



WYATT TARRANT & COMBS LLP

TENNESSEE UNIFORM TRUST CODE

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TRUSTS, ESTATES & PERSONAL PLANNING SERVICE TEAM



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Tennessee Uniform Trust Code

General Provisions

GENERAL COMMENT.

Use of Terms--Controlling Law and Comments

Use of Terms

Throughout these comments, whether in upper or lower case, the following terms apply:

"Comments," when not preceded by or otherwise containing a reference to the comments of some matter other than these comments, mean these comments.

"Title," "Chapter" and "Part" respectively mean: a title of the Tennessee Code; a chapter of its relevant title therein; and a part of its relevant chapter therein.

"Title 35" means title 35 of the Tennessee Code.

"Tennessee Trust Statutes" mean any statute, together with the comments thereto, found in title 35, including but not limited to: Chapter 6, Tennessee's adoption of the Uniform Principal and Income Act ("Tennessee Uniform Principal and Income Act"); Chapter 14, the Tennessee Uniform Prudent Investor Act of 2002 ("Tennessee Uniform Prudent Investor Act"); Chapter 15, the Tennessee Uniform Trust Code ("Tennessee Uniform Trust Code"); Chapter 16, the Tennessee Investment Services Trust Act of 2007 (Tennessee Investment Services Trust Act"); and Chapter 17, the Tennessee Community Property Trust Act of 2010 ("Tennessee Community Property Trust Act").

"Tennessee law," individually and collectively, means any code, act, statute or law (together with any comments to such) of the state of Tennessee; or the holding or ruling of any court, judicial or administrative body of the state of Tennessee.

"Uniform law," "uniform code," "uniform act" or "uniform legislation," individually and collectively, mean any uniform code, act, law or other legislation (together with any amendments and comments to such) proposed for adoption by the Uniform Law Commission ("ULC," also known as the National Conference of Commissioners on Uniform State Laws or "NCCUSL," both nomenclatures being included in the acronym "ULC-NCCUSL," sometimes referred to in these comments as "commission" and the members of which sometimes referred to in the these comments as "commissioners"). Regardless of whether or not any of the Tennessee trust statutes were or are based on any uniform law, code or act, such Tennessee trust statutes are not included within the meaning of any of the terms uniform law, uniform code or uniform act; the Tennessee trust statutes being a distinct and integrated set of trust laws, separate therefrom.

"Uniform trust code" means the Uniform Trust Code (together with any amendments and comments to such) proposed for adoption by ULC-NCCUSL.

"Section," as well as any other subdivision of any matter, when not preceded by or otherwise containing a reference to the terms "Tennessee," "Tennessee Code" or "T.C.A.," means a section or other subdivision of legislation (or any other matter compiled by number), other than the sections and subdivisions thereof contained in the Tennessee Code. When the word section is followed by a number between 101 and 1106 and contains no other words modifying it or otherwise referencing it to a specific matter compiled by numbers, section means a section of the Uniform Trust Code as proposed for adoption by ULC--NCCUSL.

"Restatement" means one or more restatements of the law (together with any comments thereto), individually and collectively, as such are published by the American Law Institute.

"Foreign jurisdiction" means the same as does such term in T.C.A. § 35-15-103.

"Foreign law," individually and collectively, means any code, act, statute or law (together with any comments to such) of any foreign jurisdiction; or the holding or ruling of any court, judicial or administrative body of any foreign jurisdiction.

"Other law," individually and collectively, means any foreign law; any uniform law, code or act; and any restatement.

Throughout these comments any reference to a code, act, statute, law or other holding, when not preceded by or otherwise containing a reference to the word "Tennessee," an abbreviation relative to such reference including the letters "T.C.A." or a citation to the ruling of any court, judicial or administrative body of the state of Tennessee, refers to other law and not to Tennessee law.

Controlling Law and Controlling Comments

As originally adopted, numerous provisions of title 35, chapters 6, 14 and 15 were modified and diverge, in some cases significantly, from their respective uniform codes as well as related restatements. Moreover, there are no uniform code provisions addressing the subjects covered by title 35, chapters 16 and 17. Finally, since their initial adoption, various amendments to the Tennessee trust statutes have also been enacted. For example since its initial adoption in 2004, the Tennessee Uniform Trust Code underwent amendment in 2005, substantial amendment in 2007, further amendment in 2010 and substantial amendment in 2013. This has resulted in further divergence from uniform law and related restatements, such divergence sometimes being significant. This divergence was undertaken deliberately and after significant consideration. Taken as a whole, the Tennessee trust statutes are a distinct and integrated set of trust laws.

It is for this reason that the provisions of T.C.A. § 35-15-1101 reverse those of section 1101 of the Uniform Trust Code and expressly state that in applying and construing title 35 no consideration shall be given to any need to promote uniformity with respect to its subject matter among states, including relative to the laws of any foreign jurisdiction that has enacted versions of the various uniform codes, laws or acts. Moreover, T.C.A. § 35-15-1101 provides that unless specifically provided otherwise in title 35, chapters 6, 14, 15, 16 and 17, courts shall not consult or give any persuasive value to any such uniform acts or any foreign jurisdiction's acts based on or similar to them; or to the comments of any of them; none of which have any force or effect relative to trusts governed by the laws of Tennessee.

Accordingly, regardless of the fact that throughout these comments references are made to other law, including various uniform acts and restatements, as well as to foreign law, none of such are controlling to the extent they conflict with Tennessee law. While attempts have been made throughout these comments to identify other law (e.g., by use of words such as "according to ULC--NCCUSL"), the fact that any such other law is not so identified does not alter the above.

Finally, relative to any other law, any cross reference to Tennessee law (e.g., by inclusion of a given section from the Tennessee Code or the changing of nomenclature of various parts of codification from that used in foreign law to that used in the Tennessee Code; such as "article" to "part;" or "section" to "subsection" or "subdivision") does not in itself signify the Tennessee law so cross-referenced is in accord with such other law, and to the extent such other law is in conflict with the cross-referenced Tennessee law, the Tennessee law controls.

Default Rule

According to ULC--NCCUSL, most of the Uniform Trust Code consists of default rules that apply only if the terms of the trust fail to address or insufficiently cover a particular issue. Pursuant to section 105 [T.C.A. § 35-15-

105], a drafter is free to override a substantial majority of the Code's provisions. The relatively limited number of exceptions (called "mandatory rules") are scheduled in subsection 105(b) [T.C.A. § 35-15-105(b)].

It is a primary objective of the Tennessee trust statutes that a settlor's intent be the lodestar by which a trust is interpreted, that such intent be carried out and that settlors have the freedom to dispose of their assets to whom and in the manner they wish, all to the greatest extent constitutionally allowable. Therefore, the number of mandatory rules under the Tennessee Uniform Trust Code are fewer than those found in the Uniform Trust Code. Moreover, T.C.A. § 35-15-105(a) specifically provides that the rule that states that statutes in derogation of the common law are to be strictly construed has no application to T.C.A. § 35-15-105. Finally, such section provides that, except as restricted by T.C.A. § 35-15-105(b), courts shall give maximum effect to the principle of freedom of disposition and to the enforceability of trust instruments.

Innovative Provisions

According to ULC--NCCUSL, much of the Uniform Trust Code is a codification of the common law of trusts. But the Code does contain a number of innovative provisions. Among the more significant are specification of the rules of trust law that are not subject to override in the trust's terms (section 105) [T.C.A. § 35-15-105], the inclusion of a comprehensive part on representation of beneficiaries (part 3) [T.C.A. § 35-15-301--35-15-305], rules on trust modification and termination that will enhance flexibility (sections 410-417) [T.C.A. §§ 35-15-410--35-15-417], and the inclusion of a part collecting the special rules pertaining to revocable trusts (part 6) [T.C.A. §§ 35-15-601--35-15-604].

Existing Uniform Laws on Trust Law Subjects

According to UCL-NCCUSL, certain older uniform acts are incorporated into the Uniform Trust Code, while other uniform acts, addressing more specialized topics, continue to be available for enactment in free-standing form. As mentioned above certain portions of the Tennessee trust statutes diverge, in some cases significantly, from the Uniform Trust Code, as well as from other uniform acts and restatements, in all cases intentionally and after significant consideration.

According to UCL-NCCUSL, the following uniform acts are incorporated into or otherwise superseded by the Uniform Trust Code:

Uniform Probate Code (UPC) Article VII. Originally approved in 1969, Article VII has been enacted in about fifteen (15) jurisdictions. Article VII, although titled 'Trust Administration,' is a modest statute, addressing only a limited number of topics. Except for its provisions on trust registration, Article VII is superseded by the Uniform Trust Code. Its provisions on jurisdiction are incorporated into part 2 [T.C.A. §§ 35-15-201--35-15-204] of the Code, and its provision on trustee liability to persons other than beneficiaries are replaced by section 1010 [T.C.A. § 35-15-1010].

Uniform Prudent Investor Act (1994) [T.C.A. §§ 35-11-101 et seq.]. This Act has been enacted in thirty-five (35) jurisdictions. This Act, and variant forms enacted in a number of other states, has displaced the older 'prudent man' standard, bringing trust law into line with modern investment practice. States that have enacted the Uniform Prudent Investor Act are encouraged to recodify it as part of their enactment of the Uniform Trust Code. The Tennessee Uniform Prudent Investor Act of 2002 is codified at title 35, chapter 14 and is incorporated by reference in the Tennessee Uniform Trust Code at T.C.A. § 35-15-901.

Uniform Trustee Powers Act (1964). This Act has been enacted in sixteen (16) states. The Act contains a list of specific trustee powers and deals with other selected issues, particularly relations of a trustee with persons other than beneficiaries. The Uniform Trustee Powers Act is outdated and is entirely superseded by the Uniform Trust Code, principally at sections 815, 816, and 1012 [T.C.A. §§ 35-15-815, 35-15-816, and 35-15-1012]. States enacting the Uniform Trust Code should repeal their existing trustee powers legislation.

Uniform Trusts Act (1937). This largely overlooked Act of similar name was enacted in only six (6) states, none within the past several decades. Despite a title suggesting comprehensive coverage of its topic, this Act, like Article VII of the UPC, addresses only a limited number of topics. These include the duty of loyalty, the registration and voting of securities, and trustee liability to persons other than beneficiaries. States enacting the Uniform Trust Code should repeal this earlier namesake.

According to ULC--NCCUSL, the following uniform acts are not affected by enactment of the Uniform Trust Code and do not need to be amended or repealed:

Uniform Common Trust Fund Act [T.C.A. §§ 35-4-101 et seq.]. Originally approved in 1938, this Act has been enacted in thirty-four (34) jurisdictions. The Uniform Trust Code does not address the subject of common trust funds. In recent years, many banks have replaced their common trust funds with mutual funds that may also be available to non-trust customers. The Code addresses investment in mutual funds at subsection 802(f) [T.C.A. § 35-15-802(f) now repealed].

Uniform Custodial Trust Act (1987). This Act has been enacted in fourteen (14) jurisdictions. This Act allows standard trust provisions to be automatically incorporated into the terms of a trust simply by referring to the Act. This Act is not displaced by the Uniform Trust Code but complements it.

Uniform Management of Institutional Funds Act (1972) [T.C.A. § 35-10-101 et seq.]. This Act has been enacted in forty-seven (47) jurisdictions. It governs the administration of endowment funds held by charitable, religious, and other eleemosynary institutions. The Uniform Management of Institutional Funds Act establishes a standard of prudence for use of appreciation on assets, provides specific authority for the making of investments, authorizes the delegation of this authority, and specifies a procedure, through either donor consent or court approval, for removing restrictions on the use of donated funds.

Uniform Principal and Income Act (1997) [T.C.A. § 35-6-101 et seq.]. The 1997 Uniform Principal and Income Act is a major revision of the widely enacted uniform act of the same name approved in 1962. Because this Act addresses issues with respect both to decedent's estates and trusts, a jurisdiction enacting the revised Uniform Principal and Income Act may wish to include it either as part of the Uniform Trust Code or as part of its probate laws. The Tennessee version of the Uniform Principal and Income Act is as title 35, chapter 6 and has been incorporated by reference into the Tennessee Uniform Trust Code at T.C.A. § 35-15-901.

Uniform Statutory Rule Against Perpetuities. Originally approved in 1986, this Act has been enacted in twenty-seven (27) jurisdictions. The Act reforms the durational limit on when property interests, including interests created under trusts, must vest or fail. The Uniform Trust Code does not limit the duration of trusts or alter the time when interests must otherwise vest, but leaves this issue to other state law. The Code may be enacted without change regardless of the status of the perpetuities law in the enacting jurisdiction. Tennessee has adopted a modified version of this uniform act as the Tennessee Uniform Statutory Rule Against Perpetuities at T.C.A. § 66-1-201 et seq. The Tennessee Uniform Statutory Rule Against Perpetuities differs from the uniform act in two major respects. Unlike the uniform act, the Tennessee legislation, which was effective July 1, 1994, has always generally applied retroactively as well as prospectively, while the uniform act only applies prospectively. Moreover, as to any trust created after June 30, 2007, or that becomes irrevocable after June 30, 2007, the Tennessee legislation extends the ninety (90) year term found in the uniform act to three hundred sixty (360) years. On a related note, at T.C.A. § 35-15-106(b)(1) the Tennessee Uniform Trust Code specifically abolishes the common law prohibition against accumulations of income and provides that no provision in a trust directing or authorizing accumulation of trust income is invalid.

Uniform Supervision of Trustees for Charitable Purposes Act (1954)--This Act, which has been enacted in four States, is limited to mechanisms for monitoring the actions of charitable trustees. Unlike the Uniform Trust Code, the Supervision of Trustees for Charitable Purposes Act does not address the substantive law of charitable trusts.

Uniform Testamentary Additions to Trusts Act. This Act is available in two versions: the 1960 Act, with twenty four (24) enactments; and the 1991 Act, with twenty (20) enactments through 1999. As its name suggests, this Act validates pourover devises to trusts. Because it validates provisions in wills, it is incorporated into the Uniform Probate Code, not into the Uniform Trust Code.

Role of Restatement of Trusts: According to ULC--NCCUSL, the Restatement (Second) of Trusts was approved by the American Law Institute in 1957. Work on the Restatement Third began in the late 1980s. The portion of Restatement Third relating to the prudent investor rule and other investment topics was completed and approved in 1990. A tentative draft of the portion of Restatement Third relating to the rules on the creation and validity of trusts was approved in 1996, and the portion relating to the office of trustee, trust purposes, spendthrift provisions and the rights of creditors was approved in 1999. The Uniform Trust Code was drafted in close coordination with the writing of the Restatement Third.

The Tennessee trust statutes concur that much of the Uniform Trust Code's coordination with, and citation in its comments to, the Restatements of Trusts is appropriate. Notwithstanding such, in certain cases the Tennessee trust statutes and comments thereto, diverge, sometimes significantly, from the provisions contained in both these Restatements of Trust, as well as in restatements covering fields of law that are related to, or impact upon, trusts. This divergence was undertaken deliberately and after significant consideration.

For example, T.C.A. § 35-15-106 provides that, generally, courts shall not consult, rely on or give any persuasive value to the Restatement (Third) of Trusts §§ 50, 56, 58, 59 or 60, nor any of their related comments because none of such have any force or effect relative to trusts governed by the laws of Tennessee.

As a result, the Tennessee trust statutes' retain the traditional view regarding distinctive treatment of spendthrift, mandatory, support and discretionary trusts. That view controls a number of things regarding a trust, including the Tennessee trust statutes' retention of the traditional standard by which a trustee's exercise or refusal to exercise discretion is judged in general, as well as regarding distributions, specifically. Therefore, the Tennessee trust statutes reject the existence of any duty of reasonableness in exercising a trustee's discretion that is or may be implied by the Restatement (Third) of Trusts or the Uniform Trust Code. Moreover, under the Tennessee trust statutes, a beneficiary (or that beneficiary's creditors) cannot generally force a trustee to make a distribution.

Similarly, under the Tennessee trust statutes, a beneficiary's interest in a discretionary trust is protected from anticipation or alienation by that beneficiary or that beneficiary's creditors, even if the trust does not contain spendthrift protection language. Additionally, the Tennessee trust statutes provide that discretionary, support and most remainder interests are not property interests, but only expectancies, thereby facilitating stronger creditor protection, as well as the use of advanced transfer tax planning techniques.

Overview of Uniform Trust Code and Tennessee Uniform Trust Code Differences.

While the Uniform Trust Code consists of eleven (11) articles, the Tennessee Uniform Trust Code is comprised of twelve (12) parts. The first eleven (11) track in general format and coverage the similar articles of the Uniform Trust Code, but in some cases diverge significantly from the uniform code. Moreover, unlike in the Uniform Trust Code, part 11 of the Tennessee Uniform Trust Code contains substantive as well as transitional and effective date provisions. Part twelve (12) of the Tennessee Uniform Trust Code contains detailed provisions not found in the Uniform Trust Code that provide for true directed trusts (sometimes called multi-participant or reserved powers trusts). Although Tennessee has had statutes fully providing for true directed trusts since the late 1980s, such provisions being contained in title 35, chapter 3, they were initially only addressed in the other Tennessee trust statutes by reference. Part twelve (12) of the Tennessee Uniform Trust Code contains significantly more detailed provisions governing the operation of directed trusts than do Tennessee's original 1980s directed trust statutes. Finally, many modifications to various other provisions of the Tennessee Uniform Trust Code and certain other provisions of the Tennessee trust statutes have been made to coordinate those provisions with such part twelve (12).

