to furnish a bond. Enacting that provision will require repeal of Banking Law § 100-a(5) which states in its entirety:

No bond or other security, except as hereinafter provided, shall be required from any trust company for or in respect to any trust, nor when appointed executor, administrator, guardian, trustee, receiver, committee or depository or in any other fiduciary capacity nor when receiving commissions under the provisions of SCPA 2310 or 2311. The court, or officer making such appointment may, upon proper application, require any trust company, which shall have been so appointed to give such security as to the court or officer shall seem proper, or upon failure of such trust company to give security as required, may remove such trust company from and revoke such appointment.

That portion of SCPA 806 which requires a testamentary trustee to furnish a bond as a matter of default should be repealed.

I. SECTION 7-A-7.3. CO-TRUSTEES.

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

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

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

(d) If a co-trustee is **either unwilling to perform duties or exercise joint powers or is** unavailable to perform duties **or exercise joint powers** because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining co-trustee or a majority of the remaining co-trustees may act. ~~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.~~ **The rules for delegation by a trustee to another trustee are provided in section 8.7(e).**

~~(e)~~**(f)** Except as otherwise provided in paragraph ~~(g)~~**(h)**, a trustee who does not join in an action of another trustee is not liable for the action: **if the trustee is unavailable to join in the action due to absence, illness, disqualification under other law or other temporary**

incapacity, or if the trustee has properly delegated the performance of the action pursuant to section 8.7.

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

~~(h) A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified any co-trustee 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.~~

(h) A trustee is not excused from liability for failing to ~~shall~~ exercise reasonable care to:

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

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

II. PRESENT NEW YORK LAW.

EPTL 10-10.7 provides as follows:

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.

EPTL 10-10.7 effectively 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.

Under EPTL 10-10.7, 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.

Case law allows a co-trustee or co-trustees to act when a co-trustee is unable to able due to an emergency situation. *See* Bennett Commission, 3rd Report at pages 498–499.

III. DISCUSSION.

The NYUTC-LAG recommends that section 7-A-7.3 be modified in several respects, including some minor changes to paragraphs (a) and (b), which generally incorporate the substance of the first two sentences of EPTL 10-10.7. Paragraph (c) would be modified to replace “function” with “duties and joint powers” to better reflect the role of a co-trustee; in addition, “joint powers” continues existing law under EPTL 10-10.7. In addition, performance of duties and joint powers would be excused if the same are properly delegated.

Paragraph (d) would allow also action by another co-trustee or co-trustees if a co-trustee is unwilling to carry a duty. Requiring a co-trustee to exercise “joint powers” (in addition to duties) would be consistent with paragraph (c)’s reference to joint powers and current New York law. *See* Bennett Commission, 3rd Report at pages 498–499. *Accord* Restatement (Third) of Trusts § 39, cmt. c.

As in other states, delegation by one trustee to another is treated under a delegation section; section 7-A-8.7(e) so provides.

Reflecting existing New York law, paragraph (f) absolves liability for non-participation but only for the reasons enumerated in paragraph (c) but not from liability under paragraph (h).

Paragraph (g) also reflects New York law as does paragraph (h), that is, no distinction is made between minor and serious breaches.

Paragraph (i) incorporates the language of the recent amendment to 10-10.7, which is italicized.

Finally, the NYUTC-LAG recommends that EPTL 10-10-7 be amended to delete: “*but including a power in a trustee to invade trust principal under section 10-6.6 of this article or under the terms of the dispositive instrument*” as the same will be provided in paragraph (i). In effect, EPTL 10-10.7 would not apply to trustees because the definition of fiduciaries under 11-1.1(a) would be amended to delete reference to trustees. *See* discussion under section 7-A-8.16, *below*.

I. SECTION 7-A-7.4. VACANCY IN TRUSTEESHIP; APPOINTMENT OF SUCCESSOR.

(a) A vacancy in a trusteeship occurs if:

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

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

(c) A vacancy in a trusteeship of a 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) Nothing in this section shall be construed to limit the application of sections seven hundred six and one thousand five hundred two of the surrogate's court procedure act.

II. PRESENT NEW YORK 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 if the acting fiduciary is removed or dies, *Matter of Gluck*, N.Y.L.J., June 28, 1996 (Sur. Ct. Nassau Cnty.); *Matter of Keech*, 187 Misc. 154 (Sur. Ct. Orange Cnty. 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 doing so 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.

III. DISCUSSION.

The NYUTC-LAG recommends that EPTL 7-A-7.4, as modified, be enacted into law and that EPTL 7-2.3 as it relates to resignation be repealed since the substance of provision is provided in last sentence of paragraph (b).

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 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 paragraph (f) to make clear that the rules in SCPA 706 and 1502 may also be availed of by the court.

I. SECTION 7-A-7.4-A. SUSPENSION OF POWERS OF TRUSTEE IN WAR SERVICE.

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

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

(1) If he is a member of the armed forces of the United States or of any of its

allies, or if he has been accepted for such service and is awaiting induction.

(2) If he is engaged in any work abroad in connection with a governmental agency of the United States or with the American Red Cross Society or any other body with similar objectives.

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

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

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

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

(e) The successor trustee shall be limited to commissions as computed under SCPA 2308 or 2309, whichever is applicable, upon income received and disbursed and upon

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

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

II. PRESENT NEW YORK LAW.

EPTL 7-2.5 is identical to Section 7-A-7.4-A.

III. DISCUSSION

The Reporters recommend that the language of EPTL 7-2.5 be included as section 7-A-7.4-A. EPTL 7-2.5 would be retained in Article 7 for trusts which are not express trusts as defined by section 7-A-1.3(8).

I. SECTION 7-A-7.5. RESIGNATION OF TRUSTEE.

(a) A trustee may resign:

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

(2) with the approval of the court.

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

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

~~(d) Notwithstanding the terms of the trust, a trustee of a testamentary trust shall not resign without 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. PRESENT NEW YORK LAW.

Under SCPA 715 and 716 a testamentary trustee seeking to resign must obtain court approval. EPTL 7-2.6 provides that the supreme court may accept the resignation of trustees.

III. DISCUSSION.

The NYUTC-LAG recommends that section 7-A-7.5, as modified, 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 believes 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 will and revocable trust combinations was much less prevalent. Furthermore, EPTL 10-6.6(b) (proposed as section 7-A.4.19) 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, paragraph (d) is made a mandatory rule by section 7-A-1.5(b)(5).

I. SECTION 7-A-7.6. REMOVAL OF TRUSTEE.

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

(b) The court may remove a trustee if:

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

(2) lack of cooperation among co-trustees substantially impairs the administration of the trust;

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

(4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, **provided that** the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with ~~a material purpose~~ **with the purposes** of the trust, and a suitable co-trustee 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. PRESENT NEW YORK 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 a 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 (3d Dep’t 2010); *Matter of Bornkamp Trust*, 2005 N.Y. Misc. LEXIS 3375; 233 N.Y.L.J. 113 (Sur. Ct. Nassau Cnty. 2005).

III. DISCUSSION.

The NYUTC-LAG recommends that section 7-A-7.6, as modified, 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 includes one involving a trustee in war service.

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

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

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

I. SECTION 7-A-7.7. DELIVERY OF PROPERTY BY FORMER TRUSTEE.

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

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

II. PRESENT NEW YORK 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.

III. DISCUSSION.

The NYUTC-LAG recommends that section 7-A-7.7 be enacted into law. The NYUTC-LAG believes that this section simply codifies the procedures that well-advised fiduciaries currently follow.

I. SECTION 7-A-7.8. COMPENSATION OF CORPORATE TRUSTEE.

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

~~(b) If the terms of 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. PRESENT NEW YORK 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.

III. DISCUSSION.

Because the NYUTC-LAG believes that the current provisions of the SCPA governing trustee commissions—fixed commissions for individual trustees, reasonable compensation for corporate trustees with a statutory minimum for trusts having of principal value of not more than \$400,000, and express provisions governing the commission of multiple trustees— are preferable to the 6th Report's reasonable compensation regime for 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 its view, the 6th Report 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 the 6th Report's mandatory rule of section 7-A-1.5(b)(8) should be deleted.

I. SECTION 7-A-7.9. REIMBURSEMENT OF EXPENSES.

(a) A trustee is entitled to be reimbursed out of the trust property, with interest, **if appropriate, at a reasonable rate** ~~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 **property**,

expenses that were not properly incurred in the administration of the trust.

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

II. PRESENT NEW YORK 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.

III. DISCUSSION.

The NYUTC-LAG recommends, with minor modifications, that section 7-A-7.9 be enacted into law. The NYUTC-LAG believes that the statute should expressly state that interest may be paid only if appropriate and if paid must be at a reasonable rate.

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. SECTION 7-A-7.10. ACCOUNTING BY TRUSTEE IN SUPREME COURT.

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

II. PRESENT NEW YORK LAW.

EPTL 2-7(a) provides the identical language as provided in Section 7-A-1.2-A.

III. DISCUSSION.

The Reporters recommend enactment of this section and the repeal of EPTL 7-2.7(a).

PART 8
DUTIES AND POWERS OF TRUSTEE

SUMMARY OF PART

- § 7-A-8.1. **Duty to Administer Trust.**
- § 7-A-8.2. **Duty of Loyalty.**
- § 7-A-8.3. **Duty of Impartiality.**
- § 7-A-8.4. **Duty of Prudent Administration.**
- § 7-A-8.5. **Duty Regarding Costs of Administration.**
- § 7-A-8.6. **Duty to Exercise Trustee's Special Skills and Expertise.**
- § 7-A-8.7. **Powers and Duties Regarding Delegation by Trustee to Agent or Another
Trustee.**
- § 7-A-8.8. **Trustee Duties and Powers Under Directed Trusts.**
- § 7-A-8.9. **Duty to Control and Protection ~~of~~ Trust Property.**
- § 7-A-8.10. **Duty Regarding Recordkeeping and Identification of Trust Property.**
- § 7-A-8.11. **Duty to Enforcement ~~and~~ Defend ~~se of~~ Claims.**
- § 7-A-8.12. **Duty to Collecting Trust Property.**
- § 7-A-8.14. **Duty Regarding Discretionary Powers; ~~Tax Savings.~~**
- § 7-A-8.15. **General Powers of Trustee.**
- § 7-A-8.16. **Specific Powers of Trustee.**
- § 7-A-8.17. **Duties and Powers Regarding Distribution Upon Termination.**
- § 7-A-8.18. **Power of Trustee to Pay Income or ~~Application of~~ Principal to Creator ~~of~~
Trust as Reimbursement for Income Taxes.**

§ 7-A-8.19. Powers and Duties Regarding Decanting.

§ 7-A-8.20. Duty When a Resulting Trust Arises.

I. SECTION 7-A-8.1. DUTY TO ADMINISTER TRUST.

~~Upon acceptance of a trusteeship, T~~he trustee shall administer the trust in good faith, in accordance with its terms and purposes ~~and the interests of the beneficiaries~~, and in accordance with this Article **and other applicable law.**

II. PRESENT NEW YORK LAW.

With respect to the duty to act in good faith and in accordance with the terms of the instrument, New York law is settled that a trustee has a non-waivable duty to act in good faith, which is generally equated with acting to further the purposes of the trust rather than acting on the basis of some ulterior motive. *See Matter of Wallens*, 9 N.Y.3d 117, 123 (2007) (“[E]ven when the trust instrument vests the trustee with broad discretion to make decisions regarding the distribution of trust funds, a trustee is still required to act reasonably and in good faith in attempting to carry out the terms of the trust.”). *See also O’Hayer v. de St. Aubin*, 30 A.D.2d 419, 423 (2d Dep’t 1968) (“That is not to say that the settlor’s directions allow the trustee free rein to deal with the trust; the law interposes to require that the trustee always exercise good faith in his administration.”).

III. DISCUSSION.

NYUTC-LAG recommends enactment of this section with the two indicated revisions. First, the phrase “the interests of the beneficiaries” would be eliminated as unnecessary. The import of the phrase, which is defined in section 7-A-1.3(8) as meaning “the beneficial interests provided in the terms of the trust,” is already included in the phrase “in accordance with [the trust’s] terms and purposes.” To the extent “interests of the beneficiaries” includes rejecting a settlor’s wishes that are not violative of public policy or capricious, the NYUTC-LAG does not agree: a settlor’s wishes should be respected. *See* the Discussion in section 7-A-4.4.

The second revision requires the trustee to also comply with any other applicable laws.

I. SECTION 7-A-8.2. DUTY OF LOYALTY.

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

(b) **Subject to the rights of persons dealing with or assisting the trustee as provided in section 7-A-10.11**, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests **is a breach of the duty of loyalty and** voidable by a **qualified** beneficiary ~~affected by the transaction~~ unless:

- (1) the transaction was authorized by the terms of the trust;
- (2) the transaction was approved by the court;
- (3) the **qualified** beneficiary did not commence a judicial proceeding within the time allowed by section 7-A-10.4;
- (4) the **qualified** beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with section 7-A-10.8; or
- (5) the transaction involves a contract entered into or claim acquired by the trustee before the person became ~~or contemplated becoming~~ trustee.

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

- (1) the trustee's spouse;
- (2) the trustee's ~~descendants~~ **issue**, siblings, parents, or their spouses;

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

(4) a corporation or other person or enterprise in which the trustee, **or a person described in paragraph (1), (2) or (3),** or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

(d) A transaction between a trustee and a **qualified** beneficiary that does not concern trust property but that occurs during the existence of the trust ~~or while the trustee retains significant influence over the beneficiary and from which the trustee obtains an advantage,~~ **and which is outside the ordinary course of the trustee's business or on terms and conditions substantially less favorable than those the trustee generally offers customers similarly situated,** is voidable by the **qualified** beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.

(e) A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity ~~involves~~ **is affected by** a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust. **Such transaction is a breach of the duty of loyalty and is voidable by a qualified beneficiary, subject to the exceptions in paragraphs (b)(1)-(5).**

(f) AN INVESTMENT BY A TRUSTEE IN SECURITIES OF AN INVESTMENT COMPANY OR INVESTMENT TRUST TO WHICH THE TRUSTEE, OR ITS AFFILIATE, PROVIDES SERVICES IN A CAPACITY OTHER THAN AS TRUSTEE IS NOT PRESUMED TO BE AFFECTED BY A CONFLICT BETWEEN PERSONAL AND FIDUCIARY INTERESTS IF THE INVESTMENT OTHERWISE COMPLIES WITH THE PRUDENT INVESTOR RULE OF SECTION 11-2.3. IN ADDITION TO ITS COMPENSATION FOR ACTING AS TRUSTEE, THE TRUSTEE MAY BE

COMPENSATED BY THE INVESTMENT COMPANY OR INVESTMENT TRUST FOR PROVIDING THOSE SERVICES OUT OF FEES CHARGED TO THE TRUST. IF THE TRUSTEE RECEIVES COMPENSATION FROM THE INVESTMENT COMPANY OR INVESTMENT TRUST FOR PROVIDING INVESTMENT ADVISORY OR INVESTMENT MANAGEMENT SERVICES, THE TRUSTEE MUST AT LEAST ANNUALLY NOTIFY THE PERSONS ENTITLED UNDER SECTION 7-A-8.13 TO RECEIVE A COPY OF THE TRUSTEE'S ANNUAL REPORT OF THE RATE AND METHOD BY WHICH THAT COMPENSATION WAS.

(g) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.

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

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

(2) payment of reasonable compensation to the trustee;

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

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

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

(i) The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

(j) **See section 7-A-10.1 which provides other remedies for a breach of trust.**

II. PRESENT NEW YORK LAW.

New York courts have long embraced the no-further-inquiry rule, which allows trust beneficiaries to rescind a transaction and hold the trustee liable for breach of the duty of loyalty upon a simple showing that the trustee was on both sides of a transaction, regardless of whether the transaction actually damaged the trust. *See, e.g., In re Garrasi*, 33 Misc. 3d 1224A (Sur. Ct. 2011); *In re Kinzler*, 195 A.D.2d 464 (2d Dep't 1993); *In re De Planche*, 65 Misc. 2d 501 (Sur. Ct. 1956) (rescinding executor's sale of trust property to himself because executor failed to obtain advance judicial approval); *In re People*, 303 N.Y. 423 (1951) (holding that when self-dealing occurs "good faith and lack of damage are irrelevant"); *In re Kilmer*, 187 Misc. 121 (Sur. Ct. 1946) (setting aside the sale of estate property to the executor even though executor acted in good faith and paid fair market value); *cf. Wendt v. Fischer*, 243 N.Y. 439 (1926) (finding that fiduciary broker violated duty of loyalty by failing to disclose that purchaser of property was a corporation in which fiduciary was an officer and shareholder, and requiring fiduciary to disgorge profits). The rule corrects for beneficiaries' poor ability to detect conflicts of interest by requiring trustees to obtain advance approval for transactions involving self-dealing.

The no-further-inquiry rule is a default rule—settlor's can modify the rule's harsh effects by authorizing certain types of transactions that would otherwise violate the rule. *See, e.g., City Bank Farmers Trust Co. v. Cannon*, 291 N.Y. 125 (N.Y. 1943) (settlor authorized institutional trustee to hold shares in which trustee had an interest). Settlor-authorized conflicts are allowed because they reflect *settlor's* determination that allowing the conflicted transaction will maximize the trust's value and effectuate settlor's intent. For instance, the settlor might name her spouse as trustee and income beneficiary, implicitly exempting the trustee from per se liability for making distributions to himself. Or the trustee might place shares of the family business, held as a close corporation, in the trust, and name one of her children as trustee. If the trustee is also an officer of the close corporation, a conflict of interest arises. But by giving the trustee the power to buy, sell, or transfer shares of stock, settlor has drafted around the no-further-inquiry rule's prohibition on self-dealing. *See O'Hayer v. De St. Aubin*, 30 A.D.2d 419 (2d Dep't 1968).

Because the rule forces early disclosure of conflicts of interest, New York courts have applied it not just to transactions involving direct self-dealing between the trustee and the trust, but to other transactions tainted by a conflict of interest between the trustee's fiduciary and personal interests. *See, e.g., Matter of Rothko*, 43 N.Y.2d 305, 319 (1977) (noting that "[w]hile a trustee is administering the trust he must refrain from placing himself in a position where his personal interest or that of a third person does or may conflict with the interest of the beneficiaries"). For example, the rule applies to transactions between the trust and the trustee's spouse and other close family members. *See In re Application of Fulton*, 253 A.D. 494, (3d Dep't 1938) (reversing Surrogate Court judgment finding no violation of duty of loyalty because the transaction between the trustee and his spouse was for fair market value; applying no-further-

inquiry rule to void transaction); *In re Bradley's Estate*, 143 N.Y.S.2d 264 (Sur. Ct. 1955) (holding that “[i]t is elemental that he cannot transfer trust property to himself individually. There is little, if any, difference in a trustee conveying trust property to her husband.”); *cf. In re Ray*, 9 Misc. 2d 113 (Sur. Ct. 1957) (authorizing in advance a transaction between the trustee and spouse and other relatives while noting that absent such approval the transaction would be presumed to be a breach of duty); *Silverstein v. Goodman*, 35 A.D.3d 301 (1st Dep’t 2006) (trustees violated duty of loyalty by allowing their immediate family members and a trust beneficiary to occupy real property held in trust at no rent or rent below fair market value).

Courts have also applied the no-further-inquiry rule to transactions involving the trustee and other entities or institutions with which the trustee is affiliated. *See, e.g., London v. Goodman*, 6 Misc. 2d 277 (Sup. Ct. 1957) (trustees liable for breach of duty because they traded certain stock held in trust for stock in corporation of which they were officers, even though trade was fair to the trust); *In re Estate of Bradley*, 143 N.Y.S.2d 264 (Sur. Ct. 1955) (sale of shares of closely held corporation to executor/trustee who had an interest in corporation without prior court approval was breach of duty even if terms were fair); *cf. In re Scarborough Properties Corp.*, 25 N.Y.2d 553 (1969) (affirming trial court’s advance authorization of transaction tainted by conflict of interest).

Although the logic of the no-further inquiry rule and New York precedent suggests that the no-further-inquiry rule should be extended to transactions between the trustee and the trustee’s child, a court recently declined to apply the rule in that context where the trustee acted in good faith and the protesting beneficiary could not establish that the transaction was for less than fair-market value. *In re Parisi*, 34 Misc.3d 1204(A) (2011). *Parisi* is currently on appeal.

Over the past several decades, states have carved out an exception to the duty of loyalty that allows institutional trustees to invest trust assets in proprietary mutual funds. Paragraph on (f) validates this trend. The New York rule requires a trustee who invests trust assets in investment vehicles offered by the trustee or related institutions to make a yearly decision to collect either trustee commissions *or* to receive, or have its affiliate receive, compensation for investment advice or services. EPTL 11-2.3(d). In prohibiting double dipping, the New York statute offers more protection to trust beneficiaries by dampening trustees’ incentives to choose investments for personal gain.

Similar to paragraph (f), New York’s prudent investor act authorizes institutional trustees to invest in mutual funds “notwithstanding that the trustee or an affiliate of the trustee acts as investment advisor, custodian, transfer agent, registrar, sponsor, distributor, manager or provides other services to the investment company or trust.” EPTL 11-2.3(d). New York law requires the trustee who so invests to “elect annually either (i) to receive or have its affiliate receive compensation for providing such services to such investment company or trust for the portion of the trust invested in such investment company or trust or (ii) to take annual corporate trustees’ commissions with respect to such portion.” *Id.* The provision is a default rule—a trust instrument can authorize the trustee to receive compensation for both trustee services and for providing mutual fund services.

III. DISCUSSION.

Paragraph (a) makes clear that a trustee has the duty of loyalty to the beneficiaries.

Paragraph (b) limits the remedy of voiding a transaction to qualified beneficiaries. Other beneficiaries may prevail on a court to void a transaction as provided in section 7-A-10.1.

The principal substantive change suggested by the Trustee Duties and Powers Subcommittee (hereinafter “Subcommittee”) was to expand the reach of the no-further-inquiry rule to include so- called “indirect” self-dealing cases, consistent with long-standing New York law. Paragraph (c) makes it clear that the no-further-inquiry rule applies to such transactions. Therefore, a trustee who wishes to enter into a transaction falling under this paragraph must obtain advance approval from the trust beneficiaries or the court. If the trustee fails to obtain advance approval, trust beneficiaries may choose to ratify it or to void the transaction and seek damages or disgorgement of profits, *regardless of whether the transaction is fair to the trust*.

Because the no-further-inquiry rule is a default rule that can be modified by the trust document, settlors may draft around the rule’s effects. For instance, the settlor might name her spouse as trustee and income beneficiary, implicitly exempting the trustee from per se liability for making distributions to himself. Or the trustee might place shares of the family business, held as a close corporation, in the trust, name a child who is also an officer of the corporation as trustee, and give the trustee the power to buy, sell or transfer shares of stock.

Paragraph (d) addresses conflicts of interest that do not fall under paragraphs (b) and (c). The no-further-inquiry is not applicable to such conflicts. Instead, the transaction is presumptively void and a breach of duty, but the trustee can rebut the presumption by showing that the transaction was not affected by the conflict between the trustee’s personal and fiduciary interests. Among the factors tending to rebut the presumption are whether the consideration was fair and whether the other terms of the transaction are similar to those that would be obtained in a transaction with an independent party. On review by the City Bar Committees, the application of the rule once a trust had ceased was deleted as not appropriate.

No consensus was reached by the subcommittee on paragraph (f), which is LARGE CAPPED for that reason. (Depending on how the issues are resolved, paragraph (c)(4) may have to be modified to except transactions described under paragraph (f).)

Members of the Subcommittee generally took one of two views, as follows:

- 1) Adopt paragraph (f), but broaden it to authorize trustees to invest trust assets in a variety of investment vehicles in addition to mutual funds, such as hedge funds.
- 2) Reject paragraph (f) as provided in the 6th Report and retain EPTL 11-2.3(d).³⁷

Arguments for adopting and expanding paragraph (f):

³⁷ The Trusts and Estates and Surrogate's Court Committee of the City Bar voted to approve this approach.

- Increasingly, the predominate factor settlors consider in choosing an institutional trustee is a trustee's financial management expertise and the range of investment products that the institution and its affiliates offer;
- The trustee will have more comprehensive knowledge of investments that it or a related entity offers than it will of investments offered by an unrelated entity;
- If the trustee invests trust assets managed by an unrelated entity, the trust will have to pay commissions to that entity, so the trust would not be worse off if it has to pay similar commissions to the trustee or related entity that is managing a trust investment;
- Although the rules governing proprietary investing are default rules, many old trusts do not have provisions allowing double commissions or investments that would otherwise violate the duty of loyalty, and obtaining the permission of beneficiaries or a court is unreasonably difficult and time-consuming: the trustee may be unable to obtain beneficiary consent due to the number of beneficiaries or because the beneficiaries are unborn or unascertainable. Obtaining beneficiary or judicial consent generates unnecessary additional costs to the trust.

Arguments for retaining EPTL 11-2.3(d):

- This limited exception to the duty of loyalty's no-further-inquiry rule enables trustees to invest in proprietary mutual funds, which is often advantageous to the trust. The requirement that the trustee choose to receive either trust income or fees associated with managing the funds acts as a deterrent to overreaching by the trustee, and helps ensure that the trustee will choose proprietary funds only when the choice is truly in the best interest of the trust and its beneficiaries.
- New York law exemption of only proprietary mutual funds from the reach of the no-further-inquiry rule makes sense. Broadening the rule to allow trustees to invest in a range of investments under circumstances that involve a conflict of interest creates too great a temptation for trustees to place institutional interests in profitability ahead of the best interest of the trust beneficiaries.
- The current NY rule requires trustees who wish to invest trust assets in proprietary investments other than mutual funds to make full disclosure of the conflict and obtain advance approval for the transaction from the beneficiaries or a court. This rule ensures that beneficiaries will receive information to enable them to protect their interests, and acts as a deterrent to self-dealing by trust institutions. Broadening New York law to allow trustees to invest trust assets in a variety of proprietary investment vehicles would allow trustees to make such investments without notice to or consent from trust beneficiaries. This puts the burden to detect conflicts of interest and to

evaluate the soundness of conflicted transactions on the trust beneficiaries instead of the trustee. Trust beneficiaries are poorly equipped to detect conflicts of interest, and to evaluate the soundness of an investment compared to other investments that may be available. That task properly belongs to the trustee, and New York law ensures that it does.

- Requiring the trustee to get the consent of a court or the beneficiaries ensures that the trustee will make these types of investments only when the investment truly advances the trust's best interests.

I. SECTION 7-A-8.3. DUTY OF IMPARTIALITY.

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

II. PRESENT NEW YORK LAW.

New York law has long required a trustee to act impartially in all respects except to the extent that the trust instrument otherwise directs. *See In re Estate of Coyle*, 200 Misc. 421 (Sur. Ct. 1951); *Redfield v. Critchley*, 252 A.D. 568 (1st Dep't 1937), *aff'd* 277 N.Y. 336. The duty of impartiality is especially robust if the trustee has a beneficial interest in the trust. *See Milea v. Hugunin*, 24 Misc. 3d 1211(A) (S. Ct. 2009); *In re Peabody*, 198 Misc. 505, 513 (S. Ct. 1950), *aff'd* 277 A.D. 905; *In re Watson*, 213 N.Y. 177, 183 (1914).

Although New York's prudent investor act allows the trustee to invest for total return (*see* EPTL 11-2.3(b)(1)-(4)), allocations and disbursements must be consistent with the trustee's duty of impartiality unless the trust instrument otherwise directs. *See* EPTL 11-A-1.3 (a) & (b) (stating that the trustee owes a duty of impartiality when exercising any "discretionary power of administration" under New York's Principal and Income Act). EPTL 11-2.3(b)(5) authorizes the trustee to adjust between income and principal, and is a helpful tool for enabling the trustee to comply with its duty of impartiality to the extent it exists. *See* EPTL 11-2.3(b)(5) (providing that "[w]here the rules in article 11-A apply to a trust and the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income," the trustee may make adjustments between income and principal).

III. DISCUSSION.

The NYUTC-LAG generally agrees with the 6th Report's recommendation, but would add "otherwise administering" to make clear that all administrative functions are covered.

I. SECTION 7-A-8.4. DUTY OF PRUDENT ADMINISTRATION.

A trustee **has the duty to** ~~shall~~ administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

II. PRESENT NEW YORK LAW.

New York has codified the trustee's common law duty of care in EPTL 11-2.3, the Prudent Investor Act, which provides, in pertinent part, as follows:

(a) Prudent investor rule.

A trustee has a duty to invest and manage property held in a fiduciary capacity in accordance with the prudent investor standard defined by this section, except as otherwise provided by the express terms and provisions of a governing instrument within the limitations set forth by section 11-1.7 of this chapter. This section shall apply to any investment made or held on or after January first, nineteen hundred ninety-five by a trustee.

(b) Prudent investor standard.

(1) The prudent investor rule requires a standard of conduct, not outcome or performance. Compliance with the prudent investor rule is determined in light of facts and circumstances prevailing at the time of the decision or action of a trustee. A trustee is not liable to a beneficiary to the extent that the trustee acted in substantial compliance with the prudent investor standard or in reasonable reliance on the express terms and provisions of the governing instrument.

(2) A trustee shall exercise reasonable care, skill and caution to make and implement investment and management decisions as a prudent investor would for the entire portfolio, taking into account the purposes and terms and provisions of the governing instrument.

III. DISCUSSION.

The NYUTC-LAG agrees with the 6th Report that section 7-A.8.4 be enacted into law.

I. SECTION 7-A-8.5. DUTY REGARDING COSTS OF ADMINISTRATION.

In administering a trust, the trustee **has a duty to** ~~may incur only~~ incur **only** costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee, **taking into account sections 7-A-8.7 and 7-A-8.8 to the extent those sections apply.**

II. PRESENT NEW YORK LAW.

EPTL 11-1.1(b)(22) provides in part that a trustee may “pay all other reasonable and proper expenses of administration from the property of the . . . trust, including the reasonable expense of obtaining and continuing his bond and any reasonable counsel fees he may necessarily incur.”

III. DISCUSSION.

The NYUTC-LAG recommends that section 7-A-8.5, as amended, be enacted in law. The amendment would require that section 7-A-8.7 (delegation) and section 7-A-8.8 (directed trusts) be taken into account to the extent those sections apply.

I. SECTION 7-A-8.6. DUTY TO EXERCISE TRUSTEE’S SPECIAL SKILLS AND EXPERTISE.

A a trustee who **has represented that such trustee has** ~~special skills or expertise, or is named trustee in reliance upon the trustee’s representation that the trustee~~ special skills (other than special investment skills) or expertise, shall use those special skills or expertise, **subject to the rules governing trustees with special investment skills provided in section 11-2.3(b)(6).**

II. PRESENT NEW YORK LAW.

Current New York law requires a bank, trust company or paid professional investment advisor which serves as a trustee to exercise diligence in investing and managing assets as would customarily be exercised by prudent investors having special investment skills. EPTL 11-2.3(b)(6) specifically provides as follows:

Special investment skills.

For a bank, trust company or paid professional investment advisor (whether or not registered under any federal securities or investment law) which serves as a trustee, and any other trustee representing that such trustee has special investment skills, the exercise of skill contemplated by the prudent investor standard shall require the trustee to exercise such diligence

in investing and managing assets as would customarily be exercised by prudent investors of discretion and intelligence having special investment skills.

III. DISCUSSION.

The NYUTC-LAG agrees with the 6th Report that section 7-A-8.6 be enacted into law as modified. The first modification would except trustees with special investment skills, leaving that area to existing EPTL 11-2.3(b)(6). The second modification would require that section 7-A-8.7 (delegation) and section 7-A-8.8 (directed trusts) be taken into account to the extent those sections apply.

I. SECTION 7-A-8.7. DELEGATION BY TRUSTEE POWERS AND DUTIES REGARDING DELEGATION BY TRUSTEE TO AGENT OR ANOTHER TRUSTE.

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

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

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

(3) periodically reviewing the agent's ~~actions in order to monitor the agent's performance~~ **exercise of the delegated function** and compliance with the **scope and** terms of the delegation.

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

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

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

reasonable care, skill and caution. An attempted exoneration of the agent from liability for failure to meet such duty is contrary to public policy and void.

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

(d) By accepting a delegation of **duties or powers** ~~or duties~~ from the trustee of a trust that is subject to the law of this State, an agent submits to the jurisdiction of the courts of New York. ~~this State and waives any right to arbitration. The delegee has a duty to the trustee and to the trust beneficiaries to comply with the scope and terms of the delegation and to exercise the delegated function with reasonable care, skill and caution. An attempted exoneration of the delegee from liability for failure to meet such duty is contrary to public policy and void.~~

~~(e) Notwithstanding any law to the contrary, a trustee shall not have the authority to enter into an arbitration agreement in connection with a delegation pursuant to this section under which issues concerning the proper discharge by the delegee of duties imposed by this section on the delegee are to be determined by the arbitrator; provided, however, that the trustee shall have the authority to enter into an arbitration agreement concerning a dispute solely between the trustee and the delegee.~~

(e) A trustee may delegate duties and powers to a co-trustee that a prudent trustee could properly delegate under the circumstances. Unless a delegation was irrevocable, a trustee may revoke a delegation previously made.

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

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

(B) establishing the scope and terms of the delegation consistent with the

purposes of the governing instrument; and

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

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

~~(f) To the extent that a trustee has delegated a function, the delegee shall be liable for failing to properly discharge the duties thereby imposed on the delegee and the trustee shall have no liability with respect thereto except to the extent that the delegee fails to satisfy a judgment obtained against the delegee by reason of a failure to properly discharge the delegee's duties; provided, however, the trustee shall not be liable unless the trustee is determined to have failed to properly discharge the trustee's duties.~~

II. PRESENT NEW YORK LAW.

EPTL 11-2.3(c) provides for delegation of investment or management functions as follows:

(c) Delegation of investment or management functions.

(1) Delegation of an investment or management function requires a trustee to exercise care, skill and caution in:

(A) selecting a delegee suitable to exercise the delegated function, taking into account the nature and value of the assets subject to such delegation and the expertise of the delegee;

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

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

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

(2) The delegee has a duty to the trustee and to the trust to comply with the scope and terms of the delegation and to exercise the delegated function with reasonable care, skill

and caution. An attempted exoneration of the delegee from liability for failure to meet such duty is contrary to public policy and void.

(3) By accepting the delegation of a trustee's function from the trustee of a trust that is subject to the law of New York, the delegee submits to the jurisdiction of the courts of New York even if a delegation agreement provides otherwise, and the delegee may be made a party to any proceeding in such courts that places in issue the decisions or actions of the delegee.

Matter of Blumenkrantz, 14 Misc.3d 462 (Sur. Ct. Nassau Cnty. 2006) addresses arbitration and holds that EPTL 11-2.3(c)(3) does not bar arbitration between a trustee and an agent. *Blumenkrantz* also holds that a beneficiary may be bound by an arbitration clause even though the beneficiary was a nonsignatory. Surrogate Howe very recently followed *Matter of Blumenkrantz* on both points. See *Matter of Fairchild* (Sur. Ct. Erie Cnty. Dec. 4, 2013).

New York permits delegation among co-trustees, but the courts do not appear to favor delegation arrangements. This goes back to the key element of NY law that a trustee who accepts trusteeship cannot abdicate responsibility to someone else. The delegation is generally acceptable where one trustee has expertise in a particular aspect of trust administration such as investing. Yet delegation is not absolute, and the delegating trustee must exercise oversight. As explained in *Matter of Goldstock*, 177 A.D.2d 225, 238–239 (1st Dep’t 1992):

A trustee may delegate the exercise of a trust power to a fellow trustee, especially where the latter has an expertise in some particular aspect of the trust management (see *Purdy v. Lynch*, 145 N.Y. 462); but that does not give a trustee the right to abdicate his duty to be personally “active in the administration of the trust” with regard to those functions which call for consistency with usually prudent business practice (Bogert, *Trusts* § 92, at 331 [6th ed]). In *Brown v. Phelan* (223 A.D. 393) we held that trustees cannot be automatically relieved of their responsibility for properly managing a trust with the excuse that their roles were merely “passive” in comparison to their more active co-trustee. Under such circumstances the burden would be on such trustees to demonstrate that their “inactivity” did not amount to negligence in allowing their fellow trustee to commit the defalcation. Although the rule may vary in other jurisdictions, a trustee in New York is held as much accountable for damage to the trust by reason of negligent inaction as for affirmative wrongdoing (*Matter of Howard*, 110 A.D. 61, *aff’d* 185 N.Y. 539), even where he had no direct knowledge of the wrongdoing. Of course, liability will not be imputed to a passive trustee where even the exercise of prudent behavior would not have raised any suspicion as to the surreptitiously irresponsible acts of the active co-trustee.

III. DISCUSSION.

The NYUTC-LAG recommends that section 7-A-8.7, as modified by the NYUTC-LAG, be enacted into law, and that EPTL 11-2.3(c), as modified by the NYUTC-LAG, be amended as recommended by the 6th Report to read as follows:

section 11-2.3(c): Delegation of Investment or Management Functions. A trustee, as defined in this article, shall be authorized to delegate its investment or management functions as set forth in section 7-A-8.7. ~~of the New York Uniform Trust Code.~~

The proposed amendment to EPTL 11-2.3(c) would not affect EPTL 11-2.3(b)(4)(C), which, as applied to delegation to an agent, provides as follows:

(4) The prudent investor standard authorizes a trustee:

(C) to delegate investment and management functions if consistent with the duty to exercise skill, including special investment skills.

In addition, delegation to an agent would be subject to the duty of prudence under section 7-A-8.4.

The NYUTC-LAG recommends deletion of the arbitration provision contained in paragraph (e) of the 6th Report believing that the issue should percolate through the courts. Both surrogate decisions run counter to the 6th Report's position that an arbitration agreement between a trustee and an agent should not be binding on a beneficiary.

The NYUTC-LAG disagrees that paragraph (f), which was added by the 6th Report, should be retained. Requiring an aggrieved beneficiary to first obtain a judgment against a delegatee may take years and in some cases may not even be possible. A trustee who acts improperly in making a delegation should be accountable to a beneficiary or beneficiaries without first having a delegatee fail to pay on a judgment. A trustee will be in a better position than a beneficiary to seek redress from a delegatee.

The NYUTC-LAG recommends that a trustee should be able to delegate duties and powers to another trustee,³⁸ which is provided in paragraph (e). The issue is whether there should be delegation authority without standards, which a majority of the Subcommittee favors, or a standard, that is, if "the delegating trustee reasonably believes that the other trustee has greater skills, capabilities, knowledge or resources than the delegating trustee with respect to those duties and powers and the other trustee accepts the delegation." This standard, which is loosely patterned after 20 Pa. Cons. Stat. Ann. § 7777, is greater than the authority provided in the 6th Report in 7.3(e) ("A trustee may not delegate to a co-trustee the performance of a function the settlor reasonably expected the trustees to perform jointly."). The NYUTC-LAG agrees with section 7-A-7.3(e) of the 6th Report that "Unless a delegation was irrevocable, a trustee may revoke a delegation previously made."

³⁸ The 6th Report includes delegation by a trustee to another trustee in section 7-A-7.3 (Co-Trustees). The NYUTC-LAG believes that the matter is better handled under section 7-A-8.7.

It should be understood that a trustee's authority to delegate without standards is not unbridled. In all cases, the delegating trustee would be subject to the duty of prudence of section 7-A-8.4. Assuming the constituent bodies agree that delegation without standard is appropriate—several other UTC states have gone this route—then it will be necessary to address the effect of, and most likely amend, EPTL 11-2.3(b)(4)(C) which provides as follows:

(4) The prudent investor standard authorizes a trustee:

(C) to delegate investment and management functions if consistent with the duty to exercise skill, including special investment skills;

The NYUTC-LAG made the following additional revisions to section 7-A-8.7 to help clarify its provisions:

1. substitute “duty to the trustee and the beneficiaries” for “duty to trust”;
2. delete the phrase “of comparable skills” in paragraph (a) as circular and redundant in light of the phrase “under the circumstances.”

I. SECTION 7-A-8.8. TRUSTEE DUTIES AND POWERS UNDER DIRECTED TRUSTS.

~~(a) As used in this section:~~

~~————— (1) The term “investment advisor” means a fiduciary whose appointment is provided by the terms of the trust instrument and who has authority to direct investment decisions.~~

~~————— (2) The term “administrative trustee” means a trustee whose appointment is provided by the terms of the trust instrument and whose sole responsibility with respect to the investment of trust funds is to follow the written direction of the investment advisor. The administrative trustee shall possess all powers and duties granted to a trustee other than the powers and duties to direct the investment decisions.~~

~~————— (3) The term “investment decision” means retention, purchase, sale, exchange, tender or other transaction affecting the ownership of trust property.~~

~~————— (4) The term “trust” means any express trust of property, created by a will, deed or other instrument, whereby there is imposed upon a trustee the duty to administer property for the benefit of a named or otherwise described income or principal beneficiary, or both. A trust shall not include trusts for the benefit of creditors, resulting or constructive trusts, business trusts where certificates of beneficial interests are issued to the beneficiary, investment trusts, voting trusts, security instruments such as deeds of trust and mortgages, trusts created by the judgment or decree of a court, liquidation or reorganization trusts, trusts for the sole purpose of paying dividends, interest, interest coupons, salaries, wages, pensions or profits, instruments wherein persons are mere nominees for others, or trusts created in deposits in any banking institution or savings and loan institution.~~

~~(b) Except as otherwise provided by the express terms and provisions of a trust instrument within the limitations set forth by section 11-1.7 of the Estates, Powers and Trusts Law:~~

~~(1) The investment advisor is solely responsible for investing the trust funds by directing the administrative trustee in writing as to the investment decisions of the trust funds held by the administrative trustee.~~

~~(2) The administrative trustee shall comply with the written directions of the investment advisor and if the administrative trustee acts in accordance with such directions, the administrative trustee shall not be liable for any loss resulting from any action taken pursuant to such directions or not taken by reason of inaction of the investment advisor.~~

~~(3) The investment advisor is a fiduciary to the extent of the powers, duties and discretions granted to the investment advisor under the terms of the trust instrument and under this section, and the investment advisor is liable for any loss that results from breach of said fiduciary duty.~~

~~(4) The administrative trustee shall have no duty to review the actions of the investment advisor while the investment advisor is acting.~~

~~(5) Notwithstanding anything in this section to the contrary, in the event of the absence, incapacity or other condition preventing the investment advisor from acting, upon written notice to the administrative trustee, all powers and duties conferred on the investment advisor under the terms of the trust agreement and under this section shall vest in the administrative trustee.~~

~~(e) By accepting the appointment to serve as investment advisor or administrative trustee, the investment advisor or the administrative trustee submits to the jurisdiction of the courts of this state even if the investment advisory agreement or other related agreements provide otherwise, and the investment advisor and the administrative trustee may be made a party to any action or proceeding relating to decisions, actions or inactions of the investment advisor or the administrative trustee.~~

~~(d) The investment advisor shall be entitled to such compensation as may be reasonable, and the court, upon application of a person interested in the trust, may review the reasonableness of such compensation.~~

~~(e) The administrative trustee shall be entitled to either commissions in accordance with section 2312 of the Surrogate's Court Procedure Act or one half of the commissions provided under section 2309 of the Surrogate's Court Procedure Act, whichever section of the Surrogate's Court Procedure Act is applicable.~~

~~(f) This section shall apply to all trusts which came into existence after _____, 200____, and which incorporate this section by reference.~~

(a) For purposes of this section, the term “governing instrument” or “trust” means lifetime trust, trust created by will and trust created or reformed pursuant to judgment or decree that requires the trust to be administered in the manner of an express trust.

(b) For purposes of this section or a governing instrument:

(1) The term “advisor” means a persons, authorized by surrogate’s court procedure act section 707 to be a fiduciary, whose appointment is provided by the terms of the governing instrument and who has the power to direct the trustee or consent to the trustee’s decisions.

(2) The term “investment decisions” means decisions concerning or relating to retention, purchase, sale, exchange, tender, encumbrance or other action affecting the income and principal of a trust, and the valuation of nonpublicly traded investments.

(3) The term “investment advisor” means an advisor having the power to direct the trustee as to investment decisions or consent to the trustee’s investment decisions.

(4) The term “distribution decisions” means decisions concerning or relating to distribution of income or principal to the beneficiaries of a trust and to the grant of a power of appointment to one or more beneficiaries of a trust, with permissible appointees excluding the distribution advisor, the distribution advisor’s estate, the distribution advisor’s creditors and the creditors of the distribution advisor’s estate.