Part 1. General Provisions and Definitions.

According to UCL-NCCUSL, in addition to definitions, this part addresses miscellaneous but important topics. The Uniform Trust Code is primarily default law and can generally be modified by the provisions of a trust instrument.

This also applies to part one (1) of the Tennessee Uniform Trust Code. However, as stated above the Tennessee trust statutes stand for the principles that a settlor's intent is paramount and that one should have the broadest freedom to dispose of assets as that person sees fit. Therefore, the Tennessee Uniform Trust Code provides settlors with significantly more freedom to draft trust terms departing from its default provisions than does the Uniform Trust Code. While certain limitations regarding that freedom still remain in T.C.A. § 35-15-105(b), those limitations are fewer in number and in certain cases, less restrictive, than in section 105 of the Uniform Trust Code. Moreover, unlike the Uniform Trust Code and Restatement (Third) of Trusts, the Tennessee Uniform Trust Code explicitly states that any purpose of a trust that is stated by a settlor in a trust instrument to be material is to be treated as material for all purposes under the Tennessee trust statutes.

Another goal of the Tennessee Uniform Trust Code is to provide significantly more certainty than does the Uniform Trust Code over the law that will control a trust and its administration. This is in accordance with Tennessee's emphasis on settlor's intent and freedom of disposition. Therefore, the Tennessee Uniform Trust Code allows any person having the requisite nexus (such being defined therein) with a jurisdiction to choose that jurisdiction's law as controlling over a trust. A settlor can then designate that controlling law by including a state jurisdiction provision in a trust. When such provision designates that Tennessee law controls, Tennessee obtains jurisdiction over the trust and its law controls the validity, construction and administration of a trust (or any part thereof, as a settlor desires). In the absence of such a state jurisdiction provision, the laws of the jurisdiction where the trust was executed determine its validity and the laws of descent, while the laws of the trust's principal place of administration determine its administration. Except as otherwise expressly provided by the terms of a governing instrument, the Tennessee Uniform Trust Code provides that such place of administration is Tennessee if all or part of such administration takes place in Tennessee. Nevertheless, by following a relatively simple procedure, the trustee (or appropriate fiduciary) of a trust may transfer the principal place of administration to another jurisdiction within or without the United States. Moreover, unlike the Uniform Trust Code under which such power can be blocked by a single qualified beneficiary, the Tennessee Uniform Trust Code requires that timely objection to the transfer be made by a majority of the qualified beneficiaries or the transfer will proceed.

Furthermore and notwithstanding provisions contained in the Restatement (Second) Conflicts of Laws, in keeping with the policy of the state of Tennessee and its overriding emphasis on settlor's intent and freedom of disposition, the Tennessee Uniform Trust Code rejects the concept that any law governing a trust is in any way controlled by a jurisdiction's public policy or dependent upon which jurisdiction has the most significant relationship to a matter at issue.

Finally, when a state jurisdiction provision designates that Tennessee law controls, the Tennessee Uniform Trust Code explicitly provides that no foreign country has any jurisdiction, power or effect over that trust or any disposition under it. Moreover, in such case no foreign country has any power to set the trust or any of its provisions aside, or attempt to do so. Therefore, a foreign country's failure to recognize trusts, or the fact a trust avoids a foreign country's laws granting rights to some person relative to property in the trust; such rights being based on a personal relationship to a settlor of, a party to, or beneficiary of, the trust; are irrelevant and are not respected by Tennessee. Any laws of a foreign country relative to forced heirship, legitime, forced share or similar rights are rejected and are unenforceable under the Tennessee Uniform Trust Code. Therefore, no judgment of any foreign country will be recognized or enforced by Tennessee to the extent such judgment concerns a trust having a state jurisdiction provision designating the law of Tennessee as controlling.

According to UCL-NCCUSL, in order to encourage nonjudicial resolution of disputes, the Uniform Trust Code provides more certainty for when such settlements are binding. While the Code does not prescribe the exact rules

to be applied to the construction of trusts, it does extend to trusts whatever rules the enacting jurisdiction has on the construction of wills. The Uniform Trust Code, although comprehensive, does not legislate on every issue. Its provisions are supplemented by the common law of trusts and principles of equity.

While the Tennessee Uniform Trust Code generally follows this model, such code contains provisions that more easily facilitate nonjudicial resolution than does the Uniform Trust Code. Moreover, as noted above there are various provisions in the Tennessee trust statutes that specifically diverge from and override what some foreign jurisdictions perceive to be appropriate "common law or principles of equity." A few examples of such overriding Tennessee provisions include: i) the invalidity of any common law restrictions on accumulations of income; and ii) the law relative to what constitutes a discretionary trust, the construction and interpretation of same, as well as how discretion under same should be exercised. As described above, the Tennessee trust statutes' position on the latter issue is intentionally not in accord with the common law as such is interpreted in §§ 50, 56, 58, 59 and 60 of the Restatement (Third) of Trusts and such sections' comments.

Part 2. Judicial Proceedings.

According to ULC--NCCUSL, this part addresses selected issues involving judicial proceedings concerning trusts, particularly trusts having contacts with more than one (1) state or country. The courts in the trust's principal place of administration have jurisdiction over both the trustee and the beneficiaries as to any matter relating to the trust. Optional provisions on subject matter jurisdiction and venue are provided. The minimal coverage of this part was deliberate. The drafting committee concluded that most issues related to jurisdiction and procedure are not appropriate to a trust code, but are best left to other bodies of law.

In light of the fact that the Tennessee Uniform Trust Code provides greater certainty regarding controlling law and principal place of administration than does the Uniform Trust Code, the former likewise gives more certainty regarding appropriate subject matter jurisdiction and venue.

Part 3. Representation.

According to ULC--NCCUSL, this part deals with the representation of beneficiaries and other interested persons, both by fiduciaries (personal representatives, guardians and conservators), and through what is known as virtual representation. The representation principles of the part apply to settlement of disputes, whether by a court or nonjudicially. They apply for the giving of required notices. They apply for the giving of consents to certain actions. The part also authorizes a court to appoint a representative if the court concludes that representation of a person might otherwise be inadequate. The court may appoint a representative to represent and approve a settlement on behalf of a minor, incapacitated, or unborn person or person whose identity or location is unknown and not reasonably ascertainable.

While the Tennessee Uniform Trust Code generally follows this model, such code contains provisions that more easily facilitate virtual representation and more classes of persons can be so represented than under the Uniform Trust Code. For example, the Tennessee Uniform Trust Code only requires that there be no material conflict of interest between the representative and the person(s) represented. On the other hand the Uniform Trust Code has no such materiality threshold, thereby more often precluding virtual representation. Also under the Tennessee Uniform Trust Code, remote descendants can be so represented and those who are subject to any power of appointment may be represented by the power holder. Finally a settlor or the beneficiaries can designate in writing a person or persons who can represent and bind beneficiaries.

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

According to ULC--NCCUSL, this part specifies the requirements for creating, modifying and terminating trusts. Most of the requirements relating to creation of trusts (sections 401 through 409 [T.C.A. §§ 35-15-401--35-15-409]) track traditional doctrine, including requirements of intent, capacity, property, and valid trust purpose. The Uniform Trust Code articulates a three-part classification system for trusts: noncharitable, charitable, and

honorary. Noncharitable trusts, the most common type, require an ascertainable beneficiary and a valid purpose. Charitable trusts, on the other hand, by their very nature are created to benefit the public at large. The so called honorary or purposes trust, although unenforceable at common law, is valid and enforceable under the Uniform Trust Code despite the absence of an ascertainable beneficiary. The most common example is a trust for the care of an animal.

Sections 410 through 417 [T.C.A. §§ 35-15-410--35-15-417] provide a series of interrelated rules on when a trust may be terminated or modified other than by its express terms. The overall objective of these sections is to enhance flexibility consistent with the principle that preserving the settlor's intent is paramount. Termination or modification may be allowed upon beneficiary consent if the court concludes that the trust or a particular provision no longer serves a material purpose or if the settlor concurs; by the court in response to unanticipated circumstances or to remedy ineffective administrative terms; or by the court or trustee if the trust is of insufficient size to justify continued administration under its existing terms. Trusts may be reformed to correct a mistake of law or fact, or modified to achieve the settlor's tax objectives. Trusts may be combined or divided. Charitable trusts may be modified or terminated under cy pres to better achieve the settlor's charitable purposes.

While the Tennessee Uniform Trust Code generally follows this model, such code contains provisions that, relative to the Uniform Trust Code: allow broader trust purposes; better facilitate the assurance of settlor's intent; extend the enforceable periods of purpose trusts and trusts for the care of animals; as well as better facilitate the modification, termination combination or division of trusts.

Part 5. Creditor's Claims; Spendthrift and Discretionary Trusts.

According to ULC--NCCUSL, this part addresses the validity of a spendthrift provision and other issues relating to the rights of creditors to reach the trust to collect a debt. To the extent a trust is protected by a spendthrift provision, a beneficiary's creditor may not reach the beneficiary's interest until distribution is made by the trustee. To the extent not protected by a spendthrift provision, a creditor can reach the beneficiary's interest, subject to the court's power to limit the award. Certain categories of claims are exempt from a spendthrift restriction, including certain governmental claims and claims for child support or alimony. Other issues addressed in this part include creditor claims against discretionary trusts; creditor claims against a settlor, whether the trust is revocable or irrevocable; and the rights of creditors when a trustee fails to make a required distribution within a reasonable time.

The provisions of part five (5) of the Tennessee Uniform Trust Code diverge, in many cases significantly, from the provisions contained in Uniform Trust Code, as well as from the Restatement (Third) of Trusts, on which much of part 5 of the Uniform Trust Code was based.

Part five (5) of the Tennessee Uniform Trust Code offers far more creditor protection to trusts and their beneficiaries than does the Uniform Trust Code or the Restatement (Third) of Trusts. This is achieved in a number of ways, some of which are enumerated hereafter.

Relative to spendthrift trusts, T.C.A. § 35-15-503 contains no exception creditors other than the state of Tennessee, and then only to the extent that a statute of the state of Tennessee so provides. The protection given by the Tennessee Uniform Trust Code to discretionary trusts is far broader than that provided by the Uniform Trust Code and, unlike under the latter, there are no exception creditors relative to an interest held in a discretionary trust.

When combined with the Tennessee Uniform Trust Code's definition of what constitutes a discretionary trust, only a limited number of the types of trusts typically used for donative purposes do not obtain the benefit of such creditor protection. This is in keeping with the objective of the Tennessee trust statutes that a settlor should have the broadest freedom to dispose of their assets to whom, and in the manner, they wish (and to only those persons, and in only such manner, as a settlor wishes). Such creditor protection respects that the assets in the trust initially belonged to the settlor and not the beneficiary. When those assets are put in a discretionary trust, the

beneficiary obtained only beneficial rights that do not rise to the status of a property interest and, therefore, cannot be reached by creditors. Under the Tennessee trust statutes, an irrevocable special needs trust is shielded from claims by creditors of the settlor regardless of whether or not such trust complies with the provisions of chapter 16, the Tennessee Investment Services Trust Act. Finally, any interest of a beneficiary under a support trust likewise does not rise to the status of a property interest and is therefore protected from creditors, even absent a spendthrift provision. Notwithstanding the above, the Tennessee trust statutes still respect the right of beneficiaries of support and mandatory interests to obtain redress for a trustee's failure to respect such interests due such beneficiaries under them. However, no creditor of any such beneficiary has such right and can only reach a distribution made from such interests after the distribution is made and then in only specified circumstances.

Part 6. Revocable Trusts.

According to ULC--NCCUSL, this short part deals with issues of significance not totally settled under current law. The basic policy of this part and of the Uniform Trust Code in general is to treat the revocable trust as the functional equivalent of a will. The part specifies a standard of capacity, provides that a trust is presumed revocable unless its terms provide otherwise, prescribes the procedure for revocation or amendment of a revocable trust, addresses the rights of beneficiaries during the settlor's lifetime, and provides a statute of limitations on contests.

Part 6 of the Tennessee Uniform Trust Code generally follows this model. However, the Tennessee Uniform Trust Code makes it clear that no inter vivos trust need be executed with the formalities of a will and, relative to the Uniform Trust Code, has a shorter statute of limitation on contests. Part 6 of the Tennessee Uniform Trust Code also contains certain other differences relative to the Uniform Trust Code, such differences being in conformity with the spirit of the overall objectives of the Tennessee trust statutes.

Part 7. Office of Trustee.

According to ULC--NCCUSL, this part contains a series of default rules dealing with the office of trustee, all of which may be modified in the terms of the trust. Rules are provided on acceptance of office and bonding. The role of the cotrustee is addressed, including the extent that one cotrustee may delegate to another, and the extent to which one (1) cotrustee can be held liable for actions of another trustee. Also covered are changes in trusteeship, including the circumstances when a vacancy must be filled, the procedure for resignation, the grounds for removal, and the process for appointing a successor trustee. Finally, standards are provided for trustee compensation and reimbursement for expenses.

Part 7 of the Tennessee Uniform Trust Code generally follows this model. However, such part is augmented by numerous provisions to provide default rules that are substantially equivalent to those dealing with the office of a trustee, but that apply to other fiduciaries that exist in the case of a directed trust governed by Part 12. Moreover, all fiduciaries have a statutory duty to keep all other fiduciaries reasonably informed about the administration of the trust to the extent such other fiduciaries do not have such knowledge. This is to assure that all such fiduciaries have the material information necessary to perform their respective duties.

Part 8. Duties and Powers of Trustee.

According to ULC--NCCUSL, this part states the fundamental duties of a trustee and enumerates the trustee's powers. The duties listed are not new, although some of the particulars have changed over the years. This part was drafted where possible to conform to the Uniform Prudent Investor Act. The Uniform Prudent Investor Act prescribes a trustee's responsibilities with respect to the management and investment of trust property. This part also addresses a trustee's duties regarding distributions to beneficiaries.

Part 8 of the Tennessee Uniform Trust Code generally follows this model. However, such part is augmented by numerous provisions to: add flexibility; conform to the Tennessee Uniform Trust Code's extensive directed trust provisions; allow for "quiet" trusts under certain circumstances; require any beneficiary who is eligible to receive

information concerning the trust to agree in writing to keep confidential any such information that is confidential before receiving same; and require the various fiduciaries to keep each other reasonably informed with the information necessary for them to respectively carry out their duties.

Moreover, due to the Tennessee Uniform Trust Code's view on the distinctions among mandatory, support and discretionary interests, this part of such code contains significant variances from the Uniform Trust Code relative to the exercise of powers over such interests.

Finally, the Tennessee Uniform Trust Code contains a detailed but flexible statutory provision expressly authorizing a trustee having a power to invade principal to do so by appointing such principal in trust; i.e., a "decanting" power.

Part 9. Uniform Prudent Investor Act--Uniform Principal and Income Act.

According to ULC--NCCUSL, this part provides a place for a jurisdiction to enact, reenact or codify its version of the Uniform Prudent Investor Act [ULC--NCCUSL does not mention the Uniform Principal and Income Act relative to its part 9]. States adopting the Uniform Trust Code which have previously enacted the Uniform Prudent Investor Act are encouraged to reenact their version of the Prudent Investor Act in this part.

Both the Tennessee Uniform Prudent Investor Act of 2002, title 35, part 14, T.C.A. § 35-14-101 et seq., and Tennessee's version of the Uniform Principal and Income Act, title 35, part 6, T.C.A. § 35-6-101 et seq., were adopted prior to the Tennessee Uniform Trust Code. As with the Tennessee Uniform Trust Code, both have been amended since their respective enactments and in certain cases, both diverge, sometimes significantly, from their respective uniform codes, as well as from various restatements. Instead of "reenacting" the Tennessee Uniform Prudent Investor Act of 2002 in part 9, the Tennessee Uniform Trust Code incorporates therein by reference such act, codified at title 35, part 14, as well as Tennessee's version of the Uniform Principal and Income Act, codified at title 35, part 6.

Part 10. Liability of Trustees and Rights of Persons Dealing With Trustees.

According to ULC--NCCUSL, sections 1001 through 1009 [T.C.A. §§ 35-15-1001--35-15-1009] list the remedies for breach of trust, describe how money damages are to be determined, provide a statute of limitations on claims against a trustee, and specify other defenses, including consent of a beneficiary and recognition of and limitations on the effect of an exculpatory clause. Sections 1010 through 1013 [T.C.A. §§ 35-15-1010--35-15-1013] address trustee relations with persons other than beneficiaries. The objective is to encourage third parties to engage in commercial transactions with trustees to the same extent as if the property were not held in trust.

In the Tennessee Uniform Trust Code, T.C.A. §§ 35-15-1001-35-15-1009 track in general format and coverage Uniform Trust Code sections 1001 through 1009. However, T.C.A. § 35-15-1003 reverses the rule of Uniform Trust Code section 1003 and provides that absent a breach of trust, a trustee is not liable for a loss or depreciation in the value of trust property or for not having made a profit. T.C.A. § 35-15-1004 allows trustees to use trust funds to pay fees, as well as reasonable costs and expenses incurred in a nonjudicial proceeding when the parties to the proceeding agree to such in writing. Such section also provides for an award made by mediators or arbitrators of fees, costs and expenses, relative to a proceeding involving trust administration to be paid from the trust. T.C.A. § 35-15-1005 provides: for more flexibility regarding the adequacy of disclosure of facts indicating the existence of a potential claim for breach of trust; does not require a trustee to inform a beneficiary of the time after such disclosure by which any proceeding must be commenced; and shortens in other situations the statute of limitations relative to the Uniform Trust Code from five (5) years to three (3). Such section also provides similar limitations periods for actions against a trustee for breach of trust brought by the various other fiduciaries that can exist in a directed trust or similar setting and provides that if a claim is barred against all beneficiaries, such other fiduciary is likewise barred from making a claim against a trustee.