(5) The term “distribution advisor” means an advisor having the power to direct the trustee as to distribution decisions or consent to the trustee’s distribution decisions, but which power is subject to the restrictions under section 10-10.1 which shall be read for purposes of this section as if references therein to a “trustee” are instead references to a “distribution advisor.” A distribution advisor does not include the donee of a power of appointment.

(c) If a governing instrument provides that a trustee is to make decisions only with the consent of an advisor, then, except in cases of willful misconduct on the part of the trustee, the trustee shall not be liable for any loss resulting directly or indirectly from any action taken with the consent of an advisor, or not taken by reason of the advisor's failure to provide such consent after having been requested to do so by the trustee.

(d) The following provisions shall apply if a governing instrument provides that a trustee is to follow the direction of an advisor.

(1) If the trustee acts only in accordance with the direction of an advisor or fails to act because of lack of direction by an advisor, then, except in cases of willful misconduct on the part of the trustee so directed, the trustee shall not be liable for any loss resulting directly or indirectly from any action taken pursuant to such direction or not taken by reason of lack of direction by the advisor.

(2) While the advisor is acting, the trustee shall have no duty (i) to monitor the conduct of the advisor, (ii) provide advice to the advisor or consult with the advisor, or (iii) communicate with or apprise any beneficiary or third party concerning instances in which the trustee would or might have exercised the trustee's own discretion in a manner different than the manner directed by the advisor.

(3) Absent clear and convincing evidence to the contrary, any action taken by the trustee with regard to a power granted exclusively to an advisor, shall be presumed to be an administrative action taken by the trustee solely to allow the trustee to perform the powers given to the trustee under the terms of the governing

instrument and such action shall not be deemed to be an exercise or oversight of the advisor's powers.

(4) The trustee shall possess all powers and duties granted to a trustee under law and the governing instrument other than the powers and duties granted to an advisor under the governing instrument.

(5) The advisor may delegate the advisor's powers and duties as provided under section 7-A-8.7. The rules for trustees as provided in section 7-A-8.7 shall apply to an advisor who delegates under this section.

(e) Each advisor shall inform the trustee concerning the exercise of the advisor's powers and duties to the extent that such information is reasonably necessary for the trustee to perform the trustee's powers and duties.

(f) If at any time there is a vacancy in the office of advisor and the governing instrument directs the trustee to assume the office of the advisor, then all powers and duties conferred on the advisor under the terms of the governing instrument and under this section shall vest in the trustee.

(g) An advisor is a fiduciary and the powers and duties of a trustee under this part 8 shall apply to such advisor to the extent of the advisor's powers and duties authorized under the terms of the governing instrument, except that the investment advisor shall not be deemed to be a fiduciary with respect to powers under section 675 of the Internal Revenue Code.

(h) So long as the situs of administration under the governing instrument is New York, then by accepting their appointment under the governing instrument, the advisor and the trustee submit to the jurisdiction of the courts of New York

(even if the investment advisory agreement or other related agreements provide otherwise), and the advisor and the trustee may be made a party to any action or proceeding relating to decisions, actions or lack of action by the advisor or the trustee.

(i) The advisor and trustee shall be entitled to such compensation as may be reasonable, to be paid pursuant to the provisions of section 2312(5) of the surrogate's court procedure act, and the court, upon application of a person interested in the trust, may review the reasonableness of such compensation.

II. PRESENT NEW YORK LAW.

New York does not have a statutory provision corresponding to the concept of directed trusts in the context of investment decisions. However, there is limited case law that recognizes the concept of directed trusts. *See Matter of Rubin*, 143 Misc.2d 303 (Sur. Ct., Nassau Cnty. 1989), *aff'd* 172 A.D. 2d 841 (2d Dep't 1991). *Matter of Rubin* involved a construction proceeding in which the executors disputed the validity of a will clause granting advisors the power to direct the executors. The court acknowledged the long-standing principle in New York that a testator has the right to "limit, qualify, or condition the authority granted to his fiduciary." *Rubin*, 143 Misc.2d at 304. The court further acknowledged that a testator may appoint, in a governing instrument, an individual whose advice the named fiduciaries must follow, specifically mentioning the scenario "where the testator divides the fiduciary functions between a primary fiduciary and an advisor on investments." *Rubin*, 143 Misc.2d at 305–306. Other cases uphold the right of testators and settlors to grant advisors the power to direct executors and trustees as to administration under a will or trust. *Matter of Rockefeller*, N.Y.L.J., Aug. 24, 1999, at 28, col. 2 (Sur. Ct., New York Cnty.); *Matter of Winston*, N.Y.L.J., Dec. 24, 1990, at 33, col. 3 (Sur. Ct. Westchester Cnty.). These cases essentially equate the advisors and the executors/trustees to co-fiduciaries with separate duties.

In the context of distribution decisions, section 7-A-8.8 is essentially the exercise of a limited power of appointment by its holder (EPTL 10-3.1). The holder of a limited power of appointment is not held to a fiduciary standard.

III. DISCUSSION.

The NYUTC-LAG agrees with the 6th Report's recommendation that the directed trust statute should be expanded beyond investment decisions to cover other types of decisions, including distribution decisions. Accordingly, the NYUTC-LAG has rewritten the language of the draft statute to accomplish this as well as the following purposes:

Paragraph (a) of section 7-A-8.8 makes clear that the statute applies to testamentary and lifetime trusts, including those reformed by court order.

Paragraph (b) creates terminology, which is easily recognizable in a directed trust context, to create uniformity and assist the practitioner in drafting.

Paragraph (c) addresses situations where a trustee can only make decisions with the consent of an advisor and paragraph (d) applies to situations where a trustee is directed by an advisor. In this context, NYUTC-LAG considered the issue of trustee's liability. Because under these provisions the trustee has no power to act except with the consent of the advisor or only at the direction of the advisor, the NYUTC-LAG's considered judgment is that the trustee should not be liable except in cases of the trustee's willful misconduct as the language of paragraphs (c) and (d) make clear. The trustee should not be liable for decisions over which the trustee has no responsibility. Thus, there is no conflict with EPTL 11-1.7. (The Trustee Duties and Powers Subcommittee determined that the Litigation Subcommittee address whether the advisor should be subject to rules for exoneration, which are currently found in EPTL 11-1.7.)

Also, as paragraph (d)(2) makes clear, the trustee who acts only on the direction of the advisor, has no duty to monitor the actions of the advisor, advise the advisor, or apprise the beneficiaries about the advisor's conduct.

Section 7-A-8.7 also applies to advisors, who may delegate their powers and duties in accordance with the provisions set out in section 7-A-8.7 with regard to the trustees.

Paragraph (e) requires the advisor to inform the trustee of advisor's actions to the extent such actions affect trustee's performance. The communication between advisor and trustee is critical for the directed trust to work properly.

Paragraph (f) provides that in instances where there is a vacancy in the office of advisor, the trustee assumes the powers and duties of the advisor, but only if the governing instrument so directs. It would be inappropriate to require a trustee to take on an advisor's responsibilities, particularly if the trustee has no ability or capacity to perform them.

Paragraph (g) is consistent with current New York law in providing that a distribution advisor is not deemed a fiduciary, but an advisor possessed with the power to invest is a fiduciary. However, NYUTC-LAG recognizes that in some instances, a settlor of the trust acts as the investment advisor and, to the extent the settlor has power to substitute trust assets under IRC section 675, the investment advisor would not be deemed to be a fiduciary with respect to such substitution powers. The distribution advisor must act in good faith in the interest of trust beneficiaries and in accordance with the terms of the governing instrument.

Paragraph (h) makes clear that both advisor and trustee are subject to the jurisdiction of New York courts. The NYUTC-LAG realizes that in some instances the situs of administration of the trust may be moved out of state, in which case the advisor and the trustee will be subject to the laws of that other jurisdiction.

Current New York law on trustee compensation does not take into account the bifurcation of duties between trustee and advisor and so has no comparable mechanism of compensation set forth in paragraph (j). Paragraph (j) requires that the compensation to the advisor and the trustee be reasonable so that the totality of compensation be commensurate with the responsibilities of the trustee and the investment advisor. The compensation should be paid as provided in SCPA 2312 (5) concerning the payment of 1/3 of the compensation from income and 2/3 from principal, and SCPA 2312 (6) concerning the retention of the commissions during the trust year.

Finally, one other recommendation: advisors should not be required to obtain letters in a testamentary trust.

NOTE ON TRUST PROTECTOR LEGISLATION: The Trustee Duties and Powers Subcommittee recommended that trust protector legislation should be added as part of section 7-A-8.8 or as new section 7-A-8.8A. Due to time constraints, the Subcommittee was unable to finish work on trust protector legislation. Going forward, trust protector legislation should be considered.

I. SECTION 7-A-8.9. DUTY TO CONTROL AND PROTECTION OF TRUST PROPERTY.

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

II. PRESENT NEW YORK LAW.

New York does not have a statute that specifically addresses a trustee's duty to control and protect trust property. Nonetheless, under New York common law, a trustee is under a duty to secure possession of trust assets and protect and preserve the trust property for the benefit of the trust beneficiaries. *In re Marine Midland Bank*, 127 A.D.2d 999, 1000 (4th Dep't 1987) ("The duty to reduce the trust *res* to its possession is one of the Trustee's first duties."); *Matter of Joseph Heller Inter Vivos Tr.*, 161 Misc. 2d 369, 370 (Sur. Ct. New York Cnty. 1994) (approving a trustee's request to sever trust assets to protect liquid assets from potential liability arising from trust's real property, the court noted such severance was consistent with the trustee's "fundamental duty to use reasonable care to protect the trust from unnecessary exposure to risk of loss"); *Matter of Brunner*, 49 Misc. 2d 139, 140 (Sur. Ct. Kings Cnty. 1966), *aff'd* 26 A.D.2d 838 (2d Dep't 1966) (acknowledging that "[i]t was the clear duty of the trustee to obtain possession of the trust fund; he was required to use care and diligence in doing this" and holding that the trustee's unexplained failure to take possession of the trust fund constituted prima facie negligence); *In re Gurlitz' Will*, 134 Misc. 160, 161–162 (Sur. Ct. Kings Cnty. 1929) ("[O]ne of the primary duties of a trustee is to conserve the property and assets of the trust estate until its complete and final termination, which takes place only when its terms are entirely fulfilled by final distribution to those ultimately entitled."); *In re Garrasi*, 33 Misc. 3d 1224(A) (Sur. Ct. Schenectady Cnty. 2011) (quoting *Matter of Donner*, 82 N.Y.2d 574 (1993) ("At the very least,

it is the trustee's absolute duty to preserve the assets of the trust 'to insure that they [are] protected for the persons or entities eventually entitled to receive them', and prevent losses.").

A trustee must be reasonably diligent about discovering the location of trust assets and taking control of such assets without unnecessary delay. *See, e.g., Matter of Chalmers*, 163 Misc. 142, 145 (Sur. Ct. Albany Cnty. 1937) ("[A] trustee must use extreme diligence in gathering in the assets necessary for the establishment of a trust. If a trustee fails to exercise such care and diligence, any delay is at his personal risk.").

III. DISCUSSION.

The NYUTC-LAG recommends that section 7-A-8.9, as modified, be enacted into law.

The NYUTC-LAG considered whether a trustee should have duties or powers before accepting the trusteeship. *Cf. Matter of Yarm*, 119 A.D.2d 754 (2d Dep't 1986) (providing that an executor may act to preserve estate assets before letters are issued based on EPTL 11-1.3). The NYUTC-LAG rejected the notion of a preliminary trusteeship, which does not have a basis in law, believing that section 7-A-7.1(c), which allows a trustee to take actions before rejecting the trusteeship, is the appropriate approach.

I. SECTION 7-A-8.10. DUTY REGARDING RECORDKEEPING AND IDENTIFICATION OF TRUST PROPERTY.

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

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

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

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

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

II. PRESENT NEW YORK LAW.

EPTL 11-1.6 requires that the trustee keep the trust's property separate from his, her, or its own property. Under EPTL 11-1.6(a), any bank or trust company, when acting as fiduciary, may hold securities registered in the name of a nominee with the consent (if applicable) of any individual fiduciary. Securities held in nominee form are not specifically registered in the name of the fiduciary. (This is in harmony with paragraph (c) because the records maintained by the nominee satisfy the requirements of paragraph (c).)

In addition, the EPTL specifically provides that a fiduciary or custodian has the authority to deposit securities in a central depository (EPTL 11-1.9) and the power to employ a broker-dealer as custodian (EPTL 11-1.10).

III. DISCUSSION.

The NYUTC-LAG recommends enactment of this section as modified. Specifically, the NYUTC-LAG recommends that paragraph (c) be modified by adding the phrase "or elsewhere in this Article", by changing the reference to "trust" from "trustee" and by substituting the phrase "capable of registration" for "feasible." The NYUTC-LAG decided not to cross-reference the language "capable of registration" that appears in EPTL 7-1.18 to avoid possible confusion, because the "capable of registration" language of EPTL 7-1.18 (section 7-A-4.2-A(d)) only applies in the case of a trust of which the creator (settlor) is the sole trustee.

In addition, the NYUTC-LAG recommends that paragraph (d) be clarified by inserting the wording "of each trust" following "respective interests."

The NYUTC-LAG observes that paragraph (b) ("A Trustee shall keep trust property separate from the trustee's own property") is already addressed by EPTL 11-1.6 ("Property Held as Fiduciary to be Kept Separate"). In addition, paragraph (c) concerning due designation overlaps with EPTL 11-1.1(b)(10), which is incorporated by reference in section 7-A-8.16(7)(C). The NYUTC-LAG recommends that these overlaps be addressed by adding a new paragraph 7-A-8.10(e) to provide that, notwithstanding this section, other relevant EPTL provisions shall continue to apply.

I. SECTION 7-A-8.11. DUTY TO ENFORCE AND DEFEND ENFORCEMENT AND DEFENSE OF CLAIMS.

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

II. PRESENT NEW YORK LAW.

Under New York law, trustees owe a duty to beneficiaries to take reasonable steps to enforce claims that are held by the trustee of the trust and defend against claims against the trustee of the trust and may be surcharged for the value of assets that they fail to acquire. *In re Marine Midland Bank*, 127 A.D.2d 999 (4th Dep't 1987) (finding that where trustee failed to file tax refund forms before statute of limitations period expired, the trustee may be personally surcharged for the value of the lost tax refund); *Matter of Kistler*, 167 Misc. 528, 530 (Sur. Ct. Kings Cnty. 1938) (finding that where trustee was entitled to receive assets from executor, trustee was "in essence the holder of a matured and enforceable debt against the executor" which the trustee had a duty to enforce); *In re Corn Exch. Bank Trust Co.*, 87 N.Y.S.2d 675, 677 (Sup. Ct. New York Cnty. 1948), *modified on other grounds*, 276 A.D. 430 (1950) (trustee has a duty to defend the trust even against a settlor who claims that the trust was created under mistake and therefore rescindable, provided there is reasonable ground for defense).

It may not be reasonable to enforce a claim depending on the likelihood of recovery and cost of suit and enforcement. Such determination is a matter within the discretion of the trustee. *See, e.g., Matter of Kline Rev. Trust*, 196 Misc. 2d 66, 76–77 (Sur. Ct. Fulton Cnty. 2003) (where court declined to direct successor trustee on whether to pursue possible claims against predecessor, noting that such matter involves the successor trustee's exercise of discretion and reasonable judgment, including his consideration of practical reservations about expending trust assets to pursue such claims).

III. DISCUSSION.

Because section 7-A-8.11 is generally consistent with New York law, the NYUTC-LAG recommends that the provision be enacted into law, as modified. The modifications are intended to make this provision consistent with general principles of trust law which do not treat trusts as entities and consequently do not recognize claims of and against the *trust*, but instead recognize claims of and against the *trustee*.

I. SECTION 7-A-8.12. DUTY TO COLLECT ~~COLLECTING~~ TRUST PROPERTY.

A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee, and to redress a breach of trust known to the trustee to have been committed by a former trustee.

II. PRESENT NEW YORK LAW.

SCPA 1506 provides for a testamentary trustee's liability for an executor's prior actions as follows:

A trustee who was not an executor of the estate of the same decedent shall not be liable for breach of trust committed by the executor in any of the following cases:

1. He received the assets of the trust pursuant to a final decree of the court.
2. He did not know of a situation constituting a breach of trust committed by the executor, and does not improperly permit it to continue.
3. He does not neglect to take proper steps to compel the executor to deliver trust property to him.
4. He does not neglect to take proper steps to redress a breach of trust committed by the executor.

SCPA 1506 does not change the common law rule that a trustee will be surcharged for his own wrongful acts or breach in failing to protect the beneficiaries' rights. For example, after the trustee discovers a breach by the executor (or has had ample opportunity to make an investigation to reasonably discover such breach), the trustee has a duty to timely take steps to prevent the executor from further damaging the trust property. *See, e.g., Villard v. Villard*, 219 N.Y. 482, 504 (1916) (holding trustee liable for own wrongdoing where trustee accepted improperly purchased assets because "it was not the care of an ordinarily prudent man to continue to hold the investments without inquiry or further investigation"); *see also Matter of Kistler*, 167 Misc. 528, 530 (Sur. Ct. Kings Cnty. 1938) (trustee's failure to compel executor to transfer assets to fund testamentary trust where estate had been open for six years presents potential basis of liability as if trustee had engaged in affirmative misconduct because "[n]onfeasance is as potent a ground for surcharge as misfeasance").

There is no equivalent statute protecting a successor trustee from liability for a former trustee's actions. New York courts have held that a successor trustee must take proper steps to redress his predecessor's actions. *See, e.g., Bank of New York v. N.J. Title Guar. & Tr. Co.*, 256 A.D. 609, 611 (1st Dep't 1939), *rearg. denied*, 257 A.D. 806 (1st Dep't 1939) (holding successor trustee has a duty to redress the breach of a predecessor trustee—a proposition "too clear to require detailed argument"—and thus had standing to sue the predecessor trustee for conversion in failing to turn over trust securities); *Matter of Alpert*, 243 N.Y.L.J. 17, January 27, 2010 (Sur. Ct. New York Cnty.) (recognizing that successor trustee "owed a duty to inquire into the accuracy of the account of his predecessors and to redress any breach of trust committed by them" and holding successor trustee liable for his predecessor's actions during the entire 58-year period of the trust because no account had ever been judicially settled). *But see Matter of Kline Rev. Tr.*, 196 Misc.2d 66, 75–76 (Sur. Ct. Fulton Cnty. 2003) (citing *Pfeffer v. Lehmann*, 255, App. Div. 220, (1938) for proposition that the trustee "is only responsible for the assets which come into his hands, and has no particular legal duty to seek an accounting from his predecessors" but noting that "[a]t the same time, New York courts have cited with favor the position espoused in the Restatement of Trusts that a successor trustee can be held liable for failure to proceed against his predecessors for their breach of trust").

How the trustee corrects the breach is situation-specific and a matter of business judgment to be determined in the discretion of the trustee. *See, e.g., Matter of Kline Rev. Tr.*, 196 Misc.2d 66, 76 (Sur. Ct. Fulton Cnty. 2003); *Matter of Gibson*, 40 N.Y.S.2d 727, 736 (Sur. Ct. Westchester Cnty. 1943).

III. DISCUSSION.

The NYUTC-LAG recommends that section 7-A-8.12 be enacted into law. This provision codifies existing standards and is therefore acceptable.

I. SECTION 7-A-8.13. DUTY TO INFORM AND REPORT.

(a) ~~A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.~~ Unless unreasonable under the circumstances, a trustee **has the duty to** ~~shall~~ promptly respond to a beneficiary's request for ~~existing reports and other~~ information related to the administration of the trust, **including a report containing the information referred to in paragraph (c).**

(b) A trustee:

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

(2) within 60 days after accepting a trusteeship, **has the duty to** ~~shall~~ notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number;

(3) within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, **has the duty to** ~~shall~~ notify the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the

right to request a copy of the trust instrument, and of the right to a trustee's report as provided in paragraph (c); and

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

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

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

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

II. PRESENT NEW YORK LAW.

SCPA 2102(1) provides as follows:

A proceeding may be commenced to require a fiduciary:

1. To supply information concerning the assets or affairs of an estate relevant to the interest of the petitioner when the fiduciary has failed after request made upon him in writing therefor.

SCPA 2309(4) and 2312(6) require that trustees furnish information to certain beneficiaries when commissions are involved.

In addition, trustees may be required to account. There do not appear to be any New York cases involving a trustee's specific requirement to inform or report when not governed by statute.

III. DISCUSSION.

As modified, the NYUTC-LAG recommends that section 7-A.8.13 be enacted. The Trustee Duties and Powers Subcommittee (hereinafter "Subcommittee") also recommended that several of the provisions in section 7-A-8.13 be mandatory. *See* § 7-A-1.5(b)(10) and (11). The following sets forth how the Subcommittee came to recommend its compromise for the mandatory provisions.

The Subcommittee considered various alternative revisions (including those already adopted by other states) to the 6th Report, which made the applicable provisions mandatory in all cases of section 7-A-1.5(b)(9) and (10). In particular, it spent substantial time discussing the pros and cons of the so-called "surrogate" approach adopted in several states, under which the disclosure requirements of 8-1.3 can be waived by the settlor only if the disclosures are made to someone designated by the settlor to receive the disclosures on behalf of the beneficiaries. In the end, it was determined that the "surrogate" approach was unwise because of the substantial uncertainties that would have to be addressed and resolved with respect to both the default and mandatory aspects of the role, responsibility, and liability of the "surrogate" designated by the settlor.

The Subcommittee rejected the approach taken in several states, which effectively made disclosure merely a default rule that could be overridden by the settlor. In effect, a trust could be kept "secret" from the trust beneficiaries if a settlor so wished. The Subcommittee felt strongly that the concept of a "secret" trust is antithetical to the basic concept of a trust, where a trustee owes enforceable duties to beneficiaries.

The Subcommittee then focused on another revision adopted elsewhere. Under this approach the mandatory disclosure requirements of the UTC are retained but are relaxed while the settlor or the settlor's surviving spouse is alive. It was recognized that for the period of the settlor's lifetime, the UTC provisions themselves (and as adopted by the 6th Report) effectively prohibit a waiver or modification of the disclosure requirements of section 8-1.3 only with respect to irrevocable lifetime trusts. During such period, no disclosure whatsoever is required with respect to the existence or terms of either testamentary trusts or revocable lifetime trusts. Indeed, even with respect to irrevocable lifetime trusts, if the settlor retains the lifetime interests

in the trust, the disclosure requirements during the settlor's life would effectively apply only to beneficiaries of future interests if and when they attain the age of 25. With these considerations in mind, the Subcommittee decided to recommend what is, in effect, a relatively minor modification of the UTC provisions adopted by the 6th Report. Specifically, it is recommended that the settlor be allowed to waive or modify the 8-1.3 disclosure requirements only with respect to the period commencing with the establishment of the trust and ending with the death of the later to die of the settlor and the settlor's surviving spouse.

Reporters' Note: For trusts created by persons who are not individuals, the Reporters believe that a settlor may bar disclosures for a 21 year period.

I. SECTION 7-A-8.14. DUTY REGARDING DISCRETIONARY POWERS; ~~TAX POWERS.~~

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

(b) The rules that address discretionary powers and tax savings are set forth in section 10-10.1.

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

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

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

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

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

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

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

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

II. PRESENT NEW YORK LAW.

Paragraph (a): *In re Estate of Adelson*, 29 Misc. 3d 1217(A) (Sur. Ct. Bronx Cnty. 2010) provides a good statement of New York law:

[A]lthough a trustee's "absolute" discretion is indeed broad, a trustee must reach a determination "in good faith" and "in accordance with the standard which the trust imposes;" therefore, if the trustee's decision was arbitrary or made in bad faith, the court will not honor the trustee's purported exercise of discretion.

Subsection (b) - (d):

EPTL 10-10.1 provides as follows:

A power held by a person as trustee of an express trust to make a discretionary distribution of either principal or income to such person as a beneficiary, or to make discretionary allocations in such person's favor of receipts or expenses as between principal and income, cannot be exercised by such person unless (1) such person is the grantor of the trust and the trust is revocable by such person during such person's lifetime, or (2) the power is a power to provide for such person's health, education, maintenance or support within the meaning of sections 2041 and 2514 of the Internal Revenue Code, or (3) the trust instrument, by express reference to this section, provides otherwise. If the power is conferred on two or more trustees, it may be exercised by the trustee or trustees who are not so disqualified. If there is no trustee qualified to exercise the power, its exercise devolves on the supreme court or the surrogate's court, except that if the power is created by will, its exercise devolves on the surrogate's court having jurisdiction of the estate of the donor of the power.

This section generally prohibits a trustee from making discretionary distributions to himself or herself unless the trust is revocable or the discretionary power is limited by an ascertainable standard.

To qualify for the ascertainable standard exception under this section, the grantor or testator must have created the power with such limitation. The court is not authorized to "scale down" or "peel back" an unrestricted power to an ascertainable standard and then allow the sole trustee to exercise it in his or her own favor.

III. DISCUSSION.

The NYUTC-LAG agrees with the 6th Report that section 7-A-8.14(a) be enacted as declarative of New York common law, except the benefit of the beneficiaries provision, for which deletion is recommended. It disagrees that the remainder of the proposed section should be enacted because current EPTL 10-10.1 addresses the issues. However, the NYUTC-LAG recommends that EPTL 10-10.1 be amended in one respect:

The phrase "who the trustee has an obligation of support" (which is the grantor trust formulation for income tax purposes) should be changed to read "in discharge of the trustee's personal obligation of support" (which is the focus of the *Upjohn* 6th Circuit case involving this issue from the 1970s). Otherwise, a parent trustee could never make distribution decisions with respect to a beneficiary who is the trustee's minor child.

I. SECTION 7-A-8.15. GENERAL POWERS OF TRUSTEE.

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

- (1) powers conferred by the terms of the trust; ~~or~~ **and**
- (2) except as limited by the terms of the trust, **court order or decree or other**

applicable law:

- (A) all powers over the trust property which an unmarried competent owner has over individually owned property;
- (B) any other powers appropriate to achieve the proper investment, management, and distribution of the trust property; and
- (C) any other powers conferred by this Article.

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

~~Article.~~

II. PRESENT NEW YORK LAW.

Current New York law does not provide as a default rule that a trustee will have the broadest possible powers subject to the exercise of the trustee's fiduciary duties. Instead, New York provides for specific default powers, principally in EPTL 11-1.1(b). EPTL 11-1.1(c) permits a court to authorize additional powers as necessary.

III. DISCUSSION.

The NYUTC-LAG generally agrees with the 6th Report that a trustee should, as a default, have the broadest possible powers. However, the NYUTC-LAG recommends three modifications: First, the NYUTC-LAG believes that “and” rather than “or” should be used in section 7-A-8.15(a)(1). This change, which was made to UTC § 815(a)(1) was explained as follows: “[The change] corrects an inadvertent style glitch. As the comments to section 815 make clear, the drafters intended that the trustee have both the powers stated in the terms of the trust and the powers specified in this Act, not that they be alternatives.”

The second recommendation by the NYUTC-LAG is that a trustee should not have powers that are limited by court order or decree or by other applicable law. For example, SCPA 710(4) prohibits a trustee from removing property from New York without court approval. *See also* section 7-A-1.8(c) (requiring court approval to transfer the principal place of administration of a testamentary trust).

Finally, the NYUTC-LAG recommends that the exercise of powers be made to fiduciary duties throughout the EPTL, including duties under New York’s prudent investor statute in EPTL 11-2.3.

I. SECTION 7-A-8.16. SPECIFIC POWERS OF TRUSTEE.

Without limiting the authority conferred, **or the restrictions imposed**, by section 7-A-8.15, a trustee may:

(1) collect trust property and accept or reject additions to the trust property from a settlor or any other person;

(2) acquire or sell **trust** property, ~~for cash or on credit, at public or private sale;~~ **at public or private sale, and on such terms as in the opinion of the trustee will be most advantageous to those interested therein;**

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

(4) deposit trust money in an account in a ~~regulated financial institution~~ **bank or other insured depository institution.**

(5) borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;

(6) with respect to an interest in a proprietorship (**and subject to SCPA 2108**), partnership, limited liability company, business trust, corporation, or other form of business or enterprise, continue the business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization or contributing additional capital;

(7) with respect to stocks or other securities **held as a trustee**, exercise the rights of an absolute owner, including the right to:

(A) vote, or give proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement;

(B) ~~hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;~~ **employ a financial institution as custodian of any such stock or other securities as in the same manner as authorized for a fiduciary section 11-1.1(b)(9) of this chapter;**

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

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

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

~~(C)~~(F) pay calls, assessments, and other sums chargeable or accruing against the securities, ~~and sell or exercise stock subscription or conversion rights; and~~ **in the same manner as authorized for a fiduciary in section 11-1.1(b)(15); and**

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

~~_____ (D) deposit the securities with a depository or other regulated financial service institution;~~

~~(8) with respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries~~ **repairs and other actions;**

(A) for an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries;

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

(9) enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;

(10) grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;

(11) ~~insure the property of the trust against damage or loss and insure the trustee, the trustee's agents, and beneficiaries against liability arising from the administration of the trust;~~
effect and keep in force fire, rent, title, liability casualty or other insurance to protect the property of the trust and to protect the fiduciary;

(12) abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration;

(13) with respect to possible liability for violation of environmental law:

(A) inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;

(B) take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of governmental enforcement;

(C) decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;

(D) compromise claims against the trust which may be asserted for an alleged violation of environmental law; and

(E) pay the expense of any inspection, review, abatement, or remedial action to comply with environmental law;

(14) pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust;

(15) pay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust, **including the reasonable expense of obtaining and continuing the trustee's bond and any reasonable counsel fees the trustee may necessarily incur;**

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

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

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

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

(20) appoint a trustee to act in another jurisdiction with respect to **real or tangible or personal** trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, require that the appointed trustee furnish security, and remove any trustee so appointed;

(21) pay an amount distributable to a beneficiary who is under a legal disability ~~or who the trustee reasonably believes is incapacitated~~, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by:

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

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

(C) ~~if the trustee does not know of a guardian or custodian, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf; or if the amount is not in excess of \$10,000 paying the amount to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf;~~

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

(E) if the sum payable to a patient in an institution in the state department of mental hygiene is not in excess of the amount which the director of the institution is authorized to receive under section 29.23 of the mental hygiene law, paying such sum to such director for use as provided in that section.

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

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

(24) ~~prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;~~ **contest, compromise or otherwise settle any claim in favor of the trust or trustee or in favor of third persons and against the trust or trustee;**

(25) sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's powers; ~~and~~

(26) on termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it;

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

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

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

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

(31) **in the case of a successor or substitute trustee, succeed to all of the powers, duties and discretion of the original trustee, with respect to the trust, as were given to the**

original trustee unless the exercise of such powers, duties or discretion of the original fiduciary are expressly prohibited by the will, deed or other instrument to any successor or substituted fiduciary;

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

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

II. PRESENT NEW YORK LAW.

EPTL 11-1.1(b) provides 22 default fiduciary powers, which includes testamentary and lifetime trustees pursuant to EPTL 11-1.1(a). EPTL 11-1.1(c) authorizes a court to grant additional powers. EPTL 11-8 through 10 also authorize certain trustee powers.

III. DISCUSSION.

Although section 7-A-8.15 grants a trustee virtually unlimited authority to act, subject to trustee duties, the Estate Planning Subcommittee and the City Bar Committees believe that section 7-A-8.16 provides a useful recitation of specific powers that will be helpful for trustees and beneficiaries. As a result, the Estate Planning Subcommittee and the City Bar Committees recommend that the 6th Report be modified as highlighted in section 7-A-8.16.

The modifications are based on a comparison between existing New York law on powers and the powers as proposed by the 6th Report. Where a power is similar under both, the better explication of the power has been chosen.³⁹ Where a power is only provided in the 6th Report that power is generally recommended with possible modification for clarity and completeness. Where a power is only provided under current New York law that power is generally recommended with possible modification for clarity and completeness. *See* Paragraphs 27-32. Paragraph 33 is recommended to complement section 7-A-8.10(d) (“If the trustee may invest as a

³⁹ The Litigation Subcommittee was of the opinion that a trustee be required to pay for insurance premiums out of the trustee’s funds. This would make a lot of sense if prior history could be disregarded. However, EPTL 11-1.1(b)(4) has allowed a trustee (and other fiduciaries) to obtain insurance for their protection without requiring payment from personal funds. Moreover, the expense of bonding a testamentary trustee is treated as an expense of administration.

whole the property in which the trustee has interests under two or more trust instruments, the trustee must maintain records clearly indicating the respective interests of the trustee under each trust instrument.”)

The Litigation Subcommittee was asked to review section 7-A-8.16(23) and provided the following helpful input:

II. PRESENT NEW YORK LAW

CPLR §7501 states that “[a] written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment.” Likewise, the courts have become increasingly receptive to enforcing agreements that require the arbitration of disputes. *See, e.g., Sprinzen v. Nomberg*, 46 N.Y.2d 623 (1979). In *Sprinzen*, the Court stated that arbitration “is now favorably recognized as an efficacious procedure whereby parties can select their own nonjudicial forum for the ‘private and practical’ resolution of their disputes ‘with maximum dispatch and at minimum expense’.”

While these issues rarely arise in the practice, one must imagine that the Surrogate's Courts would be reluctant to enforce CPLR 7501 to its fullest extent if it believes it is encroaching upon its jurisdiction. This is especially true if the parties were to seek a decree from the court after arbitration.

Notwithstanding the strong public policy favoring arbitration (and, by logical necessity, the lesser alternatives like mediation), the traditional case law in New York Surrogate's Court practice has prohibited arbitration of certain proceedings that are relevant to trusts. For example, accountings have frequently been held to be immune from arbitration. SCPA 2211 has been interpreted to mean that the court is the mandatory forum for accountings because it cannot be divested from reviewing the issues presented by the schedules sua sponte, especially if the parties would seek a decree from the court after the arbitration. Also, the courts have an affirmative duty to ‘police’ the attorneys’ fees charged in estates, including trust estates. *See, Matter of Stortecky v. Mazzoni*, 85 N.Y.2d 518, (1995); 9-119 Warren's Heaton on Surrogate's Court Practice § 119.04, [3] Accounting Proceedings Not Subject to Arbitration. Therefore, it is uncertain how a court would react to an arbitrator's decision on such an issue. Nevertheless, when all parties are competent and are enabled to informally resolve a trustee's accounting without resort to the court, it is difficult to see the conceptual distinction between an informal account and the consent to submit issues to an arbitrator.

III. DISCUSSION

Despite some reservations about a blanket authorization for binding arbitration, and whether the courts would have to divest themselves of their sua sponte mandate as to issues like fees, the Litigation Subcommittee recommended that the provision be enacted into law, as did the 6th Report.

The Estate Planning Subcommittee and the City Bar Committees also recommend that EPTL 11-1.1(a) be amended by deleting its reference to trustees because trustee powers will now be provided in section 7-A.8.16.

As amended, EPTL 11-1.1(a) would read as follows:

(a) As used in this section, unless the context or subject matter otherwise requires, (1) the term "estate" means the estate of a decedent; (2) the term "fiduciary" means administrators, executors, preliminary executors, administrators d.b.n., administrators c.t.a.d.b.n., administrators c.t.a., ancillary executors, ancillary administrators, and ancillary administrators c.t.a [c.t.a.] and a successor or substitute fiduciary so designated.

I. SECTION 7-A-8.17. DUTIES AND POWERS REGARDING DISTRIBUTION UPON TERMINATION.

(a) Upon termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. Subject to the provisions of subsection (c) hereof, the right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within 30 days after the proposal was sent but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection.

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

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

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

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

II. PRESENT NEW YORK LAW

The proposal is a clear expression of New York law in so far as it treats the continuing duties of a trustee vis-a-vis distribution and accounting.

III. DISCUSSION

The Litigation Subcommittee agrees with the 6th Report that section 7-A-8.17 should be enacted. *See also* § 7-A-8.16(26), with which the Litigation Subcommittee also agrees.

I. SECTION 7-A-8.18. POWER OF TRUSTEE TO PAY INCOME OR PRINCIPAL TO TRUST CONTRIBUTOR AS REIMBURSEMENT FOR INCOME TAXES. APPLICATION OF PRINCIPAL TO CREATOR~~SETTLOR OF TRUST AS~~ REIMBURSEMENT FOR INCOME TAXES.

(a) Notwithstanding any contrary provision of law, the trustee of an express trust, unless otherwise provided in the disposing instrument, may, from time to time, pay **to the trust contributor of such trust an amount equal to any income taxes on any portion of the trust income or trust principal with which such trust contributor is charged. If the income tax is based on amounts allocated to trust income it shall be paid from trust principal. If the trust does not allocate amounts as between principal and income (as in the case of a unitrust), the tax may be paid from such trust property as the trustee may select.** ~~from principal to the creator of such trust an amount equal to any income taxes on any portion of the trust trust principal with which he is charged.~~

(b) **If the application or the possibility of the application of this section to any trust would reduce or eliminate a charitable deduction otherwise available to any person or entity under the income tax, gift tax or estate tax provisions of the internal revenue code, the provisions of this section shall not apply to such trust.**

~~The provisions of this section do not apply to any trust by which a future estate is indefeasibly vested in the United States or a political subdivision for exclusively public purposes; a corporation organized exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to~~

~~children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda or otherwise attempting to influence legislation; a trustee, or a fraternal society, order or association operating under the lodge system, provided the principal or income of such trust is to be used by such trustee or by such fraternal society, order or association exclusively for religious, charitable, scientific, literary or educational purposes, or for the prevention of cruelty to children or animals, and no substantial part of the activities of such trustee or of such fraternal society, order or association is carrying on propaganda or otherwise attempting to influence legislation; or any veteran's organization incorporated by Act of Congress, or of its department or local chapters or posts, no part of the net earnings of which inures to the benefit of any private shareholder or individual.~~

II. PRESENT NEW YORK LAW.

See the discussion in Part III.

III. DISCUSSION.

From the beginning EPTL 7-1.11(a) has applied only with respect to reimbursement for income taxes that are caused by the grantor having to include income items attributable to principal, like capital gains, but not with respect to ordinary income items such as ordinary dividends. Yet some grantor trust provisions (like the power to substitute equivalent property under Internal Revenue Code section 675) render the grantor taxable on ordinary income as well as capital gains. There does not seem to be any reason why in such a case the trustee should not have the reimbursement power as a default rule. In this respect it should be noted that the provisions which amended EPTL 7-3.1 in 2005 to indicate that EPTL 7-1.11 does not give rise to rights in a grantor's creditors to reach the corpus of a grantor trust were required to be expanded to trust provisions which make the grantor taxable on ordinary income items. Those provisions would not have been necessary if EPTL 7-1.11 itself extended to ordinary income as well as capital gains. Such extension is recommended and included as part of paragraph (a).

The provisions of paragraph (b) is an amended version of EPTL 7-1.11(b). Following the suggestion of Professor Turano in the McKinney's commentary to EPTL 7-1.11, it is recommended that this provision, as does a similar provision in EPTL 7-1.16, read:

If the application or the possibility of the application of this section to any trust would reduce or eliminate a charitable deduction otherwise available to any person or entity under the income tax, gift tax or estate tax provisions of the internal revenue code, the provisions of this section shall not apply to such trust.

The McKinney's commentary to 7-1.11 states:

Under subparagraph (b), this section does not apply to charitable remainder trusts, because the right to invade principal would jeopardize the charitable deduction. When the legislature amended a similar provision in EPTL 7-1.6 to provide that the prohibition

relating to charities would not apply unless the proposed invasion of principal would in fact jeopardize the charitable deduction, it did not simultaneously amend this section, which potentially suffers from the same overbreadth.

The relevant commentary to 7-1.16 is as follows:

26 U.S.C. (Internal Revenue Code) §§ 170, 2055 and 2522 set up stringent rules for trusts split between private and charitable beneficiaries, and the power to invade principal could violate them, causing the loss of income-tax, estate-tax and gift-tax charitable deductions. The legislature accordingly provided in the original version of this statute that the court could not order a principal invasion if a charity had “an indefeasibly vested future estate” in the trust or was a potential appointee of the property. This amendment was overkill, because it applied even if the future estate in the charity was small and the invasion would not have affected the charitable share or the deduction. See *Matter of Heyman*, 74 Misc.2d 1029, 346 N.Y.S.2d 602 (Surrogate's Court, New York County 1973) (dictum). The legislature therefore amended the statute again in 1978 to provide that the trustee could not invade principal if it would reduce or eliminate a charitable deduction under the federal tax laws (estate, gift or income taxes). L.1978, ch. 83, § 1.

I. SECTION 7-A-8.19. POWERS AND DUTIES REGARDING DECANTING.

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

(1) An authorized trustee exercising the power under this paragraph

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

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

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

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

(b) An authorized trustee with the power to invade trust principal but without unlimited discretion may appoint part or all of the principal of the trust to a trustee of an appointed trust, provided that the current beneficiaries of the

appointed trust shall be the same as the current beneficiaries of the invaded trust and the successor and remainder beneficiaries of the appointed trust shall be the same as the successor and remainder beneficiaries of the invaded trust.

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

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

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

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

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

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

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

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

(g) An authorized trustee exercising the power under this section has a fiduciary duty to exercise the power in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under the prevailing circumstances. The authorized trustee may not exercise the power under this section if there is substantial evidence of a contrary intent of the creator and it cannot be established that the creator would be likely to have changed such intention under the circumstances existing at the time of the exercise of the power. The provisions of the invaded trust alone are not to be viewed as

substantial evidence of a contrary intent of the creator unless the invaded trust expressly prohibits the exercise of the power in the manner intended by the authorized trustee.

(h) Unless the authorized trustee provides otherwise:

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

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

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

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

with notice to all persons interested in the invaded trust.

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

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

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

(5) The receipt of a copy of the instrument exercising the power shall

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

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

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

(k) Nothing in this section is intended to create or imply a duty to exercise a power to invade principal, and no inference of impropriety shall be made as a result

of an authorized trustee not exercising the power conferred under paragraph (a) or (b) of this section.

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

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

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

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

(3) To eliminate a provision granting another person the right to

remove or replace the authorized trustee exercising the power under paragraph (a) or (b) of this section unless a court having jurisdiction over the trust specifies otherwise;

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

(5) To jeopardize (A) the deduction or exclusion originally claimed with respect to any contribution to the invaded trust that qualified for the annual exclusion under section 2503(b) of the Internal Revenue Code, the marital deduction under section 2056(a) or 2523(a) of the internal revenue code, or the charitable deduction under section 170(a), 642(c), 2055(a) or 2522(a) of the Internal Revenue Code, (B) the qualification of a transfer as a direct skip under section 2642(c) of the Internal Revenue Code, or (C) any other specific tax benefit for which a contribution originally qualified for income, gift, estate, or generation-skipping transfer tax purposes under the internal revenue code.

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

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

(p) (1) Unless a court otherwise directs, an authorized trustee may not exercise a power authorized by paragraph (a) or (b) of this section to change

the provisions regarding the determination of the compensation of any trustee; the commissions or other compensation payable to the trustees of the invaded trust may continue to be paid to the trustees of the appointed trust during the term of the appointed trust and shall be determined in the same manner as in the invaded trust.

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

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

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

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

(r) For purposes of this section:

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

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

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

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

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

(6) The term "person or persons interested in the invaded trust" shall mean any person or persons upon whom service of process would be required in a proceeding for the judicial settlement of the account of the trustee, taking into account section three hundred fifteen of the surrogate's

court procedure act.

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

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

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

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

II. PRESENT NEW YORK LAW.

EPTL 10-6.6(b)-(s) provides the rules for decanting by a trustee.

III. DISCUSSION.

The Estate Planning Subcommittee was of the opinion that rules regarding decanting are best situated in Part 8, rather than in Part 4 which is where they are included in the 6th Report. Section 7-A-8.19 transports EPTL 10-6.6(b)-(t), with one important modification. EPTL 10-6.6(s)(1) (“For purposes of creating the new trust, the requirement of section 7-1.17 of this chapter that the instrument be signed by the creator shall be deemed satisfied by the signature of the trustee of the appointed trust”) is deleted because the result is provided in section 7-A-4.2-A(c).

I. SECTION 7-A-8.20. DUTY WHEN A RESULTING TRUST ARISES.

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

II. PRESENT NEW YORK LAW.

EPTL 7-1.7 provides as follows:

§ 7-1.7 Interest remaining in creator of trust

Every legal estate and interest not embraced in an express trust and not otherwise disposed of remains in the creator.

III. DISCUSSION.

The Reporters believe that this provision should be enacted to make clear the duty of the trustee when a resulting trust, which is defined in section 7-A-1.3(17), arises. Section 7-A-1-3(17) states that a “‘Resulting Trust’ means a trust that arises in favor of the settlor or the settlor’s successor’s interest on the failure of an express trust in whole or in part.”