Likewise, T.C.A. §§ 35-15-1010-35-15-1013 track in general format and coverage Uniform Trust Code sections 1010 through 1013. However, T.C.A. § 35-15-1010 and 35-15-1011 provide a trustee with significantly greater protection from personal liability than does the Uniform Trust Code. T.C.A. § 35-15-1013, regarding certifications of trust, diverges significantly from Uniform Trust Code section 1013.

Finally in keeping with the Tennessee trust statutes' emphasis on freedom of disposition and settlor's intent, T.C.A. § 35-15-1014 expressly provides for the enforceability of no-contest, in terrorem and forfeiture provisions contained in trust instruments. However, such provisions will not be enforced if the beneficiary bringing the action triggering same had probable cause to do so under grounds specified in such section. Such section also contains exceptions to enforceability of such provisions in the case of actions brought for certain other reasons, some of which include: to challenge the actions of a fiduciary to the extent that fiduciary has breached his duties; for construction or interpretation; or an agreement among persons in resolution of a matter relating to the trust.

Part 11. Miscellaneous Provisions.

According to ULC-NCCUSL, part 11 of the Uniform Trust Code is primarily an effective date provision. Moreover, the Uniform Trust Code is intended to have the widest possible application, consistent with constitutional limitations. The Code applies not only to trusts created on or after the effective date, but also to trusts in existence on the date of enactment.

While the Tennessee Uniform Trust Code, as well as the Tennessee trust statutes in general, are intended to have the widest possible application, consistent with constitutional limitations, various provisions in the Tennessee trust statutes should better assure such application.

Moreover, part 11 of the Tennessee Uniform Trust Code contains multiple substantive provisions and is far more than "an effective date provision." As covered in detail above, T.C.A. § 35-15-1101 reverses the provisions of section 1101 of the Uniform Trust Code and expressly states that, relative to the subject matter of title 35, no consideration shall be given to any need to promote uniformity among states and that such other states' acts. Unlike the Uniform Trust Code, the Tennessee Uniform Trust Code contains no severability clause, it being intended that the Tennessee Uniform Trust Code, as well as the Tennessee trust statutes in general, be fully applicable as written.

Finally, in keeping with the Tennessee trust statutes' emphasis on freedom of disposition and settlor's intent, part 11 of the Tennessee Uniform Trust Code contains two sections having no corresponding provision in the Uniform Trust Code. One makes it very difficult for a settlor of a trust to be deemed an alter ego of the trustee of such trust, while the other makes it exceedingly difficult to sustain that the a settlor's or beneficiary's influence over a trust gives either dominion and control over such trust.

Part 12. Miscellaneous Provisions.

As stated above, the Uniform Trust Code does not contain a part 12, nor does it contain similar provisions to those provided in part 12 of the Tennessee Uniform Trust Code. Part 12 (12) of the Tennessee Uniform Trust Code contains comprehensive and detailed provisions governing the operation of true directed trusts not found in the nominal coverage of "powers to direct" under section 808 of the Uniform Trust Code. Such Part 12 (12) also provides significantly more detailed provisions governing the operation of true directed trusts than do Tennessee's original 1980s directed trust statutes. Finally, many modifications to various other provisions of the Tennessee Uniform Trust Code and certain other provisions of the Tennessee trust statutes have been made to coordinate those provisions with such part twelve (12).

END GENERAL COMMENTS

35-15-101. Short title

This chapter shall be known and may be cited as the "Tennessee Uniform Trust Code."

COMMENT. (NONE)

35-15-102. Scope

This chapter applies to express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust.

COMMENT.

The Tennessee Uniform Trust Code, while comprehensive, applies only to express trusts. Excluded from the Code's coverage are resulting and constructive trusts, which are not express trusts but remedial devices imposed by law. For the requirements for creating an express trust and the methods by which express trusts are created, see sections 401-402 [§§ 35-15-401 and 35-15-402]. The Tennessee Uniform Trust Code does not attempt to distinguish express trusts from other legal relationships with respect to property, such as agencies and contracts for the benefit of third parties. For the distinctions, see Restatement (Third) of Trusts §§ 2, 5 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 2, 5-16C (1959).

The Tennessee Uniform Trust Code is directed primarily at trusts that arise in an estate planning or other donative context, but express trusts can arise in other contexts. For example, a trust created pursuant to a divorce action would be included, even though such a trust is not donative but is created pursuant to a bargained-for exchange.

Moreover, an express trust can be created by an entity, including but not limited to a corporation, partnership, limited liability company or any other entity of similar type to any of such (under the laws of any state, the United States of America or any foreign country, all as such terms are defined in T.C.A. § 35-15-103). An express trust can also be created by a trust (governed under the laws of any state, the United States of America or any foreign country, all as such terms are defined in T.C.A. § 35-15-103). This could happen in a number of situations. Among other ways, a trust can create another trust due to the exercise of a trustee's power of appointment (i.e., through a decanting), or through a power holder's exercise of any other power of appointment. Regardless, such express trusts are covered by the Tennessee Uniform Trust Code.

Commercial trusts come in numerous forms, including trusts created pursuant to a state business trust act and trusts created to administer specified funds, such as to pay a pension or to manage pooled investments. Commercial trusts are often subject to special-purpose legislation and case law, which in some respects displace the usual rules stated in the Tennessee Uniform Trust Code. See John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J. 165 (1997).

Express trusts also may be created by means of court judgment or decree. Examples include trusts created to hold the proceeds of personal injury recoveries and trusts created to hold the assets of a protected person in a conservatorship proceeding. See, e.g., Uniform Probate Code § 5-411(a)(4).

35-15-103. Chapter definitions

As used in this chapter, unless the context otherwise requires:

- (1) "Action" with respect to an act of a trustee, includes a failure to act;
- (2) "Another state" or "other state" means any state other than this state;
- (3) "Ascertainable standard" means a standard relating to an individual's health, education, support or maintenance within the meaning of § 2041(b)(1)(A) or § 2514(c)(1) of the Internal Revenue Code of 1986, as in effect on July 1, 2004, or as later amended;

(4) "Beneficial interest" means a distribution interest or a remainder interest; provided, however, that a beneficial interest specifically excludes a power of appointment or a power reserved by a settlor;

(5) "Beneficiary" means a person that:

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

(B) Deleted by 2013 Pub.Acts, c. 390, § 3, eff. July 1, 2013.

(6) "Charitable trust" means a trust, or portion of a trust, created for a charitable purpose described in § 35-15-405(a);

(7) "Conservator" has the same meaning as in § 34-1-101;

(8) "Directed trust" means a trust where either through the terms of the trust, an agreement of the qualified beneficiaries or a court order, one or more persons are given the authority to direct or consent to a fiduciary's actual or proposed investment decision, distribution decision, or any other decision of the fiduciary;

(9) "Distribution beneficiary" means a beneficiary who is an eligible distributee or permissible distributee of the income or principal of a trust;

(10) "Distribution interest" means:

(A) An interest, other than a remainder interest, held by a distribution beneficiary under a trust and may be a current distribution interest or a future distribution interest;

(B) Relative to a distribution interest:

(i) Neither the existence of a distribution interest or the provision of services by a spouse in that spouse's capacity as a fiduciary of the trust creating the distribution interest is relevant in the equitable division of marital property;

(ii) None of the factors in subdivision (10)(B)(i) or the exercise or non-exercise of any power or discretion by a spouse in that spouse's capacity as a fiduciary of the trust creating the distribution interest (even if that spouse is also a beneficiary of the trust creating the distribution interest) are relevant to, indicative of or effect the transmutation or other conversion of separate property to community property;

(iii) The expending of any community funds by a spouse in that spouse's capacity as a fiduciary of the trust creating the distribution interest relative to the operation or maintenance of property related to a distribution interest is not relevant to or indicative of, and does not effect a transmutation or other conversion of separate property to community property;

(iv) Any funds expended pursuant to subdivision (10)(B)(iii) shall be valid debts of the trust and shall be repaid to the community with appropriate interest;

(C) A distribution interest is classified as either a mandatory interest, a support interest or a discretionary interest; and although not the exclusive means to create each such respective distribution interest, absent clear and convincing evidence to the contrary, use of the example language accompanying the following definitions of each such respective distribution interest results in the indicated classification of distribution interest:

(i) A mandatory interest means a distribution interest in which the timing of any distribution must occur within one (1) year from the date the right to the distribution arises and the trustee has no discretion in determining whether a distribution shall be made or the amount of such distribution; example distribution language indicating a mandatory interest includes, but is not limited to:

(a) All income shall be distributed to a named beneficiary; or

(b) One hundred thousand dollars (\$100,000) a year shall be distributed to a named beneficiary;

(ii) A support interest means a distribution interest that is not a mandatory interest but still contains mandatory language such as "shall make distributions" and is coupled with a standard capable of judicial interpretation; example distribution language indicating a support interest includes, but is not limited to:

(a) The trustee shall make distributions for health, education, maintenance, and support;

(b) Notwithstanding the distribution language used, if a trust instrument containing such distribution language specifically provides that the trustee exercise discretion in a reasonable manner with regard to a discretionary interest, then notwithstanding any other provision of this subdivision (10) defining distribution interests, the distribution interest shall be classified as a support interest;

(iii) A discretionary interest means any interest that is not a mandatory or a support interest and is any distribution interest where a trustee has any discretion to make or withhold a distribution; example distribution language indicating a discretionary interest includes, but is not limited to:

(a) The trustee may, in the trustee's sole and absolute discretion, make distributions for health, education, maintenance, and support;

(b) The trustee, in the trustee's sole and absolute discretion, shall make distributions for health, education, maintenance, and support;

(c) The trustee may make distributions for health, education, maintenance, and support;

(d) The trustee shall make distributions for health, education, maintenance, and support; provided, however, that the trustee may exclude any of the beneficiaries or may make unequal distributions among them; or

(e) The trustee may make distributions for health, education, maintenance, support, comfort, and general welfare;

(f) A discretionary interest may also be evidenced by:

(1) Permissive distribution language such as "may make distributions";

(2) Mandatory distribution language that is negated by the discretionary distribution language contained in the trust such as "the trustee shall make distributions in the trustee's sole and absolute discretion";

(g) An interest that includes mandatory distribution language such as "shall" but is subsequently qualified by discretionary distribution language shall be classified as a discretionary interest and not as a support or a mandatory interest;

(D) (i) To the extent a trust contains distribution language indicating the existence of any combination of a mandatory, support and discretionary interest, that combined interest of the trust shall be divided and treated separately as follows:

(a) The trust shall be a mandatory interest only to the extent of the mandatory distribution language;

(b) The trust shall be a support interest only to the extent of such support distribution language; and

(c) The remaining trust property shall be held as a discretionary interest;

(ii) For purposes of this subdivision (10)(D), a support interest that includes mandatory distribution language such as "shall" but is subsequently qualified by discretionary distribution language, shall be classified as a discretionary interest and not as a support interest;

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

(12) "Excluded fiduciary" means any trustee, trust advisor, or trust protector to the extent that, under the terms of a trust, an agreement of the qualified beneficiaries, or court order:

(A) The trustee, trust advisor, or trust protector is excluded from exercising a power, or is relieved of a duty; and

(B) The power or duty is granted or reserved to another person;

(13) "Fiduciary" means:

(A) A trustee, conservator, guardian, agent under any agency agreement or other instrument, an executor, personal representative or administrator of a decedent's estate, or any other party, including a trust advisor or a trust protector, who is acting in a fiduciary capacity for any person, trust, or estate;

(B) Fiduciary also means a trustee as defined in § 35-14-102;

(C) For purposes of subdivision (13)(A), an agency agreement includes but is not limited to, any agreement under which any delegation is made, either pursuant to § 35-15-807 or by anyone holding a power or duty pursuant to part 12;

(D) For purposes of the definition of fiduciary in this subdivision (13), fiduciary does not mean any person who is an excluded fiduciary as such is defined in this section;

(14) "Foreign" or "foreign country" means any jurisdiction, subdivision, territory or possession thereof, other than that of the United States of America or of a state;

(15) "Foreign jurisdiction" means any jurisdiction, subdivision, territory or possession thereof, other than this state;

(16) "Guardian" has the same meaning as in § 34-1-101. The term does not include a guardian ad litem;

(17) "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust;

(18) "Internal Revenue Code" means the Internal Revenue Code of 1986, as in effect on July 1, 2004, or as later amended;

(19) "Jurisdiction" with respect to a geographic area, includes a state or country;

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

(21) "Power of appointment" means:

(A) An inter vivos or testamentary power to direct the disposition of trust property, other than a distribution decision made by a trustee or other fiduciary to a beneficiary;

(B) Powers of appointment are held by the person to whom such power has been given, and not by a settlor in that person's capacity as settlor;

(22) "Power of withdrawal" means a presently exercisable general power of appointment other than a power:

(A) Exercisable by a trustee and limited by an ascertainable standard; or

(B) Exercisable by another person only upon consent of the trustee or a person holding an adverse interest;

(23) "Property" means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein;

(24) "Qualified beneficiary" means a beneficiary who, assuming the nonexercise of all powers of appointment and the nonoccurrence of any event not reasonably expected to occur, on the date the beneficiary's qualification is determined:

(A) Is a distributee or permissible distributee of trust income or principal;

(B) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subdivision (24)(A) terminated on that date; or

(C) Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date;

(D) Notwithstanding any other provisions of this subdivision (24), no ultimate beneficiary or potential ultimate beneficiary shall be a qualified beneficiary;

(i) In determining who is or may be an ultimate beneficiary, all of the following shall be taken into consideration:

(a) The terms of the trust naming any ultimate beneficiary or potential ultimate beneficiary and the intention of the settlor relative to any such beneficiary as expressed in such terms; and

(b) Any terms or provisions related to the exercise of any power by any person naming any ultimate beneficiary or potential ultimate beneficiary and the intention of the person exercising such power relative to any such beneficiary as expressed in such terms or provisions;

(ii) Determined as provided in subdivision (24)(D)(i), an ultimate beneficiary or potential ultimate beneficiary is any beneficiary who the settlor or power holder did not reasonably anticipate would take any interest upon termination of all or any part of a trust absent all other beneficiaries or members of classes of beneficiaries named in the trust instrument or in the exercise of the power, respectively, predeceasing or otherwise not being in existence at the time at which such trust or part thereof terminates;

(iii) By way of example and not in limitation of this subdivision (24)(D), an ultimate beneficiary is a person or persons often included in a trust instrument or under the exercise of a power to take an interest in a trust at the time all or any part of such trust terminates only in a case where all other named beneficiaries or classes of beneficiaries that have or had an affinity through either familial connection or friendship with any of:

(a) The settlor;

(b) The person holding any power; or

(c) Any prior beneficiary or potential beneficiary of the trust;

are predeceased or are otherwise not in existence at the time all or any part of the trust terminates;

(25) "Reach" means, with respect to a distribution interest or any power held by anyone relative to a trust, to subject such distribution interest or such power to a judgment, decree, garnishment, attachment, execution, levy, creditor's bill or other legal, equitable, or administrative process, relief, or control of any court, tribunal, agency, or other entity that, by power of law, is provided with powers or jurisdiction similar to those described in this subdivision (25);

(26) "Remainder interest" means an interest under which a trust beneficiary will receive property held by a trust outright at some time during the future; relative to a remainder interest:

(A) Neither the existence of a remainder interest or the provision of services by a spouse in that spouse's capacity as a fiduciary of the trust creating the remainder interest is relevant in the equitable division of marital property;

(B) None of the factors in subdivision (26)(A) or the exercise or non-exercise of any power or discretion by a spouse in that spouse's capacity as a fiduciary of the trust creating the remainder interest (even if that spouse is also a beneficiary of the trust creating the remainder interest) are relevant to, indicative of or effect the transmutation or other conversion of separate property to community property;

(C) The expending of any community funds by a spouse in that spouse's capacity as a fiduciary of the trust creating the remainder interest relative to the operation or maintenance of property related to a remainder interest is not relevant to or indicative of, and does not effect a transmutation or other conversion of separate property to community property;

(D) Any funds expended pursuant to subdivision (26)(C) shall be valid debts of the trust and shall be repaid to the community with appropriate interest;

(27) "Reserved power" means a power held by a settlor;

(28) "Revocable" as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest;

(29) "Settlor" means a person, including a testator, who creates, or contributes property to, a trust. If more than one (1) person creates or contributes property to a trust, each person is a settlor 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 withdraw that portion;

(30) "Spendthrift provision" means a term of a trust which restrains both voluntary and involuntary transfer of a beneficiary's interest;

(31) "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;

(32) "Successors in interest" means the beneficiaries under the settlor's will, if the settlor has a will, or in the absence of an effective will provision, the settlor's heirs at law;

(33) "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;

(34) "This state" means the state of Tennessee;

(35) "Trust advisor" means any person described in § 35-15-1201(a);

(36) "Trust instrument" means an instrument executed by the settlor that contains terms of the trust, including any amendments thereto;

(37) "Trust protector" means any person described in § 35-15-1201(a); and

(38) "Trustee" includes an original, additional, and successor trustee, and a cotrustee.

COMMENT.