PART 9
UNIFORM PRUDENT INVESTOR ACT

SUMMARY OF PART

The EPTL-SCPA Legislative Advisory Committee determined not to enact Article 9 of the Code.

Reporters' Note: New York has enacted the Uniform Prudent Investor Act under EPTL 11-2.3.

PART 10
**LIABILITY OF TRUSTEES AND RIGHTS
OF PERSONS DEALING WITH TRUSTEE**

SUMMARY OF PART

- § 7-A-10.1. Remedies for Breach of Trust.
- § 7-A-10.2. Damages for Breach of Trust.
- § 7-A-10.3. Damages in Absence of Breach.
- § 7-A-10.4. Attorney's Fees and Costs.
- § 7-A-10.45. Limitation of Action Against Trustee.
- § 7-A-10.56. Reliance on Trust Instrument.
- § 7-A-10.67. Event Affecting Administration or Distribution.
- § 7-A-10.78. Exculpation of Trustee.
- § 7-A-10.89. Beneficiary's Consent, Release, or Ratification.

§ 7-A-10.910. Limitation on Personal Liability of Trustee.

§ 7-A-10.1011. Interest as General Partner.

§ 7-A-10.1112. Protection of Person Dealing with Trustee.

§ 7-A-10.1213. Certification of Trust.

SECTION 7-A-10.1. REMEDIES FOR BREACH OF TRUST.

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

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

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

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

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

(4) order a trustee to account;

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

(6) suspend the trustee;

(7) remove the trustee as provided in Section 7-A-7.6;

(8) reduce or deny compensation to the trustee;

(9) **subject to section 7-A-10.11**, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or

(10) order any other appropriate relief.

II. PRESENT NEW YORK LAW.

Paragraph (a): No specific statute correlates to paragraph (a). However, EPTL 7-2.4 states "[i]f 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 by this article and by any other provision of law, is void."

Paragraph (b): New York does not have a specific section setting forth a comprehensive compilation of remedies. However, many of the remedies delineated in paragraph (b) are set forth statutorily in the EPTL and SCPA (EPTL 7-2.6 and 7-2.7, SCPA 209, 711, 719, 1501, 1509, 2205, 2206); others have been developed via judicial precedent.

Pursuant to the authority granted to the courts under these sections, and if it finds wrongdoing, the court has several options:

1) compel the trustee to perform the trustee's duties (EPTL 7-2.7, SCPA 209, 1501, 1509, and 2205);

(2) enjoin the trustee from committing a breach of trust (EPTL 7-2.7, SCPA 209, 1501, 1509, and 2205);

(3) compel the trustee to redress a breach of trust by paying money, restoring property, or other means (EPTL 7-2.7, SCPA 209, 1501, 1509, 2205; *see also, In re Estate of Rothko*, 43 N.Y.2d 305 (1977); *see generally, Matter of Garrasi*, 33 Misc. 3d 1224(A) (Sur. Ct. New York Cnty. 2011) (trustees required to pay the difference between what should have been the date of death value and what the actual value was as of the date of death, due to their misconduct, and ordered to pay the surcharged amount back into the trust));

(4) order a trustee to account (SCPA 2205 and 2206);

(5) appoint a special fiduciary to take possession of the trust property and administer the trust (EPTL 7-2.6, SCPA 711, 719, 2205 and 2206);

(6) suspend the trustee (EPTL 7-2.6 and SCPA 711 and 719);

(7) remove the trustee (EPTL 7-2.6 and SCPA 711 and 719);

(8) reduce or deny compensation to the trustee (*Matter of Tydings* (Ricki Singer Grantor Trust), 32 Misc. 3d 1204(A) (N.Y. Sur. Ct. 2011) *citing Ellis v. Kelsey*, 241 N.Y. 374 (1925); *see also Matter of Garcia*, N.Y.L.J., at 15, col. 3 (Sur. Ct. Bronx Cnty. 1988));

(9) void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds (*see Flaum v. Birnbaum*, 120 A.D.2d 183 (4th Dep't 1986)); or

(10) order any other appropriate relief such as surcharge a fiduciary (*Matter of Lanza*, 19 AD.3d 494 (2d Dep't 2005)(court removed the trustee and surcharged him for damages incurred); surcharge the fiduciary and then permit him/her/it to continue administering the estate (*Cooper v. Jones*, 78 AD.2d 423 (4th Dep't 1981); *Scalp & Blade, Inc. v. Advest, Inc.*, 309 AD.2d 219 (4th Dep't 2003)(compensatory damages are recoverable where breach of fiduciary duty extends beyond mere negligent retention of the portfolio's holdings and involves deliberate and flagrant self-dealing and dishonesty on the part of the fiduciaries); *Matter of Hunter*, 27 Misc. 3d 1205[A] (Sur. Ct. Westchester Cnty. 2010) ("lost profit" measure of damages appropriate where fiduciary's misconduct consisted of deliberate self-dealing with trust

property); *Matter of Tydings, supra* (where the breach of trust consists of a serious conflict of interest, the trust can recover the lost profit from the trustee)).

III. DISCUSSION.

The Litigation Subcommittee had some definitional issues with this section, particularly with regard to the 6th Report's failure to define "special fiduciary" as referenced in subparagraph (b)(5). Such an office does not exist in New York and would more accurately be described as a successor trustee. Nevertheless, the Litigation Subcommittee voted unanimously to follow the 6th Report and recommends enactment of the section.

I. SECTION 7-A-10.2. DAMAGES FOR BREACH OF TRUST.

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

(1) **the value of the capital lost by reason of the breach plus prejudgment interest as determined by the court; or** ~~the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred taking into account the purpose and expected duration of the trust, the performance of comparable prudent investment portfolios and such other factors as the court shall determine;~~

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

(b) Except as otherwise provided in this paragraph, if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee may be entitled to contribution from the other trustee or trustees **in accordance with applicable law**. A trustee is not entitled to contribution if the trustee ~~was substantially more at fault than another trustee~~ **committed the breach of trust** in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

II. PRESENT NEW YORK LAW.

New York's law governing remedies for breach of the fiduciary duty of care or prudence related to the investment of trust property which is defined by New York's version of the Prudent Investor Act, EPTL 11-2.3, is set forth in *Matter of Janes*, 90 N.Y.2d 41, 681 N.E.2d 332, 659 N.Y.S.2d 165 (1997) where in the Court of Appeals rejected the measure set forth by the 6th Report in 7-A-10.2(a)(1), described by the court as the "lost profits" measure which was used by the Surrogate in setting damages in *Janes*, in favor of the traditional "lost capital" measure. The difference between the two is best illustrated by their application to the facts of *Janes*. The trustee was held to have breached its duty of care by failing to diversify the trust's investments, specifically, for retaining too long a large position in Kodak stock. The Surrogate first determined the date at which the appropriate portion of the investment in Kodak should have been sold and set the damages as what the proceeds would be worth had they been invested in accordance with the trustee's duty of care, a value determined by finding what the proceeds would be worth if they had been invested in one of the corporate trustee's common trust funds. The policy behind this measure of damages is the determination that the damages should make the trust beneficiaries whole, that is, the damages should make the value of the trust property what it would have been had the breach not occurred. In the world of the Prudent Investor Act, that inquiry means determining what investment would satisfy the duty of care as set forth in the Act and then finding the current value of that hypothetical trust portfolio based on the "total return" on that portfolio. This is approach of Restatement (Third) of Trusts, § 100.

The Appellate Division and the Court of Appeals disagreed. The high court held that the property measure of damages was the value of the capital lost, that is, in *Janes*, the difference between the proceeds received from the sale of the Kodak and what the proceeds would have been had the stock been sold had the trustee properly diversified the trust's portfolio. The court then awarded pre-judgment interest on the damages at the statutory rate. Paragraph (a)(1) codifies the result in *Janes* which is generally applicable to damages resulting from a violation of the duty of care by not following the prudent investor standard.

In rejecting the Surrogate's measure of damages in *Janes*, the court distinguished its own decision in *Matter of Rothko*, 43 N.Y.2d 305, 323, (1977). There, the executors of the estate of abstract expressionist painter Mark Rothko were found to have violated their fiduciary duty, in words of the Court of Appeals opinion in *Janes* by "deliberate self-dealing and faithless transfers of trust property." (90 N.Y.2d at 55) Because the fiduciaries had sold property they had a duty to retain, a "lost profit" measure of damages is appropriate; that is, the appropriate measure is the value of the property at the time of judgment. This measure of damages is sometimes called "appreciation damages" and is treated by Restatement (Third) of Trusts as an instance in which the application of the general measure of damages as those needed to make the trust whole is "essentially objective." § 100 *cmt. (b)(1)*

The disgorging of profit by a faithless trustee is a basic principle of the law of trusts, as is the principle that the beneficiaries are entitled to the measure of damages that provides the greatest recovery. *See*, in general, Restatement (Third) of Trusts § 100.

Paragraph (b) deals with contribution among co-trustees. EPTL 10-10.7 allows a co-fiduciary to avoid liability for actions of the other co-fiduciaries by a timely written dissent. Such a dissent, however, will not avoid liability for “for failure to join in administering the estate or trust or to prevent a breach of trust.”

III. DISCUSSION.

There was widespread agreement in the Litigation Subcommittee that the law of New York as stated in *Janes* should not be changed by the Code. The Subcommittee was particularly convinced that the 7-A-10.2(b)(1) as reported by the 6th Report requires a measure of damages that is too speculative; specifically, the identification of proper benchmarks for properly invested portfolios would be difficult and time-consuming. Section 7-A-10.2(a), therefore, codifies the holding in *Janes* with respect to damages, including that opinion’s description of the *Rothko* measure of damages and rejects the lost profit or appreciation damages approach except as applied in *Rothko*.

The Litigation Subcommittee also decided that paragraph (b) as reported in the 6th Report required revision because the Subcommittee concluded that measuring contribution by comparative fault would create widespread uncertainty and lead to excessive litigation.

Finally, the proposed statute does not deal with the status of the “anti-netting rule” in New York law. The Reporters believe that the following comment in the 6th Report regarding 10.2 also remains accurate as applied to 7-A-10.2 as included in this Final Report.

The Committee notes that the principles set forth in paragraph (a) are not intended to codify, reject or freeze the development of, the so-called “anti-netting” rule which presently prevails in the New York case law. The rule was succinctly stated in *Matter of Harmon*, 5 Misc.2d 308, 312 (Sup. Ct. NY Co. 1956) to be that “[A] trustee cannot offset gains realized on certain unauthorized transactions against losses occasioned on other unauthorized transactions”. See also *Matter of Buck*, 55 N.Y.S.2d 841, 843-844 (Sur. Ct. Westchester Co. 1945) where the court stated: “[A] gain realized by the retention of certain securities may not be employed to offset a loss occasioned by the retention of other securities to which objection has been made. A trustee who is liable for a loss resulting from a breach of trust with respect to one portion of the trust property cannot reduce his liability by reason of a gain with respect to another portion of the trust property occasioned by a separate and distinct breach of trust”. As recently stated in *Matter of Lasdon*, 32 Misc.3d 1245 (2011): “The rationale underlying the anti-netting rule is simple enough; as was observed in a leading decision, “The money invested is [the beneficiary’s] money; and in respect of each and every dollar...he has an unqualified right to follow it, and claim the fruits of his investment, and...the trustee cannot deny it” (*King v. Talbot*, 40 N.Y. 76, 91). In other words, a trustee who has harmed the trust by a breach of duty cannot be allowed to use to his own advantage investment “fruits” that the terms of the trust have earmarked for the

beneficiary (see Matter of Bank of New York (Spitzer) (35 N.Y.2d 512 (1974); Scott and Ascher on Trusts, § 24.18 (5th ed. 2007)).

The Committee notes that under section 101 of the Restatement (Third) of Trusts, an exception to the anti-netting rule is carved out for situations described as a “single breach”. It is unclear whether such an exception is, or will be, recognized by the New York courts. The proposed statute leaves to the courts further developments in this area.

I. SECTION 7-A-10.3. DAMAGES IN ABSENCE OF BREACH.

(a) A trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust.

(b) Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.

II. PRESENT NEW YORK LAW.

Paragraph (a) is based on the Restatement (Second) of Trusts § 203.⁴⁰ (New York courts generally follow this Restatement). Comment a provides as follows:

[I]f [a trustee] enters into the transaction without intending to make a profit for himself and commits no breach of trust in so doing, nevertheless he is not permitted to retain the profit. Thus, if the trustee receives a commission or bonus for acts done in connection with the administration of the trust, he is accountable therefor, even if he does not commit a breach of trust in receiving the commission or bonus.

Restatement (Second) of Trusts § 203, comment a.

Paragraph (b) appears to be an innocuous enough statement that a trustee is not a guarantor and may be held liable to the trust beneficiaries only for breaches otherwise defined in these sections.

III. DISCUSSION.

The Litigation Subcommittee agrees with the 6th Report and recommends that this section be enacted.

⁴⁰ Restatement (Third) of Trusts § 99(b) is to the same effect.

I. SECTION 7-A-10.4. ATTORNEY'S FEES AND COSTS.

The award of costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is subject to the controversy is governed by section 2110 of the surrogate's court procedure act.

II. PRESENT NEW YORK LAW.

This provision authorizes a court to award costs and fees, including reasonable attorney's fees, in judicial proceedings involving the administration of a trust, to be paid by another party or from the trust.

New York follows the common-law "American Rule" which "requires all parties to a controversy—the victors and the vanquished—to pay their own 'incidents of litigation'" *In re Hyde*, 15 N.Y.3d 179, 185 (2010), quoting *Chapel v Mitchell*, 84 N.Y.2d 345, 349 (1994). "Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" *Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 N.Y.2d 487, 491 (1989). The rule encourages the "submission of grievances to judicial determination and [provides] freer and more equal access to the courts ... promot[ing] democratic and libertarian principles." *Mighty Midgets v Centennial Ins. Co.*, 47 NY 2d 12, 22 (1979).

However, SCPA 2110 authorizes the Surrogate to "fix and determine the compensation of an attorney for services rendered to a fiduciary or to a devisee, legatee, distributee or any person interested," and to direct payment of the fees, "from the estate generally or from the funds in the hands of the fiduciary belonging to any ... person interested." Further, SCPA 2301(4) gives the court discretion to award costs, and provides that such award may be "made payable by any party personally."

In *Matter of Hyde*, 15 N.Y.3d 179 (2010), the Court of Appeals clarified the broad discretion granted the Surrogate by SCPA 2110, holding that the section provides the court with discretion to allocate responsibility for payment of attorney's fees which "the estate is obligated to pay - either from the estate as a whole or from shares of individual estate beneficiaries," and establishing a multi-factored assessment to be applied by the courts.⁴¹ Specifically, the Court identified the following non-dispositive factors for consideration: "(1) whether the objecting beneficiary acted solely in his or her own interest or in the common interest of the estate; (2) the possible benefits to individual beneficiaries from the outcome of the underlying proceeding; (3) the extent of an individual beneficiary's participation in the proceeding; (4) the good or bad faith of the objecting beneficiary; (5) whether there was justifiable doubt regarding the fiduciary's conduct; (6) the portions of interest in the estate held by the non-objecting beneficiaries relative

⁴¹ While SPCA 2110 refers specifically to estates, the law is clear that it applies equally to trusts. Indeed, *Matter of Hyde* involved contested trust accounting proceedings.

to the objecting beneficiaries; and (7) the future interests that could be affected by reallocation of fees to individual beneficiaries instead of to the corpus of the estate generally" (*id.* at 186–87).

III. DISCUSSION.

The Litigation Subcommittee agrees with the 6th Report that existing New York case law should be applied in terms of the assessment of legal fees. Given the statutory authority discussed above, and the extensive body of case law in this State concerning the propriety of "fee shifting," the Litigation Subcommittee agreed with the 6th Report, and recommended that this section not be adopted. The Reporters thought it would be helpful for the statute to provide that current law applies. Section 7-A-10.4 makes that clear.

The Reporters think it would be helpful for the statute to provide that current law applies. Section 7-A-10.4 makes that clear.

I. SECTION 7-A-10.5 LIMITATION OF ACTION AGAINST TRUSTEE.

~~(a) A beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.~~

~~—— (b) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.~~

~~—— (c) If subsection (a) does not apply, a~~

A judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within six years after the first to occur of:

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

II. PRESENT NEW YORK LAW.

Current law has no equivalent to paragraphs (a) or (b) of this section. It is clear that the extent of New York law is limited to the six year statute of limitations to proceed against a trustee who has openly repudiated a trustee's duties. *See Matter of Barabash*, 31 N.Y.2d 76 (1972).

III. DISCUSSION.

The Litigation Subcommittee disagrees with the 6th Report and recommends that paragraphs (a) and (b) be deleted altogether. The 6th Report is far too ambiguous as to what would constitute "adequate disclosure" of a potential claim against a trustee, as described in paragraphs (a) and (b). The change to the law would only serve to increase litigation and diminish the rights of beneficiaries. Query: does the annual statement, supplied by a trustee in order to allow for the payment of annual commissions, satisfy this provision?

The Litigation Subcommittee recommended that paragraph (c) of the 6th Report constitute the entire section.

I. SECTION 7-A-10.6-5. RELIANCE ON TRUST INSTRUMENT.

A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

II. PRESENT NEW YORK LAW.

The language of proposed section is within the rubric of the Prudent Investor Act as expressed in EPTL 11-2.3 (a) and (b)(1) which provides:

A trustee has a duty to invest and manage property held in a fiduciary capacity in accordance with the prudent investor standard ... except as otherwise provided by the express terms and provisions of a governing instrument ... *A trustee is not liable to a beneficiary to the extent that the trustee acted in substantial compliance with the prudent investor standard or in reasonable reliance on the express terms and provisions of the governing instrument.* (emphasis added)

Case law generally follows the statute: The "language [of EPTL sec. 11-2.3(a) and (b)(1)] makes it abundantly clear that these statutes set forth default standards which are subordinate to the terms of the governing instrument. Thus as this Court has previously noted in a conflict between the governing instrument and [the statute], the governing instrument reigns supreme." *Matter of David Small Trust*, 862 N.Y.S.2d 815 (Sur. Ct. Onondaga Cnty. 2008), *affirmed in part*

and modified in part, 66 AD.3d 1377 (4th Dep't 2009). *See also Matter of HSBC Bank USA, NA. (Knox)*, 98 AD.3d 300, 310 (4th Dep't 2012), *affirmed in part and modified in part*, 96 AD.3d 1652 (4th Dep't 2012), *affirmed in part and modified in part*, 96 AD.3d 1655 (4th Dep't 2012) (upholding the retention of stock as authorized under the terms of the governing trust instrument).

However, a number of cases in New York assessed significant damages against a trustee who failed to diversify trust assets, even when there was a direction in the governing instrument that the trustee could retain the investments as they existed at the time of trust funding.

III. DISCUSSION.

The Litigation Subcommittee agrees that this section be enacted. The 6th Report noted in its discussion of this provision that, although it may appear obvious, “it is worth emphasizing that any provision in a trust that is invalid by reason of a mandatory rule in section 7-A-1.5(b) will not be considered to constitute a provision of the trust.” The Subcommittee agrees with this statement.

I. SECTION 7-A-10.7 6. EVENT AFFECTING ADMINISTRATION OR DISTRIBUTION.

If the happening of an event, including marriage, divorce, performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge.

II. PRESENT NEW YORK LAW.

Section 7-A-10.6 is based on Washington Revised Code § 11.9S.100 (formerly § 30.99.090), which has very similar language to Section 7-A-10.6. No Washington State cases, nor any other authority, has cited or discussed this section (or its predecessor). Several other states, however, have similar provisions in their laws of trusts—Alabama, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, and Vermont. Like the Washington statute, these statutes also have not been the subject of judicial scrutiny.

There are articles that discuss UTC § 1007 and the South Carolina section that provide examples of how the statute operates. For example, if a trustee were to pay from the trust educational expenses only if the beneficiary attends an accredited college, and if the beneficiary's college lost its accreditation without the trustee's knowledge even as the trustee had been exercising due care to confirm the issue, then the trustee would not be liable for losses from the trust to pay for the now non-accredited college's fees. Similarly, a trust could be created for the

benefit of several beneficiaries, one of whom is an ex-spouse, so long as that ex-spouse remains unmarried. If the ex-spouse remarries and the trustee, even though the trustee exercises reasonable diligence, does not discover this fact and continues to pay from the trust to the ex-spouse, then the trustee would be protected from liability to the other beneficiaries.

The UTC comments note that this provision represents a change from the common law as stated in the Restatement (Second) of Trusts (1959), which imposes strict liability for wrongful payments to non-beneficiaries despite the trustee's reasonable care in attempting to ascertain to whom the trust should make distributions.

Some New York cases follow the Restatement. *See, e.g., Matter of Sniffin*, 36 N.Y.S.2d 527 (N.Y. Sur. Ct. 1942), *rev'd*, 265 A.D. 1014 (N.Y. App. Div. 1943); *Ellis v. Kelsey*, 241 N.Y. 374 (1925). However, the First Department in *Matter of Spitzmuller*, 279 A.D. 233 (1st Dep't 1951), *aff'd*, 304 N.Y. 60S (1952) reached a different conclusion. The court held that a trustee who attempted in good faith to determine whether it was making a correct distribution but, based on facts unknown and not reasonably discoverable to the trustee, happened to make an improper distribution, could not be liable to the correct beneficiary because the trustee had exercised due care in attempting to ascertain the correct facts. In that case, the trust was to pay to the settlor's next of kin unless the settlor had executed a will saying otherwise. The settlor had executed a will, but the trustee did not find it after attempting, diligently, to find any will after the settlor's death. The First Department held that the trustee was not liable to the beneficiary under the will because it had exercised due care in attempting to discover the will, even though it had not discovered the will. *See also Matter of Carpenter*, 1935 N.Y. Misc. LEXIS 921 (Sur. Ct. Orange Cnty. 1935).

III. DISCUSSION.

The Litigation Subcommittee recommends enactment of this section. The Litigation Subcommittee saw the proposal as innocuous enough, especially with the provision that imposes a duty of reasonableness upon the trustee.

I. SECTION 7-A-10.8 7. EXCULPATION OF TRUSTEE AND OTHERS.

A term of a trust relieving a trustee, **an agent acting pursuant to a delegation under section 7-A-8.7 or trust advisor under section 7-A-8.8 [or a trust protector]** of liability for breach of trust is unenforceable to the extent that it exonerates the trustee from liability for failure to exercise reasonable care, diligence and prudence.

II. PRESENT NEW YORK LAW.

EPTL 11-1.7 severely limits the ability of a testator to exonerate a testamentary trustee or executor. The statute invalidates any attempt to exonerate the fiduciary “from liability for failure to exercise reasonable care, diligence and prudence” as well as the grant of the power “to make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise.” The courts have disagreed on whether the ban should apply to lifetime trusts as well. In *Matter of HSBC Bank USA (Knox)*, 98 A.D.3d 300 (4th Dep’t 2012), the court held it did not, *but see Matter of Shore*, 19 Misc.3d 663 (Sur. Ct. New York County 2008) where in a through opinion Surrogate Roth held that the statutory prohibition did apply to a lifetime trust, at least where by the terms of the trust “there is no one in a position to protect the beneficiaries from the actions of the trustee.” (*id.* at 666). The unsettled question of the application of EPTL 11-1.7 to lifetime trusts should have a statutory resolution. (It should be noted that legislation to apply the rules of EPTL 11-1.7 to lifetime trusts has been proposed by the Trusts and Estates Law Section of the New York State Bar Association.)

III. DISCUSSION.

The Litigation Subcommittee agrees with the 6th Report that New York’s anti-exoneration provision for testamentary trusts be extended to lifetime trusts.

The Reporters also believe that the anti-exoneration provisions should also be applied to delegated agents and trust directors (trust advisors and trust protectors).

I. SECTION 7-A-10.9-8. BENEFICIARY'S CONSENT, RELEASE, OR RATIFICATION.

A trustee is not liable to a beneficiary for breach of trust if the beneficiary, while having capacity, consented in writing to the (a) conduct constituting the breach, (b)~~-released~~ **release of** the trustee from liability for the breach, or (c)~~-ratified~~ **ratification of** the transaction constituting the breach, unless:

(1) the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or

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

II. PRESENT NEW YORK LAW.

New York law generally favors agreements among the parties and an agreement releasing a fiduciary from liability is equivalent to a judicial decree unless such release was procured through fraud or misleading representations by the fiduciary.

In the context of informal settlements of a fiduciary's account, SCPA 2202 and 2203 establish a procedure for the filing of such instruments with the court. In addition, it is well established through case law that a trustee may be relieved of liability by way of a signed release from a beneficiary, which, in the absence of fraud, misleading representations, overreaching or the like, is conclusive. *See, e.g., In re Schoenewerg's Estate*, 277 N.Y. 424 (1938). Under New York law a beneficiary who executes a release is precluded from objecting to actions taken by a fiduciary during the period covered by the release. *See, e.g., In re Salomon's Will*, 175 Misc. 264 (Sur. Ct. Kings Cnty. 1940); *In re James' Estate*, 173 Misc. 1042 (Sur. Ct. New York Cnty. 1940).

The UTC commentary noted that this section is based on sections 216 through 218 of the Restatement (Second) of Trusts (1959). A consent, release, or affirmance under this section may occur either before or after the approved conduct. This section requires an affirmative act by the beneficiary. A failure to object is not sufficient. *See* Restatement (Second) of Trusts § 216 cmt. a (1959). A consent is binding on a consenting beneficiary although other beneficiaries have not consented. *See* Restatement (Second) of Trusts § 216 cmt. g (1959). To constitute a valid consent, the beneficiary must know of the beneficiary's rights and of the material facts relating to the breach. *See* Restatement (Second) of Trusts § 216 cmt. k (1959). If the beneficiary's approval involves a self-dealing transaction, the approval is binding only if the transaction was fair and reasonable. *See* Restatement (Second) of Trusts §§ 170(2), 216(3) and cmt. n (1959).

III. DISCUSSION.

The Litigation Subcommittee agrees with the 6th Report other than a suggestion to make it clear that a writing is required under all circumstances.

I. SECTION 7-A-10.910. LIMITATION ON PERSONAL LIABILITY OF TRUSTEE.

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

(b) A trustee is personally liable for torts committed in the course of administering a trust, or for obligations arising from ownership or control of trust property, including liability for

violation of environmental law, only if the trustee ~~is personally at fault~~ **failed to exercise reasonable care, diligence, and prudence.**

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

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

II. PRESENT NEW YORK LAW.

Paragraph (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 (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 (1st Dep’t 1994)).

Paragraph (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*, (1939). *Kirchner*, in turn, cites *Matter of Lathers*, 137 Misc. 226 (Sur. Ct. New York Cnty. 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. Paragraph (b), therefore, will codify existing law.

Paragraph (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, 148 (Sur. Ct. Cattaraugus Cnty. 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 reimbursement 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* (Sur. Ct. King's Cnty. 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.

III. DISCUSSION.

The NYUTC-LAG recommends that section 7-A-7.10.9, as modified in two respects, (and renumbered 10.10) be enacted into law.

The NYUTC-LAG recommends the following two changes:

(1) In paragraph (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) Paragraph (d) should be added 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."

Paragraphs (a) and (c) are unchanged. Indeed, paragraph (c) 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.

I. SECTION 7-A-10.1011. INTEREST AS GENERAL PARTNER.

(a) ~~Except as otherwise provided in subsection (c) or u~~ 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~~ **trustee's** acquisition of the interest if the fiduciary capacity was disclosed in the contract or in a statement previously filed pursuant to the Partnership Law.

(b) ~~Except as otherwise provided in subsection (c), a~~ **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~~c) If the trustee of a revocable trust holds an interest as a general partner, the ~~settlor~~ **trust contributor** is personally liable for contracts and other obligations of the partnership as if the ~~settlor~~ **trust contributor** were a general partner.

II. PRESENT NEW YORK LAW.

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

III. DISCUSSION.

The NYUTC-LAG recommends that section 7-A-10.10 (renumbered 10.11), as modified, be enacted into law.

The NYUTC-LAG agrees in part and disagrees in part with the 6th Report. The NYUTC-LAG disagrees with paragraph (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 paragraph changes New York law and makes it unlikely families will use trusts in structuring business entities. Eliminating paragraph (c) will require

modifications of paragraphs (a) and (b) by deleting the phrase “Except as otherwise provided in paragraph (c)...”.

I. SECTION 7-A-10.112. PROTECTION OF PERSON DEALING WITH TRUSTEE.

(a) **Except in the case of a breach pursuant to section 7-A-8.2, a** person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee’s powers is protected from liability as if the trustee properly exercised the power.

(b) A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee’s powers or the propriety of their exercise.

(c) ~~A person who in good faith delivers assets to a trustee need not ensure their proper application.~~ **A person who in good faith transfers money or property to a trustee is not responsible for the proper application of such money or property; and any right or title derived by him from the trustee in consideration of such transfer is not affected by the trustee’s misapplication of such money or property.**

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

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

(f) Paragraphs (a) through (e) of this section apply only to transactions that occur after the effective date of this Article.

(g) With respect to transactions between a trustee or trustees and any person occurring before the effective date of this Article:

(1) If the trust is expressed in the instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee, in contravention of the trust, except as authorized in this article and by any other provision of law, is void.

(2) An express trust not declared in the disposition to the trustee or an implied or resulting trust does not defeat the title of a purchaser from the trustee for value and without notice of the trust, or the rights of a creditor who extended credit to the trustee in reliance upon his apparent ownership of the trust property.

II. PRESENT NEW YORK LAW.

Paragraphs (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 enacted 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 protected 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 EPTL 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 enacting the proposed paragraph 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. Tonier*, 143 N.Y. 390, (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 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 actual 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 section 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 Moratoria*, 183 Misc. 967, (Sup. Ct. Queens Cnty. 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 with 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 *Moratoria* was decided more than 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 section 7-A-10.12 requires the repeal of EPTL 7-2.4 and 7-3.2. 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.

Paragraph (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).

III. DISCUSSION.

The NYUTC-LAG recommends that section 7-A-10.12, as modified, be enacted into law. Paragraph (a) would not absolve a third person from liability if the transaction was a breach of the duty of loyalty under section 7-A-8.2. The NYUTC-LAG recommends that the entire text of

EPTL 7-3.3 “Person paying money to the trustee protected” be substituted for paragraph (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.

The NYUTC-LAG also recommends paragraph (f) which makes the section applicable only to transactions that occur after date of enactment. Transactions before the date of enactment would be governed by repealed sections EPTL 7-2.4 and 7-3.2 which are transported into paragraph (g).

I. SECTION 7-A-10.1213. CERTIFICATION OF TRUST.

(a) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing **so much of** the following information **as is requested by such person**:

- (1) that the trust exists and the date the trust instrument was executed;
 - (2) the identity of the settlor;
 - (3) the identity and address of the currently acting trustee;
 - (4) the powers of the trustee;
 - (5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
 - (6) the authority of co-trustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee;
 - ~~(7) the trust’s taxpayer identification number; and~~
 - ~~(8)~~ (7) the manner of taking title to trust property.
- (b) A certification of trust may be signed or otherwise authenticated by any trustee.

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

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

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

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

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

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

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

II. PRESENT NEW YORK LAW.

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

III. DISCUSSION.

The NYUTC-LAG recommends that proposed section 7-A-10.12, as modified, and renumbered 10.13, be enacted into law. The NYUTC-LAG believes that the section provides a highly useful tool to facilitate transactions by a trustee, especially in light of the increasing use of revocable lifetime trusts funding of which requires changing recorded title to property to reflect title in the trustee and which in turn requires the owner of the property to deal with third parties such as brokerage firms. The modification would provide that a certification need only provide the information requested. In addition, the TIN would not be a required item; banks and other entities needing the TIN will be able to obtain it by request but others will not need and should not have the TIN.

PART 11

MISCELLANEOUS PROVISIONS

SUMMARY OF PART

§ 7-A-11.1. Uniformity of Application and Construction.

§ 7-A-11.2. Electronic Records and Signatures.

§ 7-A-11.3. Severability Clause.

§ 7-A-11.4. Effective Date.

§ 7-A-11.5. [Reserved].

§ 7-A-11.6. Application to Existing Relationships.

SECTION 7-A-11.1. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

In applying and construing this article, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 7-A-11.2. ELECTRONIC RECORDS AND SIGNATURES.

The provisions of this Article governing the legal effect, validity, or enforceability of electronic records or electronic signatures, and of contracts formed or performed with the use of such records or signatures, conform to the requirements of section 102 of the electronic signatures in global and national commerce act (15 U.S.C. § 7002) and supersede, modify, and limit the requirements of the electronic signatures in global and national commerce act.

SECTION 7-A-11.3. SEVERABILITY CLAUSE.

If any provision of this article or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this [article] which can be given effect without the invalid provision or application, and to this end the provisions of this [article] are severable.

SECTION 7-A-11.4. EFFECTIVE DATE. This [article] takes effect on _____.

SECTION 7-A-11.5. [RESERVED]

SECTION 7-A-11.6. APPLICATION TO EXISTING RELATIONSHIPS.

(a) except as otherwise provided in this article, on the effective date of this article:

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

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

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

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

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

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

(c) The provisions of this Article shall not impair or defeat any rights which have accrued under dispositions or appointments in effect prior to its effective date.

Reporters' Note: The Reporters added 7-A-11.6(c) to make clear that vested rights will not be adversely affected, *see* EPTL 1-1.5.

APPENDIX B

PROPOSED NEW YORK TRUST CODE BASED ON THE RECOMMENDATIONS CONTAINED IN THE FINAL REPORT

This Appendix B sets out the **Proposed New York Trust Code Based on the Recommendations Contained in the Final Report**.

PROPOSED NEW YORK TRUST CODE BASED ON THE RECOMMENDATIONS CONTAINED IN THE FINAL REPORT

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ARTICLE 7-A

NEW YORK TRUST CODE

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Part 1. In General

§ 7-A-1.1. Short title.

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

§ 7-A-1.2. Scope.

(a) This Article applies to express trusts that are noncharitable or charitable, to resulting trusts, and where expressly made applicable to bank accounts in trust form.

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

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

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

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

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

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

§ 7-A-1.3. Definitions.

In this Article:

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

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

(3) “Beneficiary” means a person that:

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

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

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

(5) “Creator” means a person defined in section 1-2.2.

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

(7) “Express trust,” is defined as follows:

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

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

(ii) the benefit of charity, or

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

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

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

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

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

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

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

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

(12) “Irrevocable Trust” means a trust that is not a revocable trust.

(13) “Lifetime trust” means an express trust and all amendments thereto created other than by will.

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

(15) “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

(16) “Property” means property as defined in section 1-2.15

(17) “Qualified beneficiary” means a beneficiary who, on the date the beneficiary’s status as qualified beneficiary is determined:

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

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

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

(18) “Resulting Trust” means a trust that arises in favor of the settlor or the settlor’s successor’s interest on the failure of an express trust in whole or in part.

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

(20) “Settlor” means the person, including the testator, who

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

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

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

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

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

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

(22) “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.

(23) “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.

(24) “Testamentary trust” means an express trust created under a will.

(25) “Trust,” unless otherwise provided, means a lifetime trust and a testamentary trust but does include a resulting trust.

(26) “Trust contributor” means

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

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

For purposes of paragraph (B):

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

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

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

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

(28) “Trustee” means a person who has accepted an appointment as trustee or has been issued letters of trusteeship, including an original, additional, and successor trustee, and a co-trustee.

§ 7-A-1.4. Knowledge.

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

(1) has actual knowledge of it;

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

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

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

§ 7-A-1.5. Default and mandatory rules.

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

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

(1) the rules for judicial proceedings (as provided in sections 7-A-2.1 and 7-A-2.2);

(2) the requirements for creating and amending a trust (as provided in sections 7-A-4.1 to 7-A-4.9-A);

(3) the rules for commencing a proceeding (as provided in section 7-A-4.10(b)) and the limitations on modification and termination (as provided in section 7-A-4.10(c));

(4) the power of the court to amend or revoke a trust under section 7-A-4.11(c), to modify or terminate a trust under section 7-A-4.12 and sections 7-A-14 through 7-A-4.16 or to combine or divide trusts under section 7-A-4.17;

(5) the rights of creditors of trust beneficiaries (as provided in Part 5);

(6) the power of the court to require, dispense with, or modify or terminate a bond (as provided in section 7-A-7.2);

(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));

(8) the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust (as provided in section 7-A-8.1);

(9) the duty to administer the trust as a prudent person would and, in satisfying this standard, to exercise reasonable care, skill and caution (as provided in section 7-A-8.4);

(10) the duties relating to delegation if a delegation is made (as provided in section 7-A-8.7);

(11) an advisor shall be a fiduciary and perform the duties and powers (as provided in section 7-A-8.8);

(12) the duties relating to recordkeeping and identification of property (as provided in section 7-A-8.10);

(13) beginning at the death of the later to die of the settlor or the settlor's surviving spouse or after 21 years if the settlor is not an individual, the duty under section 7-A-8.13(a) to respond to the reasonable request of a beneficiary of an irrevocable trust for information related to the administration of a trust;

(14) Beginning at the death of the later to die of the settlor or the settlor's surviving spouse, or after 21 years if the settlor is not an individual, the duty under section 7-A-8.13(b)(2) and (3) to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their right to request information related to the administration of the trust;

(15) the duty under section 7-A-8.19(g) and the restrictions on powers as provided in section 7-A-8.19;

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

(17) the effect of an exoneration provision under section (as provided in 7-A-10.8);

(18) the rights under sections 7-A-10.9 ~~10~~ through 7-A-10.12~~3~~ of a person other than a trustee or beneficiary;

(19) periods of limitation for commencing a judicial proceeding; and

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

§ 7-A-1.6. Governing law. 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.

§ 7-A-1.7. Governing law.

(a) The intrinsic validity, effect, interpretation and amendment of any term of a lifetime trust and the revocation of a lifetime trust are determined by:

(1) the law of the jurisdiction designated in the trust instrument unless the designation of that jurisdiction's law is contrary to a mandatory trust rule or a strong public policy, including the rule against perpetuities, of the jurisdiction having the most significant relationship to the matter at issue; or

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

For purposes of this paragraph (a) factors to consider in determining which jurisdiction has the most significant relationship to the matter at issue include the place of the trust's creation, the location of trust property, and the domicile of the settlor, the trustee, and the beneficiaries.

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

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

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

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

(c) For purposes of paragraphs (a) and (b),

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

(2) “Effect” relates to the legal consequences attributed under the law of a jurisdiction to a valid disposition in trust.

(3) “Interpretation” relates to the procedure of applying the law of a jurisdiction to determine the meaning of language employed by the settlor where the settlor’s intention is not otherwise ascertainable.

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

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

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

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

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

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

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

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

§ 7-A-1.8. Principal place of administration.

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

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

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

(b) Unless validly designated in the trust instrument:

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

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

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

(B) If there is no corporate co-trustee or if there are more than one corporate co-trustee, the usual place of business of residence of any of the co-trustees as agreed upon by the co-trustees.

(c) Notwithstanding paragraph (b), if a corporate trustee is designated as the trustee of a trust and the corporate trustee has offices in multiple states and performs administrative functions for the trust in multiple states, the corporate trustee may designate the corporate trustee's usual place of business by providing notice to the qualified beneficiaries and trust advisors described in section 7-A-8.8. The notice is valid and controlling if the corporate trustee has a connection to the jurisdiction designated in the notice, including an office where trustee services are performed and the actual performance of some administrative functions for that particular trust in that particular jurisdiction. The subsequent transfer of some of the administrative functions of the corporate trustee to another state or states does not transfer the usual place of business as long as the corporate trustee continues to maintain an office and perform some administrative functions in the jurisdiction designated in the notice and the corporate trustee does not transfer the principal place of administration pursuant to paragraph (e).

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

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

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

(2) without the approval of any Court and in the absence of any objection by a qualified beneficiary proved that all qualified beneficiaries have received a notice of proposed transfer conforming to paragraph (f).

(f) The notice of proposed transfer referred to in paragraph (e)(2) must include:

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

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

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

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

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

(g) In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed pursuant to section 7.4 of this article.

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

§ 7-A-1.9. Methods and wavier of notice.

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

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

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

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

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

(f) The notice provision of section 7-A-8.19(i)(2) shall apply in lieu of this section.\

§ 7-A-1.10. Others treated as qualified beneficiaries.

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

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

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

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

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

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

§ 7-A-1.11 [Reserved]

§ 7-A-1.12 [Reserved]

Part 2. Judicial Proceedings.

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

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

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

(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) For purposes of paragraphs (a) and (b), "principal place of administration" is determined by section 7-A-1.8.

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

Part 3. [Reserved]

Part 4. Creation, validity, amendment, modification, and termination of trust.

§ 7-A-4.1. Methods of creating trust.

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

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

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

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

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

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

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

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

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

(1) the settlor (or a fiduciary properly acting on behalf of the settlor) has capacity to create a trust;

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

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

(A) a charitable trust;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 7-A-4.3. Trusts created in other jurisdictions.

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

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

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

(i) the settlor was domiciled; or

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

(3) any trust property was located.

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

§ 7-A-4.4. Trust purposes.

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

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

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

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

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

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

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

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

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

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

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

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

(v) Notwithstanding subparagraph (iv) of this paragraph, the beneficiary of a supplemental needs trust may be the creator of the trust if such trust meets the requirements of subparagraph two of paragraph (b) of subdivision two of section three hundred sixty-six of the social services law and of the regulations implementing such clauses. Provided, however, that if the trust is funded with the proceeds of retroactive payments made as a result of a court action and due the beneficiary under the federal supplemental security income program, as established under title XVI of the federal social security act, the creation of a supplemental needs trust by the beneficiary under this subparagraph shall not impair nor limit any right under applicable law of a

representative payee to receive reimbursement out of such proceeds for expenses incurred on behalf of the beneficiary pending the determination of the beneficiary's eligibility for such federal supplemental security income program, nor any right under applicable law of any state or local governmental entity which provided the beneficiary with interim assistance pending the determination of the beneficiary's eligibility for such federal supplemental security income program to be repaid out of such proceeds for the amount of such interim assistance.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. None of the income or principal of this trust shall be applied in such a manner as to supplant, impair or diminish benefits or assistance of any federal, state, county, city, or

other governmental entity for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving.

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

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

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

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

; provided, however, that if the mere existence of the trustee's authority to make distributions pursuant to this paragraph shall result in the beneficiary's loss of government benefits or assistance, regardless of whether such authority is actually exercised, this paragraph shall be null and void and the trustee's authority to make such distributions shall cease and shall be limited as provided in paragraphs two and three above, without exception.

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

§ 7-A-4.5. Charitable purposes; enforcement.

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

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

A trust may be set aside to the extent its creation was induced by fraud, duress, or undue influence.

§ 7-A-4.7. Oral trusts not recognized.

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

§ 7-A-4.8. Trusts for pets.

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

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

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

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

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

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

§7-A-4.9. Noncharitable trust without ascertainable beneficiary.

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

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

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

(3) Property of a trust authorized by this section may be applied only for its intended use purpose. Except as otherwise provided by the terms of the trust, if the court determines that not all of the trust property is required for its intended purpose, the excess property must be distributed to the settlor or to the settlor's successors in interest.

§ 7-A-4.9-A. Amendment of trust other than by trust contributor.

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

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

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

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

- (1) The terms of the trust so provide, including by the valid exercise of a power to revoke pursuant to the terms of the trust;
- (2) No purpose of the trust remains to be achieved;
- (3) The purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve;
- (4) All of the trust property has been distributed by the trustee in accordance with the terms of the trust;
- (5) A trust is revoked pursuant to section 7-A-4.11; or
- (6) A court orders a termination in a proceeding brought under sections 7-A-4.12 or 7-A-4.14.

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

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

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

(a) Upon the written consent, acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property, of all the living persons beneficially interested in a trust of property, heretofore or hereafter created, the creator of such trust may revoke or amend the whole or any part thereof by an instrument in writing acknowledged or proved in like manner, and thereupon the estate of the trustees ceases with respect to any part of such trust property, the disposition of which has been revoked. If the conveyance or other instrument creating a trust of property was recorded in the office of the clerk or register of any county of this state, the instrument

revoking or amending such trust, together with the consents thereto, shall be recorded in the same office of every county in which the conveyance or other instrument creating such trust was recorded.

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

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

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

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

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

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

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

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

(b) The court may modify the dispositive terms of a trust, other than a wholly charitable trust, or terminate such trust if, because of circumstances not anticipated by the settlor, including changes in law, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

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

§ 7-A-4.13. Cy pres.