"Action." A definition of "action" is included for drafting convenience, to avoid having to clarify in the numerous places in the Tennessee Uniform Trust Code where reference is made to an "action" by the trustee that the term includes a failure to act.

"Another state or "other state" The Tennessee Uniform Trust Code has always had a definition of "state." A definition of "another state" or "other state," along with definitions of "foreign" or "foreign country," "foreign jurisdiction" and "this state" were added by the 2013 amendments to the Tennessee Uniform Trust Code. Throughout the Tennessee trust statutes and comments thereto, all of such terms have the meaning ascribed to them respectively in T.C.A. § 35-15-103. Statutory definitions of these terms are included for multiple reasons, including but not limited to:

Having such statutorily defined terms provides drafting convenience and avoids having to clarify in a document any subject covered by such terms.

The Tennessee Uniform Trust Code contains detailed provisions regarding governing law. Under such provisions, neither the laws of any foreign country nor any judgment or similar holding of any foreign country's tribunals are recognized or enforceable by this state. Therefore, such foreign law and holdings have no force or effect over a trust (or distribution therefrom) when that trust is governed by Tennessee law.

The Tennessee Uniform Trust Code also has detailed provisions governing place of administration of a trust and the nexus required to determine such principal place of administration. These provisions regarding nexus also impact the ability for one to make a state jurisdiction provision in a trust. Including the above statutorily defined terms facilitates all such above provisions, as well as other provisions throughout the Tennessee Uniform Trust Code.

From time to time the parties to or that have an interest in a trust, the transactions and other matters pertaining to a trust, as well as the provisions of the Tennessee Uniform Trust Code in general, touch more than one domestic jurisdiction or both domestic and foreign jurisdictions. In such cases, having such statutorily defined terms facilitates determination of whether Tennessee law alone applies, or due to constitutional limitations the law of another state or of the United States must be considered. Such statutorily defined terms also facilitate a clear demarcation between limitations or requirements of the U.S. constitution and the chimera and nonbinding nature of comity relative to the laws and holdings of a foreign country.

Finally, the comments under "foreign" or "foreign country," under "foreign jurisdiction," as well as under "this state," are incorporated herein by reference. Added by the 2013 amendments to Tennessee Uniform Trust Code.

"Ascertainable standard." The 2007 amendments to the Tennessee Uniform Trust Code added a definition of "ascertainable standard," thereby making it apply generally throughout the Code.

"Beneficial interest." Under the Tennessee Uniform Trust Code, a beneficial interest must either be a distribution interest or a remainder interest as such are defined in T.C.A. § 35-15-103. The Tennessee trust statutes do not provide for any other form or type of beneficial interest. See below for comments regarding distribution interests and remainder interests.

A beneficial interest does not include either: a power of appointment or a reserved power as such are defined in T.C.A. § 35-15-103. See below for comments regarding powers of appointment and reserved powers. For this reason, under the Tennessee Uniform Trust Code, the holder of a power of appointment is not a beneficiary, such

being a divergence from the Uniform Trust Code. Added by the 2013 amendments to Tennessee Uniform Trust Code.

"Beneficiary." This term refers only to a beneficiary of a trust as such is defined in the Tennessee Uniform Trust Code. In addition to living and ascertained individuals, beneficiaries may be unborn or unascertained. Pursuant to T.C.A. § 35-15-402 a trust must have a beneficiary unless the trust is: a charitable trust; for the care of an animal; or for a noncharitable purpose. Moreover, under T.C.A. § 35-15-402, a trust that requires a beneficiary is valid only if a beneficiary can be ascertained now or in the future. The term "beneficiary" includes not only beneficiaries who received their interests under the terms of the trust but also beneficiaries who received their interests by other means, including by assignment, exercise of a power of appointment, resulting trust upon the failure of an interest, gap in a disposition, operation of an antilapse statute upon the predecease of a named beneficiary, or upon termination of the trust. The fact that a person incidentally benefits from the trust does not mean that the person is a beneficiary. For example, neither a trustee nor persons hired by the trustee become beneficiaries merely because they receive compensation from the trust. See Restatement (Third) of Trusts § 48 cmt. c (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 126 cmt. c (1959).

Tennessee law is consistent with the common law of trusts that the holder of a power of appointment is not considered a trust beneficiary. Contrastingly, ULC--NCCUSL's position in the Uniform Trust Code, which provides that the holder of a power of appointment is classified as a beneficiary, is in conflict with both Tennessee law and common law in general.

The definition of "beneficiary" includes only those who hold beneficial interests in the trust. Because a charitable trust is not created to benefit ascertainable beneficiaries but to benefit the community at large (See section 405(a) [T.C.A. § 35-15-405(a)]), persons receiving distributions from a charitable trust are not beneficiaries as that term is defined in the Tennessee Uniform Trust Code. Notwithstanding the above, a charitable organization expressly designated to receive distributions under the terms of a charitable trust are granted the rights of a qualified beneficiary under the Tennessee Uniform Trust Code, but only if such charitable organization otherwise holds beneficial interests sufficient to satisfy the requirements set forth in T.C.A. § 35-15-110.

For reasons similar to those applying to charitable trusts, neither any animal under a trust for the care of an animal as provided by T.C.A. § 35-15-408, nor anyone (person, entity or otherwise) benefiting from or having an interest in the purpose for which a trust is established under T.C.A. § 35-15-409 are beneficiaries as that term is defined in the Tennessee Uniform Trust Code. Moreover, relative to trusts controlled by T.C.A. §§ 35-15-408 and 35-15-409, there are no qualified beneficiaries. Nevertheless, both such Tennessee statutes provide mechanisms under which one or more persons, or a court, can enforce such types of trusts.

The Tennessee Uniform Trust Code leaves certain issues concerning beneficiaries to the common law. Any person with capacity to take and hold legal title to intended trust property has capacity to be a beneficiary. See Restatement (Third) of Trusts § 43 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts §§ 116-119 (1959). Under the Tennessee Uniform Trust Code, the extent of a beneficiary's interest is determined solely by the settlor's intent to the greatest extent constitutionally allowable. Unlike in the Uniform Trust Code and the Restatement (Third) of Trusts, the Tennessee Uniform Trust Code does not require that such intent be limited by public policy. See Restatement (Third) of Trusts § 49 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts §§ 127-128 (1959); but to the extent either of such restatements are in conflict with Tennessee law, the latter controls. While most beneficial interests terminate upon a beneficiary's death, the interest of a beneficiary may devolve by will or intestate succession the same as a corresponding legal interest. See Restatement (Third) of Trusts § 55(1) (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts §§ 140, 142 (1959).

"Charitable trust." Under the Tennessee Uniform Trust Code, when a trust has both charitable and noncharitable beneficiaries only the charitable portion qualifies as a "charitable trust." The great majority of the Tennessee Uniform Trust Code's provisions apply to both charitable and noncharitable trusts without distinction. The distinctions between the two types of trusts are found in the requirements relating to trust creation and

modification. Pursuant to sections 405 and 413 [T.C.A. §§ 35-15-405 and 35-15-413], a charitable trust must have a charitable purpose and charitable trusts may be modified or terminated under the doctrine of cy pres. Also, section 411 [T.C.A. § 35-15-411] allows a noncharitable trust to in certain instances be terminated by its beneficiaries while charitable trusts do not have beneficiaries in the usual sense. To the extent of these distinctions, a split-interest trust is subject to two sets of provisions, one applicable to the charitable interests, the other the noncharitable.

“Conservator.” See the comments below under “guardian,” which include comments relative to a conservator.

“Directed trust.” This term refers to true directed trusts as provided for in T.C.A. § 35-15-808 as opposed to a delegation of a fiduciary's duties as provided for in T.C.A. 35-15-807. Under a true directed trust, certain powers and duties that were historically and traditionally bundled in a single trustee, or in cotrustees, are removed from such and directed to other fiduciaries. Alternatively, certain other trust advisors or trust protectors are given various powers and duties relative to other fiduciaries (including trustees and cotrustees). To the extent a power or duty is removed from one fiduciary and given to another, the fiduciary from which the power or duty was removed is called an excluded fiduciary. An excluded fiduciary generally has no liability for the powers or duties so removed.

Other names for directed trusts include “multi-participant trusts” and “reserved power trusts.” Tennessee has had statutes fully providing for true directed trusts since the late 1980s, such provisions being contained in T.C.A. §§ 35-3-122 and 35-3-123. However, such statutes were initially only addressed in the other Tennessee trust statutes by reference. As used here, the term directed trust includes trusts controlled by T.C.A. §§ 35-3-122 and 35-3-123 to the extent provided by T.C.A. § 35-15-808, as well as to other trusts as provided in T.C.A. § 35-15-808, including those subject to part 12. Added by the 2013 amendments to Tennessee Uniform Trust Code.

“Distribution beneficiary.” One who holds a distribution interest under a trust. A distribution beneficiary is a beneficiary who is an eligible or permissible distributee of income or principal under such distribution interest. A distribution beneficiary, in their capacity as a distribution beneficiary, does not hold a remainder interest. This is true regardless of whether such beneficiary holds a remainder interest in some capacity other than as a distribution beneficiary. Added by the 2013 amendments to Tennessee Uniform Trust Code.

“Distribution interest.” Before discussing the term distribution interest in detail, it is beneficial to consider why the concept of distribution interest; together with the related concepts expressed by the terms beneficial interest, distribution beneficiary, reach, remainder interest, and to a lesser extent power of appointment and reserved power; are crucial to understanding Tennessee law as it relates to trusts.

All of the above terms are in T.C.A. § .35-15-103 and are discussed in these comments. Such terms are essential elements of the Tennessee Uniform Trust Code. Together with other provisions in the Tennessee trust statutes, the concepts behind these terms are designed to assure traditional Tennessee law concepts are preserved regarding spendthrift, mandatory, support and discretionary trusts, together with their concomitant rights, benefits, creditor and other protections. They are also essential elements of the Tennessee Uniform Trust Code's emphasis on settlor's intent, freedom of disposition and certainty of construction and interpretation. Finally, these concepts determine whether an interest under a trust does or does not rise to the status of a property interest. Of course, that issue, in itself, has a significant bearing on implementing settlor's intent and freedom of disposition, as well as on creditor and other protections.

Established and traditional common law made clear distinctions among the treatment of spendthrift, mandatory, discretionary and support trusts. Tennessee courts have traditionally followed that traditional, established common law, which is reflected in the Restatement (Second) of Trusts. Some of the effects of these distinctions are noted in the comments to T.C.A. § 35-15-101, near the end of the section entitled, “Existing Uniform Laws on Trust Law Subjects.” Therein it discusses the effect of T.C.A. § 35-15-106, which rejects the Restatement (Third) of Trusts §§ 50, 56, 58, 59 or 60, and such sections' comments. Other effects of these

distinctions, including when a distribution interest does or does not rise to the status of a property interest and the effect of same, are noted in the comments to T.C.A. § 35-15-101 in the last paragraph under the heading, "Part 5. Creditor's Claims; Spendthrift and Discretionary Trusts."

The Uniform Trust Code and the Restatement (Third) of Trusts do not make these clear distinctions, leaving settlors without certainty as to the meaning and effect of language used relative to spendthrift, mandatory, support and discretionary trust provisions. Moreover, language in the Restatement (Third) of Trusts indicates that even if the terms of a trust specifically give a trustee "absolute, sole and unfettered" discretion, such Restatement infers a "reasonableness" standard relative to the exercise (or non-exercise) of that discretion. Uniform Trust Code section 814(a), and the comments thereunder (but not T.C.A. § 35-15-814), refer one to section 50 of the Restatement (Third) of Trusts. The comments under that section include the "reasonableness" standard mentioned above, thereby infusing the Uniform Trust Code with the Restatement's "reasonableness" standard. A number of legal authors believe such provisions of the Restatement (Third) of Trusts and the Uniform Trust Code virtually always give any beneficiary an enforceable right to a distribution, thereby eviscerating the meaning of the word "discretionary." Regardless of how clear and obvious a drafter is regarding a settlor's intent to create a purely and absolutely discretionary trust, these authors believe such provisions of the Restatement (Third) of Trusts and the Uniform Trust Code result in nothing other than a vague "continuum" of rights and discretion that only lead to uncertainty and needless litigation. Moreover, it would not be illegitimate for one to be concerned that this "continuum" puts one on a slippery slope that could lead to a creditor of a beneficiary being able to reach that beneficiary's now (under the Restatement (Third) of Trusts) and Uniform Trust Code, potentially enforceable right to a distribution. Of course this significantly reduces the creditor protection traditionally afforded to beneficiaries of third-party discretionary trusts.

These are just a few of the reasons that Tennessee law relative to trusts rejects certain portions of the Restatement (Third) of Trusts and the Uniform Trust Code, and in the Tennessee Uniform Trust Code codifies the prior, established and traditional common law.

In its broadest terms, a distribution interest is a beneficial interest, other than a remainder interest, held by a distribution beneficiary under a trust. Distribution interests may be current distribution interests or future distribution interests. The fact that a beneficial interest is a distribution interest controls many things relative to that interest.

Distribution interests are separate as opposed to marital property for the purposes of an equitable division of marital property and therefore, are not relevant to such division. The fact that a spouse provides services in that spouse's capacity as a fiduciary of the trust that created the distribution interest (or to such distribution interest) does not change the above and the provision of such services or the results from or effects of such provision do not give rise to marital property. Therefore, neither the provision of such services, nor the results from or effects of such provision of services, are relevant to such division.

For the purposes of determining separate versus community property in a jurisdiction recognizing community property as the applicable marital property regime in that jurisdiction:

Distribution interests are likewise separate property. Similarly, the fact that a spouse provides services in that spouse's capacity as a fiduciary of the trust that created the distribution interest (or to such distribution interest) does not change the above and the provision of such services or the results from or effects of such provision do not give rise to marital or community property, nor is any of the above relevant to, indicative of, or does such effect, the transmutation or other conversion of separate property to community property. Moreover, in cases where a spouse is serving in such capacity as trustee of such trust, neither the exercise or non-exercise of any power or discretion by such spouse in such capacity as trustee give rise to marital or community property, nor is such relevant to, indicative of, or does such effect, the transmutation or other conversion of separate property to community property. This remains true even if the spouse is also a beneficiary of the trust that created the distribution interest (or of the distribution interest).

Finally, the expending of any community funds by a spouse in such spouse's capacity as a fiduciary of such trust that created the distribution interest, relative to the operation or maintenance of property related to such distribution interest, is not relevant to or indicative of, and does not effect, a transmutation or other conversion of separate property to community property. Instead any such expending of funds simultaneously creates a correspondingly equal and valid debt of the trust to the community and such debt shall be repaid to the community with appropriate interest from the assets of the trust.

Distribution interests can be classified in one of three ways.

The first classification is a mandatory interest. At least as to principal, it is also the least likely type of interest one normally encounters under the Tennessee trust statutes. In order to be a mandatory interest, a distribution interest must require distribution within one year of the date the right to the distribution arises and the trustee must have no discretion, whatsoever, relative to the making of or the amount of this distribution. The most common form of mandatory interest occurs when a trust directs that all the income or a specified dollar amount be distributed every year. Even where such mandatory interests exist under a trust, all non-mandatory distribution interests under such trust are either support or discretionary interests.

The second classification is a support interest. In order to be a support interest, a distribution interest, though not a mandatory interest, must either contain: mandatory language such as "shall make," (and as stated below, such mandatory language is not otherwise negated) and be coupled with a standard capable of judicial determination; or must contain specific language that a trustee's discretion be exercised in a "reasonable" manner. While more common, these are likely not that prevalent either, especially as such relate to principal.

The third classification is a discretionary interest. All distribution interests that are not either a mandatory or support distributions, and under which a trustee has any discretion to make or withhold a distribution, are discretionary interests. The fact that a standard, even one referring to "support," is included in the distribution language will not convert a discretionary interest to a support interest unless the standard is coupled with mandatory language such as "shall make." Moreover, even where such mandatory language is used, if such is negated (e.g., "shall make in the trustee's discretion) or subsequently qualified by discretionary language, the distribution interest is a discretionary interest and not a support or mandatory interest.

Finally, should distribution language indicate any combination of a mandatory, support and discretionary interest, the combined interest is to be divided, with each distribution interest treated as the relevant type of distribution interest only to the extent of the respective different distribution language used.

For all these reasons, the Tennessee Uniform Trust Code gravitates toward creation of discretionary interests versus support or mandatory interests.

Under the definition of distribution interest in T.C.A. § 35-15-103 there are a number of examples of distribution language, which while not exclusive, indicates one of the three types of distribution interests. Added by the 2013 amendments to Tennessee Uniform Trust Code.

"Environmental law." To encourage trustees to accept and administer trusts containing real property, the Tennessee Uniform Trust Code contains several provisions designed to limit exposure to possible liability for violation of environmental law. Section 701(c)(2) [T.C.A. § 35-15-701(c)(2)] authorizes a nominated trustee to investigate trust property to determine potential liability for violation of environmental law or other law without accepting the trusteeship. Section 816(13) [T.C.A. § 35-15-816(b)(13)] grants a trustee comprehensive and detailed powers to deal with property involving environmental risks. Finally, unlike Uniform Trust Code section 1010(b), T.C.A. § 35-15-1010 immunizes a trustee from personal liability for violation of environmental law arising from the ownership and control of trust property.

"Excluded fiduciary." This term is included to define any person who would otherwise meet the definition of fiduciary, but who is relieved in one of the prescribed manners from any power or duty normally held by such relevant fiduciary and that power or duty is granted or reserved to another person.