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

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

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

(b) The court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines under the circumstances that the value of the trust property is insufficient to justify the cost of administration. Upon termination of a trust under this paragraph, the trust property shall be distributed as the court determines will best effectuate the settlor's intention. Nothing in this paragraph shall be deemed to supersede the provisions of section 8-1(c)(2) governing a wholly charitable trust.

(c) This section does not apply to

(1) an easement for conservation or preservation, or

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

§ 7-A-4.15. Reformation to correct mistakes.

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

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

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

§ 7-A-4.17. Combination and division of trusts.

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

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

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

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

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

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

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

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

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

(j) Unless the terms of the trust that is divided into separate trusts provide otherwise, the commissions allowed to a trustee as determined under article 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.

PART 4A. Bank Accounts in Trust Form.

§ 7-A-4A.1. Definitions.

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

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

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

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

§ 7-A-4A.2 Terms of a trust account.

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

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

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

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

(4) If the beneficiary survives the depositor, and the depositor's will contains no provision revoking, terminating or modifying the trust account under paragraph two, the trust shall terminate and title to the funds shall vest in the beneficiary free and clear of the trust.

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

§ 7-A-4A.3. Payment to beneficiary.

(a) If the beneficiary survives the depositor under the circumstances provided in paragraph four of section 7-A-4A.2, the funds shall be paid to the beneficiary upon his order, if, at the time of his demand for payment of all or part of the funds, he is eighteen or more years of age.

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

§ 7-A-4A.4. Effect of payment.

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

§ 7-A-4A.5. Rights not affected.

This part does not affect:

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

§ 7-A-4A.6. Joint depositors.

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

§ 7-A-4A.7. Multiple beneficiaries.

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

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

§ 7-A-4A.8. Application.

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

Part 5. Rights of Beneficiaries and Creditors; Spendthrift and Discretionary Trusts

§ 7-A-5.1. When trust income interest inalienable; exceptions

(a) The right of a beneficiary a trust to receive income from property and apply it to the use of or pay it to any person may not be transferred by assignment or otherwise unless a power to transfer such right, or any part thereof, is conferred upon such beneficiary by the instrument creating or declaring the trust. The preceding sentence shall not apply to a beneficiary's income interest with respect to property attributable to that trust beneficiary, or to proceeds of a life insurance policy as provided in section 7-A-5.2-A.

(b) Notwithstanding paragraph (a):

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

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

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

(4) The provisions of this paragraph do not apply to sections 7-A-5.3 and 7-A-5.2-A.

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

(d) The beneficiary of an express trust to receive the income from property and apply it to the use of or pay it to any person is not precluded by anything contained in this section from transferring or assigning any part or all of such income to or for the benefit of persons whom the beneficiary is legally obligated to support.

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

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

§ 7-A-5.2. When trust principal interest inalienable.

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

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

(c) Whenever a trust is created,

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

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

§ 7-A-5.2-A. When Proceeds of Life Insurance Policy Inalienable.

The proceeds of a life insurance policy which, under a trust or other agreement, are upon the death of the insured left with the insurance company may not be (a) transferred, (b) subject to commutation or encumbrance or (c) subject to legal process except in an action for necessities, if provisions to such effect were incorporated in such trust or other agreement.

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

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

(b) A spendthrift provision is unenforceable against:

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

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

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

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

§ 7-A-5.4 Discretionary trusts.

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

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

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

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

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

(1) During the lifetime of the trust contributor, the property of a trust over which the trust contributor has the power to revoke is subject to claims of the trust contributor's creditors.

(2) After the death of a trust contributor, and subject to the trust contributor's right to direct the source from which liabilities will be paid, the property of a trust over which ~~at~~ immediately before the trust contributor's death the trust contributor has the power to revoke is subject to claims of the trust contributor's creditors, costs of administration of the trust

contributor's estate, and the expenses of the trust contributor's funeral and disposal of remains to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, and expenses.

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

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

§ 7-A-5.5-A. Creditor Claims to Contribution Property by Trust Beneficiary.

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

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

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

(d) (1) Paragraph (a) does not apply to all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either an individual retirement account plan which is qualified under section 408 or section 408A of the Internal Revenue Code, or a Keogh (HR-10), retirement or other plan established by a corporation, which is qualified under section 401 of the Internal Revenue Code, even though the individual making any contribution is (i) in the case of an individual retirement account plan, an individual who is the settlor of and depositor to such account plan, or (ii) a self-employed individual, or (iii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iv) a shareholder of the corporation sponsoring the retirement or other plan.

(2) All trusts, custodial accounts, annuities, insurance contracts, monies, assets, or interests described in subparagraph one of this paragraph shall be conclusively presumed to be spendthrift trusts under this section and the common law of the state of New York for all purposes, including, but not limited to, all cases arising under or related to a case arising under

sections one hundred one to thirteen hundred thirty of title eleven of the United States Bankruptcy Code, as amended.

(3) This section shall not impair any rights an individual has under a qualified domestic relations order as that term is defined in section 414(p) of the Internal Revenue Code.

(4) Additions to an asset described in subparagraph one of this paragraph shall not be exempt from application to the satisfaction of a money judgment if (i) made after the date that is ninety days before the interposition of the claim on which such judgment was entered, or (ii) deemed to be fraudulent conveyances under article ten of the debtor and creditor law.

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

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

§7-A-5.6. Overdue Distributions.

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

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

§ 7-A-5.7. Personal Obligations of Trustee.

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

Part 6. Revocable Trusts.

§ 7-A-6.1. Capacity of Trust Contributor of Revocable Trust.

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

§ 7-A-6.2. Revocation or Amendment of Revocable Trust.

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

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

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

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

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

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

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

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

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

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

the trust contributor directs.

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

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

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

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

(h) Cross reference. *See* section 7-A-4.2-A(e) (lifetime trust is irrevocable unless the terms of the trust expressly provide that the trust is revocable).

§ 7-A-6.3. Rights and Duties in Revocable Trusts; Power of Withdrawal

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

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

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

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

Part 7. Office of Trustee.

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

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

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

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

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

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

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

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

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

§ 7-A-7.2. Trustee's bond.

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

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

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

§ 7-A-7.3. Co-trustees.

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

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

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

(d) If a co-trustee is either unwilling to perform duties or exercise joint powers or is unavailable to perform duties or exercise joint powers because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining co-trustee or a majority of the remaining co-trustees may act.

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

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

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

(h) A trustee is not excused from liability for failing to exercise reasonable care to:

(1) prevent a co-trustee from committing a breach of trust; and

(2) compel a co-trustee to redress a breach of trust.

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

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

(a) A vacancy in a trusteeship occurs if:

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

(7) a trust instrument so provides.

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

(c) A vacancy in a trusteeship of a 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) Nothing in this section shall be construed to limit the application of sections seven hundred six and one thousand five hundred two of the surrogate's court procedure act.

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

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

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

(1) If he is a member of the armed forces of the United States or of any of its allies, or if he has been accepted for such service and is awaiting induction.

(2) If he is engaged in any work abroad in connection with a governmental agency of the United States or with the American Red Cross Society or any other body with similar objectives.

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

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

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

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

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

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

§ 7-A-7.5. Resignation of trustee.

(a) A trustee may resign:

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

(2) with the approval of the court.

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

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

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

§ 7-A-7.6. Removal of trustee.

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

(b) The court may remove a trustee if:

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

(2) lack of cooperation among co-trustees substantially impairs the administration of the trust;

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

(4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, provided that the court finds that removal of the trustee best

serves the interests of all of the beneficiaries and is not inconsistent with the purposes of the trust, and a suitable co-trustee or successor trustee is available.

(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.

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

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

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

§7-A-7.8. Compensation of corporate trustee.

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.

§ 7-A-7.9. Reimbursement of expenses.

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

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

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

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

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

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

Part 8. Duties and Powers of Trustee.

7-A-8.1. Duty to administer trust.

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

§ 7-A-8.2. Duty of loyalty.

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

(b) Subject to the rights of persons dealing with or assisting the trustee as provided in section 7-A-10.11, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is a breach of the duty of loyalty and voidable by a qualified beneficiary unless:

- (1) the transaction was authorized by the terms of the trust;
- (2) the transaction was approved by the court;
- (3) the qualified beneficiary did not commence a judicial proceeding within the time allowed by section 7-A-10.4;
- (4) the qualified beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with section 7-A-10.8; or
- (5) the transaction involves a contract entered into or claim acquired by the trustee before the person became trustee.

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

- (1) the trustee's spouse;
- (2) the trustee's issue, siblings, parents, or their spouses;
- (3) an agent or attorney of the trustee; or
- (4) a corporation or other person or enterprise in which the trustee, or a person described in paragraph (1), (2) or (3), or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

(d) A transaction between a trustee and a qualified beneficiary that does not concern trust property but that occurs during the existence of the trust, and which is outside the ordinary course of the trustee's business or on terms and conditions substantially less favorable than those the trustee generally offers customers similarly situated, is voidable by the qualified beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.

(e) A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity is affected by a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust. Such transaction is a breach of the duty of loyalty and is voidable by a qualified beneficiary, subject to the exceptions in paragraphs (b)(1)-(5).

(f) AN INVESTMENT BY A TRUSTEE IN SECURITIES OF AN INVESTMENT COMPANY OR INVESTMENT TRUST TO WHICH THE TRUSTEE, OR ITS AFFILIATE, PROVIDES SERVICES IN A CAPACITY OTHER THAN AS TRUSTEE IS NOT PRESUMED TO BE AFFECTED BY A CONFLICT BETWEEN PERSONAL AND FIDUCIARY INTERESTS IF THE INVESTMENT OTHERWISE COMPLIES WITH THE PRUDENT INVESTOR RULE OF SECTION 11-2.3. IN ADDITION TO ITS COMPENSATION FOR ACTING AS TRUSTEE, THE TRUSTEE MAY BE COMPENSATED BY THE INVESTMENT COMPANY OR INVESTMENT TRUST FOR PROVIDING THOSE SERVICES OUT OF FEES CHARGED TO THE TRUST. IF THE TRUSTEE RECEIVES COMPENSATION FROM THE INVESTMENT COMPANY OR INVESTMENT TRUST FOR PROVIDING INVESTMENT ADVISORY OR INVESTMENT MANAGEMENT SERVICES, THE TRUSTEE MUST AT LEAST ANNUALLY NOTIFY THE PERSONS ENTITLED UNDER SECTION 7-A-8.13 TO RECEIVE A COPY OF THE TRUSTEE'S ANNUAL REPORT OF THE RATE AND METHOD BY WHICH THAT COMPENSATION WAS.

(g) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.

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

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

(2) payment of reasonable compensation to the trustee;

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

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

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

(i) The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

(j) *See* section 7-A-10.1 which provides other remedies for a breach of trust.

§ 7-A-8.3. Duty of impartiality.

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

§ 7-A-8.4. Duty of prudent administration.

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

§ 7-A-8.5. Duty regarding costs of administration.

In administering a trust, the trustee has a duty to incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee, taking into account sections 7-A-8.7 and 7-A-8.8 to the extent those sections apply.

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

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

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

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

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

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

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

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

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

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

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

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

(e) A trustee may delegate duties and powers to a co-trustee that a prudent trustee could properly delegate under the circumstances. Unless a delegation was irrevocable, a trustee may revoke a delegation previously made.

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

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

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

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

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

§ 7-A-8.8. Trustee duties and powers under directed trusts.

(a) For purposes of this section, the term “governing instrument” or “trust” means lifetime trust, trust created by will and trust created or reformed pursuant to judgment or decree that requires the trust to be administered in the manner of an express trust.

(b) For purposes of this section or a governing instrument:

(1) The term “advisor” means a persons, authorized by surrogate's court procedure act section 707 to be a fiduciary, whose appointment is provided by the terms of the governing instrument and who has the power to direct the trustee or consent to the trustee's decisions.

(2) The term “investment decisions” means decisions concerning or relating to retention, purchase, sale, exchange, tender, encumbrance or other action affecting the income and principal of a trust, and the valuation of nonpublicly traded investments.

(3) The term “investment advisor” means an advisor having the power to direct the trustee as to investment decisions or consent to the trustee's investment decisions.

(4) The term “distribution decisions” means decisions concerning or relating to distribution of income or principal to the beneficiaries of a trust and to the grant of a power of appointment to one or more beneficiaries of a trust, with permissible appointees excluding the

distribution advisor, the distribution advisor's estate, the distribution advisor's creditors and the creditors of the distribution advisor's estate.

(5) The term "distribution advisor" means an advisor having the power to direct the trustee as to distribution decisions or consent to the trustee's distribution decisions, but which power is subject to the restrictions under section 10-10.1 which shall be read for purposes of this section as if references therein to a "trustee" are instead references to a "distribution advisor." A distribution advisor does not include the donee of a power of appointment.

(c) If a governing instrument provides that a trustee is to make decisions only with the consent of an advisor, then, except in cases of willful misconduct on the part of the trustee, the trustee shall not be liable for any loss resulting directly or indirectly from any action taken with the consent of an advisor, or not taken by reason of the advisor's failure to provide such consent after having been requested to do so by the trustee.

(d) The following provisions shall apply if a governing instrument provides that a trustee is to follow the direction of an advisor.

(1) If the trustee acts only in accordance with the direction of an advisor or fails to act because of lack of direction by an advisor, then, except in cases of willful misconduct on the part of the trustee so directed, the trustee shall not be liable for any loss resulting directly or indirectly from any action taken pursuant to such direction or not taken by reason of lack of direction by the advisor.

(2) While the advisor is acting, the trustee shall have no duty (i) to monitor the conduct of the advisor, (ii) provide advice to the advisor or consult with the advisor, or (iii) communicate with or apprise any beneficiary or third party concerning instances in which the trustee would or might have exercised the trustee's own discretion in a manner different than the manner directed by the advisor.

(3) Absent clear and convincing evidence to the contrary, any action taken by the trustee with regard to a power granted exclusively to an advisor, shall be presumed to be an administrative action taken by the trustee solely to allow the trustee to perform the powers given to the trustee under the terms of the governing instrument and such action shall not be deemed to be an exercise or oversight of the advisor's powers.

(4) The trustee shall possess all powers and duties granted to a trustee under law and the governing instrument other than the powers and duties granted to an advisor under the governing instrument.

(5) The advisor may delegate the advisor's powers and duties as provided under section 7-A-8.7. The rules for trustees as provided in section 7-A-8.7 shall apply to an advisor who delegates under this section.

(e) Each advisor shall inform the trustee concerning the exercise of the advisor's powers and duties to the extent that such information is reasonably necessary for the trustee to perform the trustee's powers and duties.

(f) If at any time there is a vacancy in the office of advisor and the governing instrument directs the trustee to assume the office of the advisor, then all powers and duties conferred on the advisor under the terms of the governing instrument and under this section shall vest in the trustee.

(g) An advisor is a fiduciary and the powers and duties of a trustee under this part 8 shall apply to such advisor to the extent of the advisor's powers and duties authorized under the terms of the governing instrument, except that the investment advisor shall not be deemed to be a fiduciary with respect to powers under section 675 of the Internal Revenue Code.

(h) So long as the situs of administration under the governing instrument is New York, then by accepting their appointment under the governing instrument, the advisor and the trustee submit to the jurisdiction of the courts of New York (even if the investment advisory agreement or other related agreements provide otherwise), and the advisor and the trustee may be made a party to any action or proceeding relating to decisions, actions or lack of action by the advisor or the trustee.

(j) The advisor and trustee shall be entitled to such compensation as may be reasonable, to be paid pursuant to the provisions of section 2312(5) of the surrogate's court procedure act, and the court, upon application of a person interested in the trust, may review the reasonableness of such compensation.

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

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

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

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

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

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

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

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

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

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

§ 7-A-8.12. Duty to collect trust property.

A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee, and to redress a breach of trust known to the trustee to have been committed by a former trustee.

§ 7-A-8.13. Duty to inform and report.

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

(b) A trustee:

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

(2) within 60 days after accepting a trusteeship, has the duty to notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number;

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

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

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

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

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

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

(a) Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as "absolute", "sole", or "uncontrolled", the trustee has the duty

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

(b) The rules that address discretionary powers and tax savings are set forth in section 10-10.1.

§ 7-A-8.15. General powers of trustee.

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

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

(2) except as limited by the terms of the trust, court order or decree or other applicable law:

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

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

(C) any other powers conferred by this Article.

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

§ 7-A-8.16. Specific powers of trustee.

Without limiting the authority conferred, or the restrictions imposed, by section 7-A-8.15, a trustee may:

(1) collect trust property and accept or reject additions to the trust property from a settlor or any other person;

(2) acquire or sell trust property at public or private sale, and on such terms as in the opinion of the trustee will be most advantageous to those interested therein;

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

(4) deposit trust money in an account in a bank or other insured depository institution.

(5) borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;

(6) with respect to an interest in a proprietorship (and subject to SCPA 2108), partnership, limited liability company, business trust, corporation, or other form of business or enterprise, continue the business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization or contributing additional capital;

(7) with respect to stocks or other securities held as a trustee, exercise the rights of an absolute owner, including the right to:

(A) vote, or give proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement;

(B) employ a financial institution as custodian of any such stock or other securities as in the same manner as authorized for a fiduciary section 11-1.1(b)(9) of this chapter;

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

(D) cause any such stock or other securities to be deposited in the same manner as authorized for a fiduciary in sections 11-1.8 and 11-1.9 of this chapter;

(E) employ a broker-dealer as a custodian of any such stock or other securities and to register such securities in the name of the such broker-dealer in the same manner as authorized for a fiduciary in section 11-1.10 of this chapter;

(F) pay calls, assessments, and other sums chargeable or accruing against the securities in the same manner as authorized for a fiduciary in section 11-1.1(b)(15); and

(G) sell or exercise stock subscription or conversion rights, participate in foreclosures, reorganizations, consolidations, mergers or liquidations, and consent to corporate sales, leases and encumbrances in the same manner as authorized for a fiduciary in section 11-1.1(b)(16).

(8) with respect repairs and other actions;

(A) for an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries;

(B) for an interest in tangible personal property, make repairs to, conserve or improve such property.

(9) enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;

(10) grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;

(11) effect and keep in force fire, rent, title, liability casualty or other insurance to protect the property of the trust and to protect the fiduciary;

(12) abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration;

(13) with respect to possible liability for violation of environmental law:

(A) inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;

(B) take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee,

whether taken before or after the assertion of a claim or the initiation of governmental enforcement;

(C) decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;

(D) compromise claims against the trust which may be asserted for an alleged violation of environmental law; and

(E) pay the expense of any inspection, review, abatement, or remedial action to comply with environmental law;

(14) pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust;

(15) pay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust, including the reasonable expense of obtaining and continuing the trustee's bond and any reasonable counsel fees the trustee may necessarily incur;

(16) exercise elections with respect to federal, state, and local taxes;

(17) select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the trustee, exercise rights thereunder, including exercise of the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds;

(18) make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans;

(19) pledge trust property to guarantee loans made by others to the beneficiary;

(20) appoint a trustee to act in another jurisdiction with respect to real or tangible or personal trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, require that the appointed trustee furnish security, and remove any trustee so appointed;

(21) pay an amount distributable to a beneficiary who is under a legal disability by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by:

(A) paying it to the beneficiary's guardian;

(B) paying it to the beneficiary's custodian under ~~the~~ New York's Uniform Transfers to Minors Act and, for that purpose, creating a custodianship pursuant to sections 7-6.5 and 7-6.6;

(C) if the amount is not in excess of \$10,000 paying the amount to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf;

(D) managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution; or

(E) if the sum payable to a patient in an institution in the state department of mental hygiene is not in excess of the amount which the director of the institution is authorized to receive under section 29.23 of the mental hygiene law, paying such sum to such director for use as provided in that section.

(22) on distribution of trust property or the division or termination of a trust, make distributions in cash, in kind valued at the fair market value of the property at the date of distribution, or partly in each, and make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation;

(23) seek resolution of a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution;

(24) contest, compromise or otherwise settle any claim in favor of the trust or trustee or in favor of third persons and against the trust or trustee;

(25) sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's powers;

(26) on termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it-;

(27) acquire the remaining undivided interest in the property of a trust in which the trustee, in the trustee's capacity, holds an undivided interest;

(28) invest and reinvest property of the trust under the provisions of the will, deed or other instrument or as otherwise provided by law;

(29) take possession of, collect the rents from and manage any property or any estate therein owned by the trustee;

(30) with respect to any mortgage on property owned by the trustee (A) continue the same upon and after the maturity, with or without renewal or extension, upon such terms as the trustee deems advisable; (B) foreclose, as an incident to collection of any bond or note, any mortgage securing such bond or note, and to purchase the mortgaged property or acquire the property by deed from the mortgagor in lieu of foreclosure;

(31) in the case of a successor or substitute trustee, succeed to all of the powers, duties and discretion of the original trustee, with respect to the trust, as were given to the original trustee unless the exercise of such powers, duties or discretion of the original fiduciary are expressly prohibited by the will, deed or other instrument to any successor or substituted fiduciary;

(32) hold the property of two or more trusts or parts of such trusts created by the same instrument as an undivided whole without separation as between such trusts or parts, provided that such separate trusts or parts shall have undivided interests and provided further that not such holding shall defer the vesting of any estate in possession or otherwise; and

(33) invest as a whole the property in which the trustee has interests under two or more trusts instruments.

§ 7-A-8.17. Duties and powers regarding distribution upon termination.

(a) Upon termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. Subject to the provisions of subsection (c) hereof, the right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within 30 days after the proposal was sent but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection.

(b) Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.

(c) A release by a beneficiary of a trustee from liability for breach of trust is invalid to the extent:

(1) it was induced by improper conduct of the trustee; or

(2) the beneficiary, at the time of the release, did not know of the beneficiary's rights or of the material facts relating to the breach.

§ 7-A-8.18. Power of trustee to pay income or principal to trust contributor as reimbursement for income taxes.

(a) Notwithstanding any contrary provision of law, the trustee of an express trust, unless otherwise provided in the disposing instrument, may, from time to time, pay to the trust contributor of such trust an amount equal to any income taxes on any portion of the trust income or trust principal with which such trust contributor is charged. If the income tax is based on amounts allocated to trust income it shall be paid from trust principal. If the trust does not allocate amounts as between principal and income (as in the case of a unitrust), the tax may be paid from such trust property as the trustee may select.

(b) If the application or the possibility of the application of this section to any trust would reduce or eliminate a charitable deduction otherwise available to any person under the income tax, gift tax or estate tax provisions of the internal revenue code, the provisions of this section shall not apply to such trust.