Although T.C.A. § 35-15-103 only specifically includes any "trustee," "trust advisor" or "trust protector" as being potential excluded fiduciaries, such section of the Tennessee Code should be read to include anyone who would otherwise meet the definition of fiduciary contained in T.C.A. 35-15-103, but who is relieved in one of the prescribed manners from any power or duty normally held by such relevant fiduciary and that power or duty is granted or reserved to another person. Added by the 2013 amendments to Tennessee Uniform Trust Code.

"Fiduciary." This term is included for several reasons, including but not limited to:

To facilitate drafting by providing an all-inclusive word meaning any person having fiduciary powers and duties under the Tennessee trust statutes.

To cover trust advisors and trust protectors under part 12, or otherwise, if any of such are serving in a fiduciary capacity as provided in T.C.A. § 35-15-1202 or elsewhere under the Tennessee trust statutes.

To assure that any person, regardless of the nomenclature by which that person is called, when holding powers and carrying out duties that are normally fiduciary in nature is a fiduciary, unless that person is an excluded fiduciary. Added by the 2013 amendments to Tennessee Uniform Trust Code.

"Foreign" or "foreign country." The comments under "another state" or "other state" are incorporated herein by reference.

The distinctive statutory definition of the word "foreign," either by itself or followed by the word "country" is included to demarcate the different meaning of those words, particularly "foreign," in the Tennessee trust statutes from the meaning generally ascribed to the term foreign in state statutes (including the Tennessee Code in places other than under the Tennessee trust statutes) and in state court holdings and similar rulings. Outside the Tennessee trust statutes, the word "foreign" is often used simply to denote another state of the United States. However, the appropriate term for such under the Tennessee trust statutes is "another state" or "other state," while "foreign" either by itself or followed by "country" means a jurisdiction other than the United States or a state (as such is defined in T.C.A. 35-15-103). Added by the 2013 amendments to Tennessee Uniform Trust Code.

"Foreign jurisdiction." The comments under "another state" or "other state," under "foreign" or "foreign country," as well as under "this state," are incorporated herein by reference.

By combining the word "foreign" with "jurisdiction," the latter word being the generalized term for an area or matter under some domestic or foreign governmental control or authority, this statutory definition includes any jurisdiction (governmental authority) other than that of this state, the state of Tennessee.

It is included for similar reasons as those set forth under "foreign" or "foreign country," above. It is also included for drafting convenience. By simply stating "foreign jurisdiction" a drafter can mean any other jurisdiction than that of this state, Tennessee. Added by the 2013 amendments to Tennessee Uniform Trust Code.

"Guardian." Under the Tennessee Uniform Trust Code, both the term "guardian" and the term "conservator" have the same meaning as they respectfully do in T.C.A. § 34-1-101. Under such section; guardian means a person or persons appointed by the court to provide partial or full supervision, protection and assistance of the person or property, or both, of a minor; while conservator means a person or persons appointed by the court to provide partial or full supervision, protection and assistance of the person or property, or both, of a disabled person.

"Interests of the beneficiaries." The phrase "interests of the beneficiaries" (subdivision (8)) [T.C.A. § 35-15-103(8)] is used with some frequency in the Tennessee Uniform Trust Code. The definition clarifies that the interests are as provided in the terms of the trust and not as determined by the beneficiaries. Absent authority to do so in the terms of the trust, section 108 [T.C.A. § 35-15-108] prohibits a trustee from changing a trust's principal place of

administration if the transfer would violate the trustee's duty to administer the trust at a place appropriate to the interests of the beneficiaries. Section 706(b) [T.C.A. § 35-15-706(b)] conditions certain of the grounds for removing a trustee on the court's finding that removal of the trustee will best serve the interests of the beneficiaries. Section 801 [T.C.A. § 35-15-801] requires the trustee to administer the trust in the interests of the beneficiaries, and section 802 [T.C.A. § 35-15-802] makes clear that a trustee may not place its own interests above those of the beneficiaries. Section 808(d) [T.C.A. § 35-15-808(d)] requires the holder of a power to direct who is subject to a fiduciary obligation to act with regard to the interests of the beneficiaries. T.C.A. § 35-15-1202 provides likewise. Section 1002(b) [T.C.A. 35-15-1002(b)] may impose greater liability on a cotrustee who commits a breach of trust with reckless indifference to the interests of the beneficiaries. Section 1008 [T.C.A. § 35-15-1008] invalidates an exculpatory term to the extent it relieves a trustee of liability for breach of trust committed with reckless indifference to the interests of the beneficiaries.

"Internal Revenue Code." The definition of "internal revenue code" was added to T.C.A. § 35-15-103 with the 2013 amendments to the Tennessee Uniform Trust Code. The term as now defined in T.C.A. § 35-15-103 appeared in certain sections throughout the Tennessee Uniform Trust Code, while in certain other places in the Tennessee Uniform Trust Code and its comments it was referred to generically as "Internal Revenue Code," or by similar words or abbreviations therefor. The 2013 amendments included the term's definition in T.C.A. § 35-15-103 to make it consistently applicable throughout the Tennessee Uniform Trust Code. Nevertheless, it is still appropriate to refer to the Internal Revenue Code by its initials "I.R.C." or through a full citation to title 26 of the United States Code or an abbreviation thereof. Moreover, a citation to "Treas. Reg. § " is an appropriate way to cite to the regulations under the Internal Revenue Code, as is a full citation to title 26 of the Code of Federal Regulations or an abbreviation thereof.

"Jurisdiction." (subdivision (9)) [T.C.A. § 35-15-103(9)], when used with reference to a geographic area, includes a state or country but is not necessarily so limited. Its precise scope will depend on the context in which it is used. "Jurisdiction" is used in sections 107 and 403 [T.C.A. §§ 35-15-107 and 35-15-403] to refer to the place whose law will govern the trust. The term is used in section 108 [T.C.A. § 35-15-108] to refer to the trust's principal place of administration. The term is used in section 816 [T.C.A. § 35-15-816] to refer to the place where the trustee may appoint an ancillary trustee and to the place in whose courts the trustee can bring and defend legal proceedings.

"Person." The definition in T.C.A. § 35-15-103 is self sufficiently clear and needs no further explanation.

"Power of appointment." A power of appointment as defined in the Tennessee Uniform Trust Code is a matter of state property law and not federal tax law; although there is considerable overlap between the two definitions.

A power of appointment is authority to designate the recipients of beneficial interests in property. See Restatement (Second) of Property: Donative Transfers § 11.1 (1986). A power is either general or nongeneral (such sometimes being called "special") and either presently exercisable or not presently exercisable. A general power of appointment is a power exercisable in favor of the holder of the power, the power holder's creditors, the power holder's estate, or the creditors of the power holder's estate. See Restatement (Second) of Property: Donative Transfers § 11.4 (1986). All other powers are nongeneral (such sometimes being called "special powers of appointment"). A power is presently exercisable if the power holder can currently create an interest, present or future, in an object of the power. A power of appointment is not presently exercisable if exercisable only by the power holder's will or if its exercise is not effective for a specified period of time or until occurrence of some event. See Restatement (Second) of Property: Donative Transfers § 11.5 (1986). Powers of appointment may be held in either a fiduciary or nonfiduciary capacity.

The Tennessee Uniform Trust Code makes distinctions among types of powers. Under T.C.A. § 35-15-302 the holder of any type of power of appointment may represent and bind persons whose interests are subject to the power. A "power of withdrawal" is defined as a presently exercisable general power of appointment other than a power exercisable by a trustee and limited by an ascertainable standard, or a power which is exercisable by another person only upon consent of the trustee or a person holding an adverse interest.

Finally, the Tennessee Uniform Trust Code makes two things crystal clear: A power of appointment, even when held by a trustee or other fiduciary, is different and distinct from any trustee's or other fiduciary's power to make decisions regarding distributions. Moreover, powers of appointment are held by the person to whom such power has been given in the distinct and singular capacity of a power holder. Therefore, if a settlor is given a power of appointment, such settlor holds that power of appointment as a power holder and not in that person's capacity as settlor. Portions of the above (appropriately amended) were moved from the comment pertaining to beneficiary, while other portion of the above were added, both such types of changes were done to conform with the 2013 amendments to Tennessee Uniform Trust Code, which added a separate definition for "power of appointment."

"Power of withdrawal." The definition of "power of withdrawal," was amended in 2007 to exclude a possible inference that the term includes a discretionary power in a trustee to make distributions for the trustee's own benefit which is limited by an ascertainable standard. This was done to clarify that if a beneficiary is serving as trustee or co-trustee and has discretion to make a distribution to himself or for his own benefit pursuant to an ascertainable standard, then the creditor cannot reach or compel a distribution except to the extent the interest would be subject to a creditor's claim if the beneficiary were not acting as trustee or co-trustee.

"Property." The definition of "property" (subdivision (12)) [T.C.A. § 35-15-103(12)] is intended to be as expansive as possible and to encompass anything that may be the subject of ownership. Included are choses in action, claims, and interests created by beneficiary designations under policies of insurance, financial instruments, and deferred compensation and other retirement arrangements, whether revocable or irrevocable. Any such property interest is sufficient to support creation of a trust. See section 401 Section Comment [T.C.A. § 35-15-401].

"Qualified beneficiary." Due to the difficulty of identifying beneficiaries whose interests are remote and contingent, and because such beneficiaries are not likely to have much interest in the day-to-day affairs of the trust, the Tennessee Uniform Trust Code uses the concept of "qualified beneficiary" (subdivision (12) [§ 35-103(24)]) to limit the class of beneficiaries to whom certain notices must be given or consents received. The definition of qualified beneficiaries is used in section 705 [T.C.A. § 35-15-705] to define the class to whom notice must be given of a trustee resignation. The term is used in section 813 [T.C.A. § 35-15-813] to define the class that generally has the right to request from a trustee information regarding the trust's administration. Section 417 [T.C.A. § 35-15-417] requires that notice be given to the qualified beneficiaries before a trust may be combined or divided. Actions which may be accomplished by the consent of the qualified beneficiaries include the appointment of a successor trustee as provided in section 704 [T.C.A. § 35-15-704], as well as the appointment of successor trust advisors and trust protectors. Prior to transferring a trust's principal place of administration, T.C.A. § 35-15-108 requires that the trustee give at least 60 days notice to the qualified beneficiaries.

According to ULC--NCCUSL, the qualified beneficiaries consist of the beneficiaries currently eligible to receive a distribution from the trust together with those who might be termed the first-line remaindermen. These are the beneficiaries who would become eligible to receive distributions were the event triggering the termination of a beneficiary's interest or of the trust itself to occur on the date in question. Such a terminating event will typically be the death or deaths of the beneficiaries currently eligible to receive the income. Should a qualified beneficiary be a minor, incapacitated, or unknown, or a beneficiary whose identity or location is not reasonably ascertainable, the representation and virtual representation principles of part 3 [T.C.A. §§ 35-15-301--35-15-305] may be employed, including the possible appointment by the court of a representative to represent the beneficiary's interest.

According to ULC--NCCUSL, the qualified beneficiaries who take upon termination of the beneficiary's interest or of the trust can include takers in default of the exercise of a power of appointment. The term can also include the persons entitled to receive the trust property pursuant to the exercise of a power of appointment. Because the exercise of a testamentary power of appointment is not effective until the testator's death and probate of the will, the qualified beneficiaries do not include appointees under the will of a living person. Nor would the term include the objects of an unexercised inter vivos power.

The Tennessee Uniform Trust Code generally follows ULC--NCCUSL's position as expressed in the prior two paragraphs. However, the group of persons who potentially qualify as qualified beneficiaries under Tennessee law is meaningfully smaller. Under the Tennessee Uniform Trust Code, as of any (and as of each) point in time at which it is necessary to determine which beneficiaries are qualified beneficiaries you do so assuming the following two things (neither of which are required by the Uniform Trust Code): any and all then existing powers of appointment will not be exercised; and any event then not reasonably expected to occur will not occur.

Moreover, under its definition of "qualified beneficiary" the Tennessee Uniform Trust Code provides that no ultimate beneficiary or potential ultimate beneficiary can ever be a qualified beneficiary or have the rights thereof. Additionally, no ultimate beneficiary or potential ultimate beneficiary has the standing to petition to remedy a breach of trust or to enforce a trust; the interests of such beneficiary being too remote. Notwithstanding the preceding portion of this paragraph, if and when the interests of any ultimate, or potential ultimate, beneficiary have ripened to the point that such beneficiary is eligible to receive, or have paid for their benefit, current distributions of income or principal, at such time they will no longer be an "ultimate beneficiary" or "potential ultimate beneficiary." At such time such beneficiary has all the rights of any other current beneficiary of the same type, charitable or non-charitable. Similarly if a trust for animals or a trust for a noncharitable purpose (individually and collectively, "purpose trust") is an ultimate, or potential ultimate, beneficiary, the rights of any person provided in T.C.A. §§ 35-15-408 or 35-15-409 to enforce the trust under which such purpose trust is an ultimate, or potential ultimate beneficiary will not ripen until such purpose trust is eligible to receive from the trust under which it was previously an ultimate, or potential ultimate, beneficiary, current distributions of income or principal.

T.C.A. § 35-15-103 contains a detailed definition of who is included in the meaning of the term "ultimate beneficiary." Such section then goes on to give the following example of one type of person or group of persons who meet the definition of such term:

"[A] person or persons often included in a trust instrument or under the exercise of a power to take an interest in a trust at the time all or any part of such trust terminates only in a case where all other named beneficiaries or classes of beneficiaries that have or had an affinity through either familial connection or friendship with any of: the settlor; the person holding any power; or any prior beneficiary or potential beneficiary of the trust; are predeceased or are otherwise not in existence at the time all or any part of the trust terminates." Also by way of example, one may describe an ultimate beneficiary as that person or persons who take an interest if all of the natural objects (close or remote) of the relevant person's bounty predecease the termination of all or part of a trust.

Charitable trusts do not have beneficiaries in the usual sense. However, certain persons, while not technically beneficiaries, do have an interest in seeing that the trust is enforced. Therefore, T.C.A. § 35-15-110 grants the rights of qualified beneficiaries to charitable organizations expressly designated to receive distributions under the terms of a charitable trust and whose beneficial interests are sufficient to satisfy the definition of qualified beneficiary if the trust were not a charitable trust. Finally, T.C.A. § 35-15-110 grants the rights of a qualified beneficiary with respect to a charitable trust to the attorney general of Tennessee.

"Reach." This term describes in the broadest manner possible, any means by which any judicial process, or any other process by power of law, may subject a distribution interest or any power held by anyone relative to a trust, to such process; usually, but not always, for the purpose of satisfying a claim, judgment or similar obligation with assets of a trust, or otherwise obtaining assets either from a trust or that were in a trust in the past. Added by the 2013 amendments to Tennessee Uniform Trust Code.

"Remainder interest." A remainder interest is the interest by which a beneficiary receives property held by a trust outright at some time in the future. All other beneficial interests are distribution interests.

Whether a remainder interest is separate or marital property for purposes of, or is otherwise relevant to, an equitable division of property; and whether a remainder interest remains separate property or is in any way

relevant to, indicative of or effects, any transmutation or other conversion of separate property to community property; is controlled by standards that are equivalent to those that apply to distribution interests. Moreover provisions equivalent to those pertaining to a distribution interest regarding the use of community funds relative to the operation or maintenance of property subject to such distribution interest likewise control remainder interests in similar situations. Added by the 2013 amendments to Tennessee Uniform Trust Code.

“Reserved power.” This term literally includes any power held by a settlor, so long as that power was retained or kept by the settlor at the inception of the trust. A reserved power is not a beneficial interest. Moreover, a power given to a settlor by someone other than the settlor is not a reserved power, nor is it a beneficial interest. If a power is so given by another to a settlor and that power includes the power to direct the disposition of trust property, other than as a distribution decision made by a trustee or other fiduciary to a beneficiary, then such power is a power of appointment for all purposes under the Tennessee trust statutes.

The term reserved power was added by the 2013 amendments to Tennessee Uniform Trust Code to clarify the above. Trusts with reserved powers are common throughout the various jurisdictions within the United States. A revocable trust (or revocable living trust) is perhaps the penultimate example of a trust with reserved powers (or a reserved power trust). Moreover, one often encounters the use of the terms “reserved power” or “reserved power trust” outside the United States in Commonwealth jurisdictions. Therefore, this term was also included in the Tennessee Uniform Trust Code in order to assure that persons more familiar with trusts created under the laws of Commonwealth jurisdictions would understand similar reserved power trusts were likewise fully available in Tennessee.

“Revocable.” The definition of “revocable” (subdivision (13)) [T.C.A. § 35-15-103(14)] clarifies that revocable trusts include only trusts whose revocation is substantially within the settlor’s control. The fact that the settlor becomes incapacitated does not convert a revocable trust into an irrevocable trust. The trust remains revocable until the settlor’s death or the power of revocation is released. The consequences of classifying a trust as revocable are many. The Tennessee Uniform Trust Code contains provisions relating to liability of a revocable trust for payment of the settlor’s debts (section 505) [T.C.A. § 35-15-505], the standard of capacity for creating a revocable trust (section 601) [T.C.A. § 35-15-601], the procedure for revocation (section 602) [T.C.A. § 35-15-602], the subjecting of the beneficiaries’ rights to the settlor’s control (section 603) [T.C.A. § 35-15-603], the period for contesting a revocable trust (section 604) [T.C.A. § 35-15-604], the power of the settlor of a revocable trust to direct the actions of a trustee (section 808(a)) [T.C.A. § 35-15-808(a)], notice to certain beneficiaries and other persons upon the trust becoming irrevocable (section 813(b)) [T.C.A. § 35-15-813 (b)], and the liability of a trustee of a revocable trust for the obligations of a partnership of which the trustee is a general partner (section 1011 (d)) [T.C.A. § 35-15-1011(d)].