§ 7-A-8.19. Powers and duties regarding decanting.

(a) An authorized trustee with unlimited discretion to invade trust principal may appoint part or all of such principal to a trustee of an appointed trust for, and only for the benefit of, one, more than one or all of the current beneficiaries of the invaded trust (to the exclusion of any one or more of such current beneficiaries). The successor and remainder beneficiaries of such appointed trust may be one, more than one or all of the successor and remainder beneficiaries of such invaded trust (to the exclusion of any one, more than one or all of such successor and remainder beneficiaries).

(1) An authorized trustee exercising the power under this paragraph may grant a discretionary power of appointment as defined in paragraph (b) of section 10-3.4 (including a presently exercisable power of appointment) in the appointed trust to one or more of the current beneficiaries of the invaded trust, provided that the beneficiary granted a power to appoint could receive the principal outright under the terms of the invaded trust.

(2) If the authorized trustee grants a power of appointment under subparagraph (1) of this paragraph, except as otherwise provided in subparagraph (3) of this paragraph, the granted power may only exclude as permissible appointees one or more of the beneficiary, the creator, or the creator's spouse, or any of the estates, creditors, or creditors of the estates of the beneficiary, the creator or the creator's spouse.

(3) If the authorized trustee exercises the power under this paragraph, the appointed trust may grant any power of appointment included in the invaded trust provided such power has the same class of permissible appointees as the power of appointment in the invaded trust and is exercisable in the same fashion as the power of appointment in the invaded trust.

(4) If the beneficiary or beneficiaries of the invaded trust are described by a class, the beneficiary or beneficiaries of the appointed trust may include present or future members of such class.

(b) An authorized trustee with the power to invade trust principal but without unlimited discretion may appoint part or all of the principal of the trust to a trustee of an appointed trust, provided that the current beneficiaries of the appointed trust shall be the same as the current beneficiaries of the invaded trust and the successor and remainder beneficiaries of the appointed trust shall be the same as the successor and remainder beneficiaries of the invaded trust.

(1) If the authorized trustee exercises the power under this paragraph, the appointed trust shall include the same language authorizing the trustee to distribute the income or invade the principal of the appointed trust as in the invaded trust.

(2) If the authorized trustee exercises the power under this paragraph to extend the term of the appointed trust beyond the term of the invaded trust, for any period after the invaded trust would have otherwise terminated under the provisions of the invaded trust, the appointed trust, in addition to the language required to be included in the appointed trust pursuant to subparagraph (1) of this paragraph, may also include language providing the trustees with unlimited discretion to invade the principal of the appointed trust during such extended term.

(3) If the beneficiary or beneficiaries of the invaded trust are described by a class, the beneficiary or beneficiaries of the appointed trust shall include present or future members of such class.

(4) If the authorized trustee exercises the power under this paragraph and if the invaded trust grants a power of appointment to a beneficiary of the trust, the appointed trust shall grant such power of appointment in the appointed trust and the class of permissible appointees shall be the same as in the invaded trust.

(c) An exercise of the power to invade trust principal under paragraphs (a) and (b) of this section shall be considered the exercise of a special power of appointment as defined in section 10-3.2.

(d) The appointed trust to which an authorized trustee appoints the assets of the invaded trust may have a term that is longer than the term set forth in the invaded trust, including, but not limited to, a term measured by the lifetime of a current beneficiary.

(e) If an authorized trustee has unlimited discretion to invade the principal of a trust and the same trustee or another trustee has the power to invade principal under the trust instrument which power is not subject to unlimited discretion, such authorized trustee having unlimited discretion may exercise the power of appointment under paragraph (a) of this section.

(f) An authorized trustee may exercise the power to appoint in favor of an appointed trust under paragraphs (a) and (b) of this section whether or not there is a current need to invade principal under the terms of the invaded trust.

(g) An authorized trustee exercising the power under this section has a fiduciary duty to exercise the power in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under the prevailing circumstances. The authorized trustee may not exercise the power under this section if there is substantial evidence of a contrary intent of the creator and it cannot be established that the creator would be likely to have changed such intention under the circumstances existing at the time of the exercise of the power. The provisions of the invaded trust alone are not to be viewed as substantial evidence of a contrary intent of the creator unless the invaded trust expressly prohibits the exercise of the power in the manner intended by the authorized trustee.

(h) Unless the authorized trustee provides otherwise:

(1) The appointment of all of the assets comprising the principal of the invaded trust to an appointed trust shall include subsequently discovered assets of the invaded trust and undistributed principal of the invaded trust acquired after the appointment to the appointed trust; and

(2) The appointment of part but not all of the assets comprising the principal of the invaded trust to an appointed trust shall not include subsequently discovered assets belonging to the invaded trust and principal paid to or acquired by the invaded trust after the appointment to the appointed trust; such assets shall remain the assets of the invaded trust.

(i) The exercise of the power to appoint to an appointed trust under paragraph (a) or (b) of this section shall be evidenced by an instrument in writing, signed, dated and acknowledged by the authorized trustee. The exercise of the power shall be effective thirty days after the date of service of the instrument as specified in subparagraph (2) of this paragraph, unless the persons entitled to notice consent in writing to a sooner effective date.

(1) An authorized trustee may exercise the power authorized by paragraphs (a) and (b) of this section without the consent of the creator, or of the persons interested in the invaded trust, and without court approval, provided that the authorized trustee

may seek court approval for the exercise with notice to all persons interested in the invaded trust.

(2) A copy of the instrument exercising the power and a copy of each of the invaded trust and the appointed trust shall be delivered (A) to the creator, if living, of the invaded trust, (B) to any person having the right, pursuant to the terms of the invaded trust, to remove or replace the authorized trustee exercising the power under paragraph (b) or (c) of this section, and (C) to any persons interested in the invaded trust and the appointed trust (or, in the case of any persons interested in the trust, to any guardian of the property, conservator or personal representative of any such person or the parent or person with whom any such minor person resides), by registered or certified mail, return receipt requested, or by personal delivery or in any other manner directed by the court having jurisdiction over the invaded trust.

(3) The instrument exercising the power shall state whether the appointment is of all the assets comprising the principal of the invaded trust or a part but not all the assets comprising the principal of the invaded trust and if a part, the approximate percentage of the value of the principal of the invaded trust that is the subject of the appointment.

(4) A person interested in the invaded trust may object to the trustee's exercise of the power under this section by serving a written notice of objection upon the trustee prior to the effective date of the exercise of the power. The failure to object shall not constitute a consent.

(5) The receipt of a copy of the instrument exercising the power shall not affect the right of any person interested in the invaded trust to compel the authorized trustee who exercised the power under paragraph (a) or (b) of this section to account for such exercise and shall not foreclose any such interested person from objecting to an account or compelling a trustee to account. Whether the exercise of a power under paragraph (a) or (b) of this section begins the running of the statute of limitations on an action to compel a trustee to account shall be based on all the facts and circumstances of the situation.

(6) A copy of the instrument exercising the power shall be kept with the records of the invaded trust and the original shall be filed in the court having jurisdiction over the invaded trust. Where a trustee of an inter vivos trust exercises the power and the trust has not been the subject of a proceeding in the surrogate's court, no filing is required. The instrument shall state that in certain circumstances the appointment will begin the running of the statute of limitations that will preclude persons interested in the invaded trust from compelling an accounting by the trustees after the expiration of a given time.

(j) This section shall not be construed to abridge the right of any trustee to appoint property in further trust that arises under the terms of the governing instrument of a trust or under any other provision of law or under common law, or as directed by any court having jurisdiction over the trust.

(k) Nothing in this section is intended to create or imply a duty to exercise a power to invade principal, and no inference of impropriety shall be made as a result of an authorized trustee not exercising the power conferred under paragraph (a) or (b) of this section.

(l) A power authorized by paragraph (a) or (b) of this section may be exercised,

subject to the provisions of paragraph (g) of this section, unless expressly prohibited by the terms of the governing instrument, but a general prohibition of the amendment or revocation of the invaded trust or a provision that constitutes a spendthrift provision shall not preclude the exercise of a power under paragraph (a) or (b) of this section.

(m) An authorized trustee may not exercise a power authorized by paragraph (a) or (b) of this section to effect any of the following:

(1) To reduce, limit or modify any beneficiary's current right to a mandatory distribution of income or principal, a mandatory annuity or unitrust interest, a right to withdraw a percentage of the value of the trust or a right to withdraw a specified dollar amount, provided that such mandatory right has come into effect with respect to the beneficiary. Notwithstanding the foregoing, but subject to the other limitations in this section, an authorized trustee may exercise a power authorized by paragraph (a) or (b) of this section to appoint to an appointed trust that is a supplemental needs trust that conforms to the provisions of section 7-A-4.4-A of this chapter;

(2) To decrease or indemnify against a trustee's liability or exonerate a trustee from liability for failure to exercise reasonable care, diligence and prudence;

(3) To eliminate a provision granting another person the right to remove or replace the authorized trustee exercising the power under paragraph (a) or (b) of this section unless a court having jurisdiction over the trust specifies otherwise;

(4) To make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise; or

(5) To jeopardize (A) the deduction or exclusion originally claimed with respect to any contribution to the invaded trust that qualified for the annual exclusion under section 2503(b) of the Internal Revenue Code, the marital deduction under section 2056(a) or 2523(a) of the internal revenue code, or the charitable deduction under section 170(a), 642(c), 2055(a) or 2522(a) of the Internal Revenue Code, (B) the qualification of a transfer as a direct skip under section 2642(c) of the Internal Revenue Code, or (C) any other specific tax benefit for which a contribution originally qualified for income, gift, estate, or generation-skipping transfer tax purposes under the internal revenue code.

(n) An authorized trustee shall consider the tax implications of the exercise of the power under paragraph (a) or (b) of this section.

(o) An authorized trustee may not exercise a power described in paragraph (a) or (b) of this section in violation of the limitations under sections 9-1.1, 10-8.1 and 10-8.2 of this chapter, and any such exercise shall void the entire exercise of such power.

(p) (1) Unless a court otherwise directs, an authorized trustee may not exercise a power authorized by paragraph (a) or (b) of this section to change the provisions regarding the determination of the compensation of any trustee; the commissions or other compensation payable to the trustees of the invaded trust may continue to be paid to the trustees of the appointed trust during the term of the appointed trust and shall be determined in the same

manner as in the invaded trust.

(2) No trustee shall receive any paying commission or other compensation for appointing of property from the invaded trust to an appointed trust pursuant to paragraph (a) or (b) of this section.

(q) Unless the invaded trust expressly provides otherwise, this section applies to:

(1) Any trust governed by the laws of this state, including a trust whose governing law has been changed to the laws of this state; and

(2) Any trust that has a trustee who is an individual domiciled in this state or a trustee which is an entity having an office in this state, provided that a majority of the trustees select this state as the location for the primary administration of the trust by an instrument in writing, signed and acknowledged by a majority of the trustees. The instrument exercising this selection shall be kept with the records of the invaded trust.

(r) For purposes of this section:

(1) The term "appointed trust" means an irrevocable trust which receives principal from an invaded trust under paragraph (a) or (b) of this section including a new trust created by the creator of the invaded trust or by the trustees, in that capacity, of the invaded trust.

(2) The term "authorized trustee" means, as to an invaded trust, any trustee or trustees with authority to pay trust principal to or for one or more current beneficiaries other than (i) the creator, or (ii) a beneficiary to whom income or principal must be paid currently or in the future, or who is or will become eligible to receive a distribution of income or principal in the discretion of the trustee (other than by the exercise of a power of appointment held in a non-fiduciary capacity).

(3) The term "current beneficiary or beneficiaries" means the person or persons (or as to a class, any person or persons who are or will become members of such class) to whom the trustees may distribute principal at the time of the exercise of the power, provided however that the interest of a beneficiary to whom income, but not principal, may be distributed in the discretion of the trustee of the invaded trust may be continued in the appointed trust.

(4) The term "invade" shall mean the power to pay directly to the beneficiary of a trust or make application for the benefit of the beneficiary.

(5) The term "invaded trust" means any existing irrevocable inter vivos or testamentary trust whose principal is appointed under paragraph (a) or (b) of this section.

(6) The term "person or persons interested in the invaded trust" shall mean any person or persons upon whom service of process would be required in a proceeding for the judicial settlement of the account of the trustee, taking into account section three hundred fifteen of the surrogate's court procedure act.

(7) The term "principal" shall include the income of the trust at the time of

the exercise of the power that is not currently required to be distributed, including accrued and accumulated income.

(8) The term “unlimited discretion” means the unlimited right to distribute principal that is not modified in any manner. A power to pay principal that includes words such as best interests, welfare, comfort, or happiness shall not be considered a limitation or modification of the right to distribute principal.

(9) A trust contributor shall not be considered to be a beneficiary of an invaded or appointed trust by reason of the trustee's authority to pay trust income or principal to the creator pursuant to section 7-A-8.18 or by reason of the trustee's authority under the trust instrument or any other provision of law to pay or reimburse the trust contributor for any tax on trust income or trust principal that is payable by the trust contributor under the law imposing such tax or to pay any such tax directly to the taxing authorities.

(s) Cross-reference. For the exercise of the power under paragraph (a) or (b) of this section where there are multiple trustees, see sections 10-6.7 and 10-10.7.

Part 9. [Reserved]

Part 10. Liability of Trustees and Rights of Persons Dealing with Trustee

§ 7-A-10.1 Remedies for Breach of Trust.

- (a) A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.
- (b) To remedy a breach of trust that has occurred or may occur, the court may:
 - (1) compel the trustee to perform the trustee's duties;
 - (2) enjoin the trustee from committing a breach of trust;
 - (3) compel the trustee to redress a breach of trust by paying money, restoring property, or other means;
 - (4) order a trustee to account;
 - (5) appoint a special fiduciary to take possession of the trust property and administer the trust;
 - (6) suspend the trustee;
 - (7) remove the trustee as provided in Section 7-A-7.6;
 - (8) reduce or deny compensation to the trustee;
 - (9) subject to section 7-A-10.11, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or
 - (10) order any other appropriate relief.

§ 7-A-10.2 Damages for breach of trust.

- (a) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of:

(1) the value of the capital lost by reason of the breach plus prejudgment interest as determined by the court; or

(2) the profit the trustee made by reason of the breach.

(b) Except as otherwise provided in this paragraph, if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee may be entitled to contribution from the other trustee or trustees in accordance with applicable law. A trustee is not entitled to contribution if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

§ 7-A-10.3. Damages in absence of breach.

(a) A trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust.

(b) Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.

§ 7-A-10.4. Attorney's fees and costs.

The award of costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is subject to the controversy is governed by section 2110 of the surrogate's court procedure act.

§ 7-A-10.5. Limitation of action against trustee.

A judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within six years after the first to occur of:

- (1) the removal, resignation, or death of the trustee;
- (2) the termination of the beneficiary's interest in the trust; or
- (3) the termination of the trust.
- (4) the open repudiation by the trustee.

§ 7-A-10.6. Reliance on trust instrument.

A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

§ 7-A-10.7. Event affecting administration or distribution.

If the happening of an event, including marriage, divorce, performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge.

§ 7-A-10.8. Exculpation of trustee and others.

A term of a trust relieving a trustee, an agent acting pursuant to a delegation under section 7-A-8.7 or trust advisor under section 7-A-8.8 [or a trust protector] of liability for breach of trust is unenforceable to the extent that it exonerates the trustee from liability for failure to exercise reasonable care, diligence and prudence.

§ 7-A-10.9. Beneficiary's consent, release, or ratification.

A trustee is not liable to a beneficiary for breach of trust if the beneficiary, while having capacity, consented in writing to the (a) conduct constituting the breach, (b) release of the trustee from liability for the breach, or (c) ratification of the transaction constituting the breach, unless:

(1) the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or

(2) at the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.

§ 7-A-10.10. Limitation on personal liability of trustee.

(a) Except as otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering the trust if the trustee 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 failed to exercise reasonable care, diligence, and prudence.

(c) A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administering a trust, may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim.

(d) In any case where liability is found against the trustee as the result of an action or proceeding brought under paragraph (c), issues of liability as between the trustee in the trustee's fiduciary capacity and the trustee in the trustee's individual capacity shall if necessary be determined in an accounting proceeding brought pursuant to section twenty-two hundred five of the surrogate's court procedure act.

§ 7-A-10.11. Interest as general partner.

(a) Unless personal liability is imposed in the contract, a trustee who holds an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership after the trustee's acquisition of the interest if the fiduciary capacity was disclosed in the contract or in a statement previously filed pursuant to the Partnership Law.

(b) A trustee who holds an interest as a general partner is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault.

(c) If the trustee of a revocable trust holds an interest as a general partner, the trust contributor is personally liable for contracts and other obligations of the partnership as if the trust contributor were a general partner.

§ 7-A-10.12. Protection of person dealing with trustee.

(a) A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers is protected from liability as if the trustee properly exercised the power.

(b) A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise.

(c) A person who in good faith transfers money or property to a trustee is not responsible for the proper application of such money or property; and any right or title derived by him from the trustee in consideration of such transfer is not affected by the trustee's misapplication of such money or property.

(d) A person other than a beneficiary who in good faith assists a former trustee, or who in good faith and for value deals with a former trustee, without knowledge that the trusteeship has terminated is protected from liability as if the former trustee were still a trustee.

(e) Comparable protective provisions of other laws relating to commercial transactions or transfer of securities by fiduciaries prevail over the protection provided by this section.

(f) Paragraphs (a) through (e) of this section apply only to transactions that occur after the effective date of this Article.

(g) With respect to transactions between a trustee or trustees and any person occurring before the effective date of this Article:

(1) If the trust is expressed in the instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee, in contravention of the trust, except as authorized in this article and by any other provision of law, is void.

(2) An express trust not declared in the disposition to the trustee or an implied or resulting trust does not defeat the title of a purchaser from the trustee for value and without notice of the trust, or the rights of a creditor who extended credit to the trustee in reliance upon his apparent ownership of the trust property.

§ 7-A-10.13. Certification of trust.

(a) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing so much of the following information as is requested by such person:

- (1) that the trust exists and the date the trust instrument was executed;
- (2) the identity of the settlor;
- (3) the identity and address of the currently acting trustee;
- (4) the powers of the trustee;
- (5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
- (6) the authority of co-trustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee; and
- (7) the manner of taking title to trust property.

(b) A certification of trust may be signed or otherwise authenticated by any trustee.

(c) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

(d) A certification of trust need not contain the dispositive terms of a trust.

(e) A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments which designate the trustee and confer upon the trustee the power to act in the pending transaction.

(f) A person who acts in reliance upon a certification of trust without knowledge that the representations contained therein are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the certification.

(g) A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

(h) A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.

(i) This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

Part 11. Miscellaneous Provisions.

§ 7-A-11.1. Uniformity of application and construction.

In applying and construing this article, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

§ 7-A-11.2. Electronic records and signatures.

The provisions of this article governing the legal effect, validity, or enforceability of electronic records or electronic signatures, and of contracts formed or performed with the use of such records or signatures, conform to the requirements of section 102 of the electronic signatures in global and national commerce act (15 U.S.C. § 7002) and supersede, modify, and limit the requirements of the electronic signatures in global and national commerce act.

§ 7-A-11.3. Severability clause.

If any provision of this article or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are severable.

§ 7-A-11.4. Effective date. This article takes effect on _____.

§ 7-A-11.5. [Reserved]

§ 7-A-11.6. Application to existing relationships.

(a) except as otherwise provided in this Article, on the effective date of this Article:

(1) this Article applies to all trusts created before, on, or after its effective date;

(2) this Article applies to all judicial proceedings concerning trusts commenced on or after its effective date;

(3) this Article applies to judicial proceedings concerning trusts commenced before its effective date unless the court finds that application of a particular provision of this Article would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provisions of this Article does not apply and the superseded law applies;

(4) any rule of construction or presumption provided in this Article applies to trust instruments executed before [the effective date of the Article] unless there is a clear indication of a contrary intent in the terms of the trust; and

(5) an act done before [the effective date of the Article] is not affected by this Article.

(b) if a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of the Article, that statute continues to apply to the right even if it has been repealed or superseded.

(c) the provisions of this article shall not impair or defeat any rights which have accrued under dispositions or appointments in effect prior to its effective date.

APPENDIX C

Distribution and Related Tables

Table 1 identifies those sections in Article 7 that will be repealed and distributed to sections in Article 7-A.

Table 1: Distribution of Repealed Article 7 Sections to Article 7-A Sections

Repealed Article 7 Sections	Distribution to Article 7-A Sections
7-1.1	7-A-4.2-C
7-1.2	7-A-4.2-B
7-1.3	7-A-1.2-A
7-1.4	7-A-4.4
7-1.5	7-A-5.1
7-1.6	7-A-4.12
7-1.9	7-A-4.4.11
7-1.10	7-A-1.7(c)
7-1.11	7-A-4.18
7-1.12	7-A-4.4-A
7-1.13	7-A-4.17
7-1.14	7-A-4.2-A(a)
7-1.15	7-A-4.2-A(b)
7-1.16	7-A-4.2-A(e), 7-A-6.2(c)
7-1.17(a)	7-A-4.2-A(c)
7-1.17(b)	7-A-6.2(b)(2)(B), 7-A-6.2(f)
7-1.18	7-A-4.2-A(d)
7-1.19	7-A-4.14
7-2.3	7-A-7.4
7-2.4	7-A-10.12(g)(1)
7-2.5	7-A-4.4-A
7-2.6	7-A-7.5 and 7-A-7.6
7-2.7	7-A-7.10
7-3.1	7-A-5.5-A
7-3.2	7-A-10.12(c)
7-3.3	7-A-10.12(g)(2)
7-5.1 – 7-5.8	7-A-4A.1 – 7-A-4A-8
7-8.1	7-A-4.9

Table 2 identifies those sections in Article 7 that will be repealed as obsolete. Hence none of these sections will be distributed to Article 7-A sections.

Table 2: Repeal of Article 7 Sections without any Distribution
Article 7 Sections to be outright repealed

7-1.7
7-2.1(a) and 7-2.1(b)
7-2.2
7-3.4
7-3.5

Table 3 identifies those sections in Article 7 that will remain in Article 7. These sections will be eventually renumbered.

Table 3: Article 7 Sections to be Retained in Article 7
Article 7 Sections that will continue in Article 7

7-1.8
7-2.1(c)
7-2.5 (non-gratuitous trusts)
7-2.8
7-6.1 – 7-6.26
7-7.1