Because under section 603(c) [T.C.A. § 35-15-603(c)] the holder of a power of withdrawal has the rights of a settlor of a revocable trust, the definition of “power of withdrawal” and “revocable” under T.C.A. § 35-15-103 are similar. Both exclude individuals who can exercise their power only with the consent of the trustee or person having an adverse interest although the definition of “power of withdrawal” excludes powers subject to an ascertainable standard, a limitation which is not present in the definition of “revocable.”

“Settlor.” The definition of “settlor” (subdivision (14)) [T.C.A. § 35-15-103(15)] refers to the person who creates, or contributes property to, a trust, whether by will, self-declaration, transfer of property to another person as trustee, or exercise of a power of appointment. For the requirements for creating a trust, see section 401 [T.C.A. § 35-15-401]. Determining the identity of the “settlor” is usually not an issue. The same person will both sign the trust instrument and fund the trust. Ascertaining the identity of the settlor becomes more difficult when more than one person signs the trust instrument or funds the trust. The fact that a person is designated as the “settlor” by the terms of the trust is not necessarily determinative. For example, the person who executes the trust instrument may be acting as the agent for the person who will be funding the trust. In that case, the person funding the trust, and not the person signing the trust instrument, will be the settlor. Should more than one

person contribute to a trust, all of the contributors will ordinarily be treated as settlors in proportion to their respective contributions, regardless of which one signed the trust instrument. See section 602(b) [T.C.A. § 35-15-602(b)].

In the case of a revocable trust employed as a will substitute, gifts to the trust's creator are sometimes made by placing the gifted property directly into the trust. To recognize that such a donor is not intended to be treated as a settlor, the definition of "settlor" excludes a contributor to a trust that is revocable by another person or over which another person has a power of withdrawal. Thus, a parent who contributes to a child's revocable trust would not be treated as one of the trust's settlors. The definition of settlor would treat the child as the sole settlor of the trust to the extent of the child's proportionate contribution. Pursuant to section 603(c) [T.C.A. § 35-15-603(c)], the child's power of withdrawal over the trust would also result in the child being treated as the settlor with respect to the portion of the trust attributable to the parent's contribution.

According to ULC-NCCUSL, ascertaining the identity of the settlor is important for a variety of reasons. It is important for determining rights in revocable trusts. See subdivisions 505(a)(1), (3) [T.C.A. § 35-15-505(a)(1), (6)] (creditor claims against settlor of revocable trust), section 602 [T.C.A. § 35-15-602] (revocation or modification of revocable trust), and section 604 [T.C.A. § 35-15-604] (limitation on contest of revocable trust). It is also important for determining rights of creditors in irrevocable trusts. See subdivision 505(a)(2) [T.C.A. § 35-15-505(a)(2)] (creditors of settlor can reach maximum amount trustee can distribute to settlor). While the settlor of an irrevocable trust traditionally has no continuing rights over the trust except for the right under section 411 [T.C.A. § 35-15-411] to terminate the trust with the beneficiaries' consent, the Tennessee Uniform Trust Code also authorizes the settlor of an irrevocable trust to petition for removal of the trustee and to enforce or modify a charitable trust. See subsection 405(c) [T.C.A. § 35-15-405(c)] (standing to enforce charitable trust), section 413 [T.C.A. § 35-15-413] (doctrine of cy pres), and section 706 [T.C.A. § 35-15-706] (removal of trustee).

The Tennessee Uniform Trust Code general would agree with ULC--NCCUSL's position as stated in the immediately preceding paragraph. However the TUTC diverges from the Uniform Trust Code in several ways relative to the matter discussed in such paragraph, including the following:

Regarding the comments in such paragraph relative to Uniform Trust Code section 411, under T.C.A. § 35-15-411, a settlor need not consent in advance to a modification or termination of an irrevocable trust. Instead, upon consent of all qualified beneficiaries to modify or terminate a trust, such proposed action may be taken if a settlor does not object to same within sixty (60) days (or a greater number of days if the proposal to modify or terminate so provides) of being provided notice of the proposed action by the trustee. Such notice has certain requirements as provided in T.C.A. § 35-15-411.

Regarding the comments in such paragraph relative to Uniform Trust Code section 505, under T.C.A. § 35-15-505, relative to irrevocable trusts there are certain exceptions to ULC--NCCUSL's statement that "creditors of settlor can reach maximum amount trustee can distribute to settlor." First Tennessee does grant creditor protection under prescribed conditions to a settlor of a Tennessee Investment Services Trust created under title 35, chapter 16. Second, an irrevocable special needs trust is shielded from claims by creditors of the settlor regardless of whether or not such trust complies with the provisions of title 35, chapter 16. Third, no person holding a power of withdrawal is considered a settlor by failing to exercise such power or letting it lapse. Therefore, because such person is not a settlor, the provisions regarding creditors' ability to reach maximum amount trustee can distribute to settlor simply are not applicable. Fourth, a power of appointment is held by the person to whom such power has been given as a power holder not by a settlor in that person's capacity as a settlor. Under the Tennessee Uniform Trust Code, neither a power of appointment nor a power reserved by a settlor is a beneficial interest. Therefore, a holder of either, in their capacity holding either, is not a beneficiary. For this reason, a creditor of a settlor cannot reach the rights incident to a power of appointment held by a settlor to appoint to persons other than the settlor, nor can they reach a reserved power at the level of the holder to the extent that reserved power is not equivalent to a power to revoke a trust. Fifth, a person who becomes a

beneficiary of a trust due to the exercise of a power of appointment by someone other than such person is not considered under the Tennessee Uniform Trust Code to be a settlor of a trust. This is true even if the person who so became the beneficiary created and funded the trust and granted the power of appointment to another. Therefore, if the settlor did not otherwise retain a beneficial interest in the trust that was otherwise reachable (e.g., the settlor did not name himself as a beneficiary of the trust at the time it was created) the mere fact that some other person exercises a power of appointment to later make the settlor a beneficiary will not create an interest that is reachable by the settlor's creditors.

"Spendthrift provision." (subdivision (15)) [T.C.A. § 35-15-103(16)] means a term of a trust which restrains the transfer of a beneficiary's interest, whether by a voluntary act of the beneficiary or by an action of a beneficiary's creditor or assignee, which at least as far as the beneficiary is concerned, would be involuntary. A spendthrift provision is valid under the Tennessee Uniform Trust Code only if it restrains both voluntary and involuntary transfer. For a discussion of this requirement and the effect of a spendthrift provision in general, see section 502 [T.C.A. § 35-15-502].

Note regarding prior language contained in these comments relative to spendthrift provision.

Upon the original adoption of the Tennessee Uniform Trust Code in 2004, T.C.A. § 35-15-411 omitted language similar to or in accord with Uniform Trust Code section 411(c), as well as language similar to or in accord with the ULC-NCCUSL comments to such section of the Uniform Trust Code. Such language of Uniform Trust Code section 411(c) so omitted reads as follows:

"A spendthrift provision in the terms of the trust is not presumed to constitute a material purpose of the trust."

Such language of the comments to Uniform Trust Code section 411(c) so omitted reads as follows:

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

The language of Restatement (Third) of Trusts Section 65 cmt. e., cited by ULC--NCCUSL above is more dismissive of spendthrift provisions and their protective nature. It is also dismissive of the protective nature of discretionary.

Despite omitting from T.C.A. § 35-15-411 such language above from Uniform Trust Code section 411(c), the original Tennessee Uniform Trust Code failed to omit the concordant ULC--NCCUSL commentary language from these comments to T.C.A. § 35-15-103, which state:

"The insertion of a spendthrift provision in the terms of the trust may also constitute a material purpose sufficient to prevent termination of the trust by agreement of the beneficiaries under section 411 [T.C.A. § 35-15-411], although the Tennessee Uniform Trust Code does not presume this result."

This left such comments to T.C.A. § 35-15-103 in conflict with the statutory language of (as well as the comments to) T.C.A. § 35-15-411. For that reason, the 2013 amendments to the TUTC strike from the comments to T.C.A. § 35-15-103 relative to spendthrift provisions the immediately preceding paragraph contained in quotation marks. After the 2013 amendments to the Tennessee Uniform Trust Code, such code is silent on this issue.

Nevertheless, in furtherance of the Tennessee Uniform Trust Code's overriding goals of respecting settlor's intent and freedom of disposition, the 2013 amendments add the following language to T.C.A. § 35-15-105:

"Any purpose enunciated as a material purpose of a trust in that trust's trust instrument shall be treated as a material purpose of that trust for all purposes of this chapter and chapter 16." As stated in the comments to T.C.A. § 35-15-105, such results in a settlor also having the power to so enumerate that a purpose of a trust is not a material purpose of a trust for all purposes of this chapter and chapter 16.

Therefore, a settlor can, with greater certainty through drafting, control understanding of that settlor's intent as to what is or is not a material purpose as to any purpose of a trust, including that of a spendthrift provision.

"State." The definition in T.C.A. § 35-15-103 is self sufficiently clear and needs no further explanation.

"Successors in interest." The definition in T.C.A. § 35-15-103 is self sufficiently clear and needs no further explanation. However, one reason for including it is to facilitate drafting.

"Terms of a trust." (subdivision (18)) [T.C.A. § 35-15-103(19)] is a defined term used frequently in the Tennessee Uniform Trust Code. While the wording of a written trust instrument is almost always the most important determinant of a trust's terms, the definition is not so limited. Oral statements, the situation of the beneficiaries, the purposes of the trust, the circumstances under which the trust is to be administered, and, to the extent the settlor was otherwise silent, rules of construction, all may have a bearing on determining a trust's meaning. See Restatement (Third) of Trusts § 4 cmt. a (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 4 cmt. a (1959). If a trust established by order of court is to be administered as an express trust, the terms of the trust are determined from the court order as interpreted in light of the general rules governing interpretation of judgments. See Restatement (Third) of Trusts § 4 cmt. f (Tentative Draft No. 1, approved 1996).

A manifestation of a settlor's intention does not constitute evidence of a trust's terms if it would be inadmissible in a judicial proceeding in which the trust's terms are in question. See Restatement (Third) of Trusts § 4 cmt. b (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 4 cmt. b (1959). See also Restatement (Third) Property: Donative Transfers §§ 10.2, 11.1-11.3 (Tentative Draft No. 1, approved 1995). For example, in many states a trust of real property is unenforceable unless evidenced by a writing, although section 407 [T.C.A. § 35-15-407] of the Tennessee Uniform Trust Code internally does not so require. Evidence otherwise relevant to determining the terms of a trust may also be excluded under other principles of law, such as the parol evidence rule.

"This state." The comments under "another state" or "other state, under "foreign" or "foreign country," as well as under "foreign jurisdiction" are incorporated herein by reference. This statutory definition was primarily included for drafting convenience and to assure clarity. By using the term "this state" in a trust governed by the law of Tennessee, a drafter knows Tennessee will be the term's resulting meaning. Added by the 2013 amendments to Tennessee Uniform Trust Code.

"Trust advisor." This term was added to provide for the directed trust provisions of part 12. T.C.A. § 35-15-1201(a) contains a description of the meaning of this term along with an extensive listing of powers and duties with respect to a trust such person may hold. Added by the 2013 amendments to Tennessee Uniform Trust Code.

"Trust instrument." (subdivision (19)) [T.C.A. § 35-15-103(20)] is a subset of the definition of "terms of a trust" (subdivision (18)) [T.C.A. § 35-15-103(19)], referring to only such terms as are found in an instrument executed by the settlor. Section 403 [T.C.A. § 35-15-403] provides that a trust is validly created if created in compliance with the law of the place where the trust instrument was executed. Pursuant to subdivision 604(a)(2) [T.C.A. § 35-15-604(a)(2)], the contest period for a revocable trust can be shortened by providing the potential contestant with a copy of the trust instrument plus other information. T.C.A. § 35-15-813 requires that the trustee furnish certain beneficiaries and certain holders of power of appointment with a copy of the trust instrument or an abstract

thereof, in the trustee's discretion. Notwithstanding the preceding sentence, T.C.A. § 35-15-813 allows: the terms of the trust; as well as the settlor in any event, or any trust advisor or trust protector that holds the power to so direct, to direct otherwise in writing to the trustee. In other words, unlike the Uniform Trust Code, the Tennessee Uniform Trust Code allows "quiet" trusts. To allow a trustee to administer a trust with some dispatch without concern about liability if the terms of a trust instrument are contradicted by evidence outside of the instrument, section 1006 [T.C.A. § 35-15-1006] protects a trustee from liability to the extent a breach of trust resulted from reasonable reliance on those terms. Section 1013 [T.C.A. § 35-15-1013] allows a trustee to substitute a certification of trust in lieu of providing a third person with a copy of the trust instrument. T.C.A. § 35-15-1103 provides that unless there is a clear indication of a contrary intent, rules of construction and presumptions provided in the Tennessee Uniform Trust Code apply to trust instruments executed before the effective date of such Code.

"Trust protector." See trust advisor, above. Added by the 2013 amendments to Tennessee Uniform Trust Code.

"Trustee." The definition of "trustee" (subdivision (19)) [T.C.A. § 35-15-103(21)] includes not only the original trustee but also an additional and successor trustee as well as a cotrustee. Because the definition of trustee includes trustees of all types, any trustee, whether original or succeeding, single or cotrustee, has the powers of a trustee and is subject to the duties imposed on trustees under the Tennessee Uniform Trust Code. Any natural person, including a settlor or beneficiary, has capacity to act as trustee if the person has capacity to hold title to property free of trust. See Restatement (Third) of Trusts § 32 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 89 (1959). State banking statutes normally impose additional requirements before an entity can act as trustee.

35-15-104. Knowledge

(a) Subject to subsection (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.

COMMENT.

This section specifies when a person is deemed to know a fact. Subsection (a) states the general rule. Subsection (b) provides a special rule dealing with notice to organizations. Pursuant to subsection (a), a fact is known to a person if the person had actual knowledge of the fact, received notification of it, or had reason to know of the fact's existence based on all of the circumstances and other facts known to the person at the time. Under subsection (b), notice to an organization is not necessarily achieved by giving notice to a branch office. Nor does the organization necessarily acquire knowledge at the moment the notice arrives in the organization's mailroom. Rather, the organization has notice or knowledge of a fact only when the information is received by an employee having responsibility to act for the trust, or would have been brought to the employee's attention had the organization exercised reasonable diligence.

"Know" is used in its defined sense in sections 109 [T.C.A. § 35-15-109] (methods and waiver of notice), section 305 [T.C.A. § 35-15-305] (appointment of representative), subsection 604(b) [T.C.A. § 35-15-604(b)] (limitation on contest of revocable trust), section 812 [T.C.A. § 35-15-812] (collecting trust property), section 1009 [T.C.A. § 35-15-1009] (nonliability of trustee upon beneficiary's consent, release, or ratification), and section 1012 [T.C.A. § 35-15-1012] (protection of person dealing with trustee). But as to certain actions, a person is charged with knowledge of facts the person would have discovered upon reasonable inquiry. See section 1005 [T.C.A. § 35-15-1005] (limitation of action against trustee following report of trustee). In addition, for purposes of T.C.A. § 35-15-1005, a person will be deemed to have received adequate disclosure of facts thereunder if they had sufficient knowledge to be presumed to know them or to be put on notice to inquire into their existence.

This section is based on Uniform Commercial Code § 1-202 [T.C.A. § 47-1-201] (2000 Annual Meeting Draft).

35-15-105. Default and mandatory rules

(a) Except as otherwise provided in the terms of the trust, this chapter governs the duties and powers of a trustee or any other fiduciary under this chapter, relations among trustees and such other fiduciaries, and the rights and interests of a beneficiary. The terms of a trust may expand, restrict, eliminate, or otherwise vary the duties and powers of a trustee, any such other fiduciary, relations among any of them, and the rights and interests of a beneficiary; provided, however, that nothing contained in this subsection shall be construed to override or nullify the provisions of subsection (b). The rule of statutory construction that states that statutes in derogation of the common law are to be strictly construed shall have no application to this section. Except as restricted by subsection (b), pursuant to this section, courts shall give maximum effect to the principle of freedom of disposition and to the enforceability of trust instruments.

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

(1) The requirements for creating a trust;

(2) The duty of a trustee to act in accordance with the terms and purposes of the trust and the interests of the beneficiaries;

(3) The requirement that a trust and its terms be for the benefit of its beneficiaries as the interests of such beneficiaries are defined under the terms of the trust, and that the trust has a purpose that is lawful and possible to achieve;

(4) The power to modify or terminate a trust under §§ 35-15-410 -- 35-15-416;

(5) The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in part 5 of this chapter;

(6) The power of the court under § 35-15-702 to require, dispense with, or modify or terminate a bond;

(7) The power of the court under § 35-15-708(b) to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;

(8) The effect of an exculpatory term under § 35-15-1008;

(9) The rights under §§ 35-15-1010 -- 35-15-1013 of a person other than a trustee or beneficiary;

(10) Periods of limitation for commencing a judicial proceeding;

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

(12) The subject matter jurisdiction of the court and venue for commencing a proceeding as provided in §§ 35-15-203 and 35-15-204.

(c) Any purpose enunciated as a material purpose of a trust in that trust's trust instrument shall be treated as a material purpose of that trust for all purposes of this chapter and chapter 16.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-105.

The provisions of this section in some ways diverge significantly from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

It is the policy of the state of Tennessee, as well as the overriding objective of the Tennessee trust statutes: that a settlor's intent be the lodestar by which a trust is interpreted; that such intent be carried out; and that settlors have the freedom to dispose of their assets to whom and in the manner they wish; all to the greatest extent constitutionally allowable.

Significantly more strongly than does the Uniform Trust Code, T.C.A. § 35-15-105(a) emphasizes that the Tennessee Uniform Trust Code is primarily a default statute. While the Tennessee Uniform Trust Code provides numerous procedural rules on which a settlor may wish to rely, the settlor is generally free to override these rules and to prescribe the conditions under which the trust is to be administered. Subject to only the limited exceptions contained in T.C.A. § 35-15-105(b) (which are fewer in number and in certain cases, less restrictive, than in section 105 of the Uniform Trust Code), the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary are as specified in the terms of the trust. Moreover, in certain cases there need be no specific reference to the intent to override such default rules. One example of the myriad ways in which a settlor can override the default rules contained in the Tennessee Uniform Trust Code is that a settlor may override an otherwise applicable duty of loyalty in the terms of the trust. Sometimes such override is implied. For example, the grant to a trustee of authority to make a discretionary distribution to a class of beneficiaries that includes the trustee implicitly authorizes the trustee to make distributions for the trustee's own benefit. Another way a settlor can override the default rules is such settlor can relieve a fiduciary from acting in good faith (such not being included in T.C.A. § 35-15-(b)(2).

In order to do its utmost to assure all of the above, the Tennessee Uniform Trust Code rejects the rule of statutory construction that statutes in derogation of the common law are to be strictly construed.

The subdivisions contained in T.C.A. § 35-15-105(b) (referred to hereafter in the comment to this section as "subdivision") list the items not subject to override in the terms of the trust:

Subdivision (b)(1) confirms that the requirements for a trust's creation, such as the necessary level of capacity and the requirement that a trust have a legal purpose, are controlled by statute and common law, not by the settlor. For the requirements for creating a trust, see T.C.A. §§ 35-15-401--35-15-409. Nevertheless, unlike the Uniform Trust Code, the Tennessee Uniform Trust Code contains no references to any impact of public policy on the purposes of a trust as such relates to the requirements for creating a trust under subdivisions (b)(1) or (b)(3).

Subdivision (b)(2) provides that the terms may not eliminate a trustee's duty to act in accordance with the terms and purposes of the trust and the interests of the beneficiaries. Unlike the Uniform Trust Code, the Tennessee Uniform Trust Code contains no reference to good faith in subdivision (b)(2). Therefore, a settlor may provide a standard other than good faith, (e.g., the Trustee's sole and absolute discretion, which standard under the Tennessee Uniform Trust Code contains no implied good faith or reasonableness standard) to govern the Trustee's actions. See T.C.A. § 35-15-814 for the standard by which a trustee's exercise of discretion relative to a discretionary interest may be judicially reviewed or a distribution judicially forced.

Moreover, absent some other restriction, a settlor is always free to specify the trust's terms and the interests of the beneficiaries, to both of which the trustee must comply. Subdivision (b)(3) emphasizes that the "interests of the beneficiaries" are to be judged by such terms "as the interests of such beneficiaries are defined under the terms of the trust." The Uniform Trust Code does not contain language similar to that contained in the last set of quotation marks above. Such language was added to the Tennessee Uniform Trust Code due to its overriding emphasis on settlor's intent and freedom of disposition. Therefore, throughout the Tennessee Uniform Trust Code, whenever one encounters the phrase "that a trust and its terms be for the benefit of its beneficiaries" (or a similar

phrase), one should automatically add to such phrase the remaining portion subdivision (b)(3), “as the interests of such beneficiaries are defined under the terms of the trust.”

Under subdivision (b)(4), the power of the court to modify or terminate a trust under T.C.A. §§ 35-15-410--35-15-416 is not subject to variation in the terms of the trust. However, T.C.A. §§ 35-15-410--35-15-416 involve situations which the settlor could have addressed had the settlor had sufficient foresight. These include situations where the purpose of the trust has been achieved, a mistake was made in the trust’s creation, or circumstances have arisen that were not anticipated by the settlor.

Subdivision (b)(5) clarifies that a settlor may not restrict the rights of a beneficiary’s creditors to a greater extent than is allowed as provided in part 5.

In conformity with traditional doctrine, the Tennessee Uniform Trust Code limits the ability of a settlor to exculpate a trustee from liability for breach of trust. The limits are specified in T.C.A. § 35-15-1008. Subdivision (b)(8) provides a cross-reference. Similarly, subdivision (b)(7) provides a cross-reference to section T.C.A. § 35-15-708(b), which limits the binding effect of a provision specifying a trustee’s, as well as a trust advisor’s or trust protector’s compensation.

Subdivision (b)(9) clarifies that a settlor is not free to limit the rights of third persons, such as purchasers of trust property.

Subdivision (b)(10) makes clear that the settlor may not reduce any otherwise applicable period of limitations for commencing a judicial proceeding. See T.C.A. § 35-15-604 (period of limitations for contesting validity of revocable trust), and T.C.A. § 35-15-1005 (period of limitation on action for breach of trust), as well as similar provisions regarding limitations periods applicable to trust advisors, trust protectors and other fiduciaries. Similarly, a settlor may not so negate the responsibilities of a trustee that the trustee would no longer be acting in a fiduciary capacity. Notwithstanding the preceding sentence, in a directed trust one or more fiduciary powers and duties can be removed from a trustee and given to another fiduciary, in which case relative to the powers and duties so removed, that trustee will be an excluded fiduciary.

The terms of a trust may not deny a court authority to take such action as necessary in the interests of justice, including requiring that a trustee furnish bond, which are acknowledged by subdivisions (b)(11) and (b)(6), respectively. Additionally, subdivision (b)(12) similarly provides that provisions on subject matter jurisdiction and venue cannot be altered in the terms of the trust.

Finally, Tennessee allows “quiet” trusts, under which information regarding a trust and its operations may, if certain requirements are met, be withheld from beneficiaries and holders of powers of appointment. Because of this, the Tennessee Uniform Trust Code has no provision corresponding with Uniform Trust Code subsections (b)(8) and (b)(9).

To assure the overriding objectives of the Tennessee Uniform Trust Code as stated in the third paragraph of these section comments to this section, T.C.A. § 35-15-105(c) makes it clear that the materiality of any purpose of the trust can be controlled simply by stating such in a trust instrument. While the language of such subsection (c) is written in the positive, (i.e., “Any purpose enunciated as a material purpose [HELLIPCE shall be treated as a material purpose]HELLIPCE”), such necessarily implies that a settlor also has the power to so enumerate that a purpose of a trust is not a material purpose of a trust for all purposes of this chapter and chapter 16.

35-15-106. Common law of trusts -- Principles of equity

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

(b) Notwithstanding the provisions of subsection (a):

(1) No provision in a trust directing or authorizing accumulation of trust income shall be invalid; and

(2) The traditional common law distinction between a discretionary trust and a support trust and the dual judicial review standards related to this distinction shall be maintained. Unless specifically provided otherwise in this chapter, courts shall not consult, rely on or give any persuasive value to the Restatement (Third) of Trusts §§ 50, 56, 58, 59 or 60, nor any of the comments under such sections or related thereto, none of which have any force or effect relative to trusts governed by the laws of this state.

COMMENT.

According to ULC--NCCUSL, the Uniform Trust Code codifies those portions of the law of express trusts that are most amenable to codification.

While the Tennessee Uniform Trust Code would agree that no code can cover all portions of the law of express trusts, the Tennessee Uniform Trust Code codifies meaningfully more of such portions than does the Uniform Trust Code. The additional codification of the law of express trusts in the Tennessee Uniform Trust Code is intentional and is designed to provide significantly more certainty than does the Uniform Trust Code over the law that will control a trust and its administration. This is in accordance with Tennessee's emphasis on settlor's intent and freedom of disposition.

Nevertheless, because it is impossible to codify all portions of the law of express trust, to the extent such are not codified in the Tennessee Uniform Trust Code, such code is supplemented by the common law of trusts, including principles of equity. To determine the common law and principles of equity, a court or other body adjudicating or mediating a matter is instructed to look first to other portions of the Tennessee trust statutes, then to prior and contemporaneous Tennessee law. If a court or other body adjudicating or mediating a matter cannot resolve the matter using Tennessee law, it may then look to other law (excluding the law of any foreign country), including the various applicable restatements. Regardless, to the extent any other law is in conflict with Tennessee law, Tennessee law controls. The common law of trusts also includes the traditional and broad equitable jurisdiction of the court, which the Tennessee Uniform Trust Code in no way restricts.

Notwithstanding the preceding paragraph, when considering law other than Tennessee law, courts and other bodies adjudicating or mediating a matter are instructed to be mindful of the following:

Numerous provisions of title 35, chapters 6, 14 and 15 were modified and diverge, in some cases significantly, from their respective uniform codes and the Restatements of Trust, as well as from restatements covering fields of law that are related to, or impact upon, trusts. Moreover, there are no uniform code provisions addressing the subjects covered by title 35, chapters 16 and 17. Such resulting divergence was undertaken deliberately and after significant consideration. Taken as a whole, the Tennessee trust statutes are a distinct and integrated set of trust laws.

It is for this reason that the provisions of T.C.A. § 35-15-1101 reverse those of section 1101 of the Uniform Trust Code and expressly state that in applying and construing title 35 no consideration shall be given to any need to promote uniformity with respect to its subject matter among states, including relative to the laws of any foreign jurisdiction that has enacted versions of the various uniform codes, laws or acts. Moreover, T.C.A. § 35-15-1101 provides that unless specifically provided otherwise in title 35, chapters 6, 14, 15, 16 and 17, courts shall not consult or give any persuasive value to any such uniform acts or any foreign jurisdiction's acts based on or similar to them; or to the comments of any of them; none of which have any force or effect relative to trusts governed by the laws of Tennessee.

The statutory text of the Tennessee Uniform Trust Code is also supplemented by these Comments, which, like the Comments to any uniform act, may be relied on as a guide for interpretation. See *Acierno v. Worthy Bros. Pipeline Corp.*, 656 A.2d 1085, 1090 (Del. 1995) (interpreting Uniform Commercial Code); *Yale University v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting Uniform Management of Institutional Funds Act); 2 Norman Singer, *Statutory Construction* Section 52.05 (6th ed. 2000); Jack Davies, *Legislative Law and Process in a*

35-15-107. Governing law

(a) The validity, construction and administration of a trust are determined by the law of the jurisdiction designated in the terms of the trust instrument, which is called a state jurisdiction provision.

(b) When a state jurisdiction provision designates that the law of this state controls:

(1) This state and its courts have jurisdiction over a trust created in a foreign jurisdiction;

(2) The validity, construction, and administration of a trust are determined by the laws of this state, including but not limited to:

(A) The capacity of the settlor;

(B) The powers, obligations, liabilities, and rights of the trustees and other fiduciaries;

(C) The appointment and removal of the trustees and other fiduciaries;

(D) The existence and extent of all powers conferred on a trustee or other fiduciary, including but not limited to, any trustee's or other fiduciary's discretionary powers, as well as the existence and extent of all powers retained by a settlor and the validity of the exercise of any such power, whether conferred on a trustee or other fiduciary or retained by a settlor;

(3) (A) Neither a trust nor any disposition made subject to the terms of such trust is subject to the laws of any foreign country, nor is any such trust or such disposition void, voidable, liable to be set aside or defective in any manner for any reason including but not limited to:

(i) The law of any foreign country prohibits or does not recognize the concept of a trust; or

(ii) The trust or disposition avoids or defeats any right, claim, or interest conferred by the law of a foreign country upon any person by reason of a personal relationship to the settlor or by way of heirship rights or contravenes any rule or law of a foreign country or any foreign country's judicial or administrative order or action intended to recognize, protect, enforce, or give effect to such right, claim, or interest;

(B) Relative to any foreign country or any interest in property arising or originating under the laws of any foreign country:

(i) No form of forced heirship, legitime, forced share or any similar heirship rights or form of transmission or transfer of property from a decedent or from a living person, or any restrictions on transmission or transfer of property from a decedent or a living person is recognized by this state; or

(ii) No heirship rights described in subdivision (C)(i) conferred under the law of a foreign country shall constitute an obligation or liability, the transfer, conveyance or devise of which, would violate title 66, chapter 3; and

(C) Subdivision (b)(3) shall apply to all realty or other forms of immovable property physically in this state, as well as to all personal or movable property wherever situated if owned by a trust containing a state jurisdiction provision designating that the law of this state controls such trust;

(4) No judgment or other holding of any judicial body of any foreign country, including but not limited to, any court, administrative body or other entity or organization purportedly having the power to make judicial or administrative decisions of any foreign country, shall be recognized or enforced or give rise to any equitable forms of relief, including but not limited to, estoppel, to the extent such judgment or other holding concerns a trust containing a state jurisdiction provision designating that the law of this state controls such trust or to the extent such judgment or other holding concerns property held by such trust;

(5) If, in any action brought against a trustee or other fiduciary of a trust, any judicial body of any foreign country, including but not limited to, any court, administrative body or other entity or organization purportedly having the power to make judicial or administrative decisions of any foreign country, takes any action whereby such judicial body declines to apply the law of this state in determining the validity, construction, or administration of a trust, or the effect of a spendthrift provision or discretionary interest of a trust, the trustee or other fiduciary, as applicable, shall immediately upon the action of the judicial body of the foreign country and without the further

order of any court of this state, cease in all respects to be trustee or other fiduciary, as applicable, of the trust and a vacancy in the office of trustee or other fiduciary, as applicable, shall immediately exist:

(A) Upon the existence of such vacancy, the trustee or other fiduciary, as applicable, has no power or authority other than to convey the trust property to the successor trustee or other fiduciary who fills such vacancy as provided in subdivision (5)(B);

(B) Such vacancy shall be filled in the same manner as would a vacancy in trusteeship that is required to be filled, either as provided by § 35-15-704(c) if the trust is a noncharitable trust, or as provided by § 35-15-704(d) if the trust is a charitable trust; and

(C) Section 35-15-704(e) shall also apply relative to such trustee or other fiduciary, as applicable, in the same manner as that subsection does to trustees and vacancies in trusteeship in general; however, when exercising its power provided by § 35-15-704(e), the court shall consider the purposes of this subsection (b) and make any such appointments pursuant to § 35-15-704(e) in a manner designed to give full force and effect to this subsection (b) to the maximum extent allowed by the laws of this state or of the United States.

(c) In the absence of the existence of a state jurisdiction provision, the laws of the jurisdiction where the trust was executed determine the validity of the trust and the laws of descent, while the laws of the principal place of administration determine the administration of the trust.

COMMENT.

The 2013 amendments to the Tennessee Uniform Trust Code completely and significantly rewrote this section, leaving the former version inoperative as provided in the enacting and transitional language of Section 55, Pub. Act. 2013, Pub. Ch. 390, 108th Gen. Assemb., Reg. Sess. (Tenn., 2013). Such amendment also made section 107 of the Uniform Trust Code, as well as the comments thereunder, irrelevant to the current T.C.A. § 35-15-107.

The Tennessee Uniform Trust Code is designed to provide significantly more certainty than does the Uniform Trust Code over the law that will control a trust and its administration. This is in accordance with Tennessee's emphasis on settlor's intent and freedom of disposition. Therefore, the Tennessee Uniform Trust Code allows any person having the requisite nexus (defined in T.C.A. § 35-15-108) with a jurisdiction to choose that jurisdiction's law as controlling over a trust. A settlor can then designate that controlling law by including a state jurisdiction provision in a trust. The jurisdiction selected need not have any other connection to the trust. Moreover, a settlor is free to select the governing law regardless of where the trust property may be physically located, whether it consists of real or personal property, and whether the trust was created by will or during the settlor's lifetime.

Furthermore and notwithstanding certain provisions contained in the Restatement (Second) Conflicts of Laws, in keeping with the policy of the state of Tennessee and its overriding emphasis on settlor's intent and of freedom of disposition, the Tennessee Uniform Trust Code rejects the concept that any law governing a trust is in any way controlled by another jurisdiction's public policy or dependent upon which jurisdiction has the most significant relationship to a matter at issue.

Relative to specific provisions of such Restatement (Second) Conflicts of Laws (excluding the comments thereto, such having been disregarded by the Tennessee Uniform Trust Code unless provided otherwise herein):

§ 268. The Tennessee Uniform Trust Code: is in accord with subsections (1) and (2)(a); but rejects subsection (2)(b) due to such code's preference for certainty and such code's provision that in the absence of a state jurisdiction provision, place of execution, and not "the state which the testator or settlor would probably have desired to be applicable," controls.

§ 269. The Tennessee Uniform Trust Code: is in accord with clause (a), but only as such clause applies to this state or another state and not to any foreign country; rejects the provisions of clause (b) to the extent they conflict with such code; and specifically rejects all references in clause (b) to "public policy of the state of the testator's domicile at death," as well as to references requiring that a state jurisdiction provision have a "substantial relation to the trust," the necessary nexus for a state jurisdiction provision being provided by T.C.A. § 35-15-108.

§ 270. The Tennessee Uniform Trust Code expressly rejects the concept in clause (a) that a state designated in a state jurisdiction provision need have “a substantial relation to the trust,” the necessary nexus for a state jurisdiction provision being provided by T.C.A. § 35-15-108. Moreover, the Tennessee Uniform Trust Code expressly rejects the requirement in clause (a) that application of the law of the state designated in a state jurisdiction provision “not violate a strong public policy of the state with which, as to the matter at issue, the trust has its most significant relationship.” Under the Tennessee Uniform Trust Code neither the public policy of, nor the relationship of a trust to, another state has any impact on a trust having a state jurisdiction provision. The Tennessee Uniform Trust Code rejects dependence in clause (b) on the “local law of the state with which, as to the matter at issue, the trust has its most significant relationship,” a trust’s validity in cases covered by § 270(b) being determined by the laws of the jurisdiction where the trust was executed pursuant to T.C.A. § 35-15-107(c). Finally, no public policy of, nor the relationship of a trust to, any foreign country is relevant under the Tennessee Uniform Trust Code.

§ 271. The Tennessee Uniform Trust Code is generally in accord with clause (a), but would strike from such clause the words “as to matters which can be controlled by the terms of the trust,” all matters of administration being subject to the law of the jurisdiction designated in a state jurisdiction provision under such code. The Tennessee Uniform Trust Code rejects clause (b) to the extent such clause provides that, absent a state jurisdiction provision, administration is controlled by any law other than that of the state in which the trust is being principally administered.

§ 272. The Tennessee Uniform Trust Code is generally in accord with clause (a), but would strike from such clause the words “as to matters which can be controlled by the terms of the trust,” all matters of administration being subject to the law of the jurisdiction designated in a state jurisdiction provision under such code. The Tennessee Uniform Trust Code rejects clause (b) to the extent such clause provides that, absent a state jurisdiction provision, administration is controlled by any law other than that of the state in which the trust is being principally administered.

§ 273. The Tennessee Uniform Trust Code: is generally in accord with clause (a), but only as it applies to this state or another state and not to any foreign country; rejects the provisions of clause (b) to the extent they conflict with such code; and in cases of trusts not containing a state jurisdiction provision providing for such trust’s place of administration, specifically rejects all references in clause (b) to “the local law of the state to which the administration of the trust is most substantially related,” the place of a trust’s administration being provided for in T.C.A. §§ 35-15-108 and 35-15-107(c).

§ 274. The Tennessee Uniform Trust Code rejects all references in this section relative to “the strong public policy of the testator’s domicile at death.” Notwithstanding any provisions of § 274, the Tennessee Uniform Trust Code confirms that a power of appointment: is not a property interest nor a beneficial interest; is held by the person to whom such power has been given, and not by a settlor in that person’s capacity as settlor; may not be judicially foreclosed; is not reachable by a creditor or assignee at the trust level; and the fact a beneficiary holds a power of appointment is not indicative or determinative of whether a settlor or beneficiary has dominion and control over a trust. To the extent § 274 of such Restatement is in conflict with the immediately preceding sentence, such § 274 is expressly rejected by the Tennessee Uniform Trust Code.

When a state jurisdiction provision designates that Tennessee law controls, Tennessee obtains jurisdiction over the trust and its law controls the validity, construction and administration of a trust (or any part thereof, as a settlor desires). In the absence of such a state jurisdiction provision, the laws of the jurisdiction where the trust was executed determine its validity and the laws of descent, while the laws of the trust’s principal place of administration determine its administration.

Additionally, when a state jurisdiction provision designates that Tennessee law controls, the Tennessee Uniform Trust Code explicitly provides that no foreign country has any jurisdiction, power or effect over that trust or any disposition under it. Moreover, in such case no foreign country has any power to set the trust or any of its

provisions aside, or attempt to do so. Therefore, a foreign country's failure to recognize trusts, or the fact a trust avoids a foreign country's laws granting rights to some person relative to property in the trust; such rights being based on a personal relationship to a settlor of, a party to, or beneficiary of, the trust; are irrelevant and are not respected by Tennessee. Any laws of a foreign country relative to forced heirship, legitime, forced share or similar rights are rejected and are unenforceable under the Tennessee Uniform Trust Code. No judgment of any foreign country will be recognized or enforced by Tennessee to the extent such judgment concerns a trust having a state jurisdiction provision designating the law of Tennessee as controlling.

Unless provided otherwise hereinafter, any reference to "subsection" or "subdivision" means such portion of T.C.A. § 35-15-107.

Subsection (a) defines a state jurisdiction provision and provides that, when such is included in a trust instrument, it controls validity, construction and administration of that trust.

Subsection (b) provides that when a state jurisdiction provision designates that the law of Tennessee controls:

Tennessee and its courts have jurisdiction over the trust, even if such trust was created in a foreign jurisdiction.

The validity, construction and administration of the trust is determined by the laws of Tennessee. Such laws control items including but not limited to: settlor's capacity; powers and duties of all fiduciaries; appointment and removal of all fiduciaries; the existence, validity and extent of powers conferred on any fiduciary or retained by a settlor.

No law of a foreign country has any force or effect on the trust, regardless of whether such country does or does not recognize the concept of a trust.

Tennessee does not in any way recognize any laws of a foreign country granting rights to some person relative to property in the trust; including any rights based on a personal relationship to a settlor of, a party to, or beneficiary of, the trust. Therefore, any laws of a foreign country relative to forced heirship, legitime, forced share or similar rights are rejected and are unenforceable.

Relative to any realty or immovable property physically in Tennessee and relative to any personal or movable property regardless of the location of such, foreign law has no force or effect on the trust and such property.

No judgment or other holding of any adjudicative body of a foreign country will be recognized, nor will such be enforced or otherwise be granted relief.

Should any action be brought against any fiduciary of a trust by any adjudicative body of a foreign country under which action such adjudicative body declines to apply the law of Tennessee to such trust or any provision or interest under such trust, applicable fiduciaries of such trust shall by operation of law immediately cease being such fiduciary and have no further power other than to convey trust property to a successor fiduciary. Such successor fiduciary can be named in the trust instrument, in absence of such will be appointed to office under a statutorily provided mechanism. This provision thwarts a foreign country from obtaining or attempting to obtain jurisdiction over the trust, as well as over any trust property other than immovable property physically present in such foreign country.

Subsection (c) provides for fallback governing law in the absence of a state jurisdiction provision. Such fallback governing law is clear, concise and concrete. Moreover, it is in no way dependent on the jurisdiction having the most significant relationship to the matter at issue. For all these reasons, it provides certainty.

Regarding the Hague Convention on the Law Applicable to Trusts and on their Recognition. According to ULC--NCCUSL, Uniform Trust Code section 107 (made irrelevant by the 2013 amendments to the Tennessee Uniform Trust Code) is consistent with and was partially based on the Hague Convention on the Law Applicable to Trusts and on their Recognition, signed on July 1, 1985. Despite such section of the Uniform Trust Code being

irrelevant, it is important to note that the United States has not (as of May 2013) ratified such convention. Therefore, such convention has no force and effect on the United States, any state or this state (as such terms are defined in T.C.A. § 35-15-103). To the extent such convention is in conflict with the Tennessee trust statutes or Tennessee law in general, Tennessee law controls or absence of Tennessee law, the provisions of T.C.A. § 35-15-106 and the comments thereunder control.

35-15-108. Place of administration-Sufficient nexus for a state jurisdiction provision-Place of administration.

(a) Without limiting or precluding other means for establishing a sufficient connection with a jurisdiction, the terms of a trust designating that jurisdiction's laws in a state jurisdiction provision are valid and controlling if:

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

(2) All or part of the administration occurs in the designated jurisdiction; which such administration, includes but is not limited to:

(A) Maintenance of some trust records physically in the designated jurisdiction; and

(B) Wholly or partly preparing or arranging for the preparation, either on an exclusive or a nonexclusive basis, in the designated jurisdiction of an income tax return that must be filed by the trust; or

(3) Some or all of the trust assets are deposited in the designated jurisdiction or physical evidence of such assets is held in the designated jurisdiction and the trust is being administered by a person defined in subdivision (a)(1). For purposes of this subdivision (a)(3), "deposited in the designated jurisdiction," includes assets being held in any of a checking account, time deposit, certificate of deposit, brokerage account, trust company fiduciary account, or other similar account or deposit that is located in the designated jurisdiction.

(b) Except as otherwise expressly provided by the terms of a governing instrument specifically addressing the governing law for trust administration or by court order, the laws of this state shall govern the administration of a trust while the trust is administered in this state. Without precluding other means for establishing that a trust is administered in this state, if any of the activities described in subsection (a) occur in this state, the trust is administered in this state.

(c) 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.

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

(e) The trustee shall notify the qualified beneficiaries of a proposed transfer of a trust's principal place of administration not less than sixty (60) days before initiating the transfer. The notice of proposed transfer must include:

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

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

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

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

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

(f) The authority of a trustee under this section to transfer a trust's principal place of administration terminates if a majority of those qualified beneficiaries described in § 35-15-103 notify the trustee of an objection to the proposed transfer on or before the date specified in the notice.

(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 § 35-15-704.

COMMENT.

The 2013 amendments to the Tennessee Uniform Trust Code substantially rewrote the previous subsection (a) of this section, leaving the former version inoperative as provided in the enacting and transitional language of Section 55, Pub. Act. 2013, Pub. Ch. 390, 108th Gen. Assemb., Reg. Sess. (Tenn., 2013). Such amendment also made section 107(a) of the Uniform Trust Code, as well as the comments thereunder, irrelevant to the current T.C.A. § 35-15-108.

The Tennessee Uniform Trust Code allows any person having the requisite nexus with a jurisdiction to choose that jurisdiction's law as controlling over a trust. Such requisite nexus is provided in T.C.A. § 35-15-108(a) and is defined in the broadest and most flexible terms.

Relative to a state jurisdiction provision, designating the principal place of administration should be distinguished from designating the law to determine the meaning and effect of the trust's terms. A settlor is free in a state jurisdiction provision to designate one jurisdiction as the principal place of administration and another to govern the meaning and effect of the trust's provisions.

Moreover, to the extent not otherwise provided in a state jurisdiction provision and to the greatest extent possible, T.C.A. § 35-15-108(b) provides that the principal place of administration of a trust is Tennessee if all or part of such administration takes place in Tennessee.

Locating a trust's principal place of administration may also be important for other matters, such as payment of state income tax. The fixing of a trust's principal place of administration will also determine where the trustee and beneficiaries have consented to suit under T.C.A. §§ 35-15-107 and 35-15-202, as well as the rules for locating venue under T.C.A. § 35-15-204.

Notwithstanding the above, the remainder of T.C.A. § 35-15-108 provides that a trustee has a continuing duty to administer the trust in a jurisdiction that is appropriate. Moreover, such section provides a relatively simple procedure by which the trustee (or appropriate fiduciary) of a trust may transfer its principal place of administration to another jurisdiction within or without the United States. Use of this procedure is more readily available under the Tennessee Uniform Trust Code than under the Uniform Trust Code. Under the latter, the power to so transfer can be blocked by the objection of a single qualified beneficiary. On the contrary, the Tennessee Uniform Trust Code requires that a majority of the qualified beneficiaries object to such transfer or it will proceed.

Unless provided otherwise hereinafter, any reference to "subsection" or "subdivision" means such portion of T.C.A. § 35-15-108.

Subsection (a) provides a non-exclusive list of factors containing the requisite nexus with a jurisdiction to choose that jurisdiction's law as controlling over a trust. Having chosen such jurisdiction, a settlor can then designate that jurisdiction law control law by including a state jurisdiction provision in a trust per T.C.A. § 35-15-107.

Subsection (b) provides that unless expressly specified otherwise in a trust instrument or by court order, Tennessee law governs the administration of a trust while such trust is administered in this state. Without precluding other means to establish that a trust is being administered in this state, the occurrence in Tennessee of any of the factors listed in subsection (a) causes the trust to be administered in Tennessee.

Subsection (c) provides that a trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries. "Interests of the beneficiaries," defined in T.C.A. § 35-15-103, means the beneficial interests provided in the terms of the trust. Ordinarily, absent a substantial change or circumstances, the trustee may assume that the original place of administration is also the appropriate place of administration. The duty to administer the trust at an appropriate

place may also dictate that the trustee not move the trust.

Subsections (d)-(g) provide a procedure for changing the principal place of administration to another state or country. Such changes are often beneficial. A change may be desirable for any number of reasons, the following of which is a non-exhaustive list: to secure a lower state income tax rate; to obtain more favorable creditor protection; to extend any applicable rule against perpetuities; to avoid any prohibition on trust accumulations; to obtain or maintain the traditional common law distinction among mandatory, support and discretionary interests and trusts; to avoid any laws granting rights to some person relative to property in the trust; such rights being based on a personal relationship to a settlor of, a party to, or beneficiary of, the trust (e.g., forced heirship); because of relocation of the trustee or beneficiaries; the appointment of a new trustee; or a change in the location of the trust investments. The procedure for transfer specified in this section applies only in the absence of a contrary provision in the terms of the trust. See T.C.A. § 35-15-105. To facilitate transfer in the typical case, where there is general concurrence that a transfer is either desirable or is at least not harmful, a transfer can be accomplished without court approval unless a majority of qualified beneficiary objects. To allow the qualified beneficiaries described in T.C.A. § 35-15-103 sufficient time to review a proposed transfer, the trustee must give such qualified beneficiaries at least 60 days prior notice of the transfer. Notice must be given not only to qualified beneficiaries as defined in T.C.A. § 35-15-103 but also to those granted the rights of qualified beneficiaries under T.C.A. § 35-15-110. To assure that those receiving notice have sufficient information upon which to make a decision, minimum contents of the notice are specified. If a majority of the qualified beneficiary described in T.C.A. § 35-15-103 objects, a trustee wishing to proceed with the transfer must seek court approval.

In connection with a transfer of the principal place of administration, the trustee may transfer some or all of the trust property to a new trustee located outside of this state. The appointment of a new trustee may also be essential if the current trustee is ineligible to administer the trust in the new jurisdiction. Subsection (g) clarifies that the appointment of the new trustee must comply with the provisions on appointment of successor trustees as provided in the terms of the trust or under T.C.A. § 35-15-704. Absent an order of succession in the terms of the trust, T.C.A. § 35-15-704 contains separate procedures for appointment of a successor trustee of a noncharitable trust and for appointment of a successor trustee of a charitable trust.

While transfer of the principal place of administration will normally change the governing law with respect to administrative matters, a transfer does not normally alter the controlling law with respect to the validity of the trust and the construction of its dispositive provisions. See 5A Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 615 (4th ed. 1989) as well as 7 A. W. Scott, W. F. Fratcher & M. L. Ascher, *Scott and Ascher on Trusts* § 45.5.3.2 (5th ed. 2010).

35-15-109. Methods and waiver of notice

(a) Notice to a person under this chapter or the sending of a document to a person under this chapter must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document include first-class mail, personal delivery, 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 chapter or a document otherwise required to be sent under this chapter 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 chapter or the sending of a document under this chapter may be waived by the person to be notified or sent the document.

(d) Notice of a judicial proceeding must be given as provided in the applicable rules of civil procedure.

COMMENT. (NONE)

35-15-110. 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 chapter, if the charitable organization, on the date the charitable organization's qualification is being determined:

(1) Is a distributee or a permissible distributee of trust income or principal;

(2) Would be a distributee or a permissible distributee of trust income or principal if the interests of other distributees or permissible distributees then receiving or eligible to receive distributions terminated on that date without causing the trust to terminate; or

(3) Would be a distributee or a permissible distributee of trust income or principal if the trust terminated on that date.

(b) 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.

COMMENT.

The definition of "beneficiary" includes only those who hold beneficial interests in the trust. Because a charitable trust is not created to benefit ascertainable beneficiaries but to benefit the community at large (See T.C.A. § 35-15-405(a)), persons receiving distributions from a charitable trust are not beneficiaries as that term is defined in the Tennessee Uniform Trust Code.

However, certain persons do have an interest in seeing that a charitable trust is enforced. Under T.C.A. § 35-15-110, such persons include this state's attorney general and certain charitable organizations expressly designated to receive distributions under the terms of the trust.

Unless provided otherwise hereinafter, any reference to "subsection" or "subdivision" means such portion of T.C.A. § 35-15-110.

Under subsection (a), charitable organizations expressly designated in the terms of the trust to receive distributions and that would qualify as a qualified beneficiary were the trust noncharitable are granted the rights of qualified beneficiaries under the Tennessee Uniform Trust Code despite not being beneficiaries under T.C.A. § 35-15-103. Because the charitable organization must be expressly named in the terms of the trust and must be designated to receive distributions, excluded are organizations that might receive distributions in the trustee's discretion even though not expressly mentioned in the trust's terms. Requiring that the organization have an interest similar to that of a beneficiary of a private trust also denies the rights of a qualified beneficiary to organizations holding more remote interests. Finally, requiring that only such charitable organizations that would qualify as a qualified beneficiary were the trust noncharitable are granted the rights of qualified beneficiaries also precludes such organizations from being qualified beneficiaries if they are an ultimate beneficiary or potential ultimate beneficiary. For further discussion of the definition of "qualified beneficiary" and "ultimate beneficiary" see § 35-15-103.

This section does not limit other means by which the attorney general or other designated official can enforce a charitable trust.

35-15-111. Nonjudicial settlement agreements

(a) Except as otherwise provided in subsection (b), the trustee and the qualified beneficiaries may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.

(b) 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 chapter or other applicable law.

- (c) Matters that may be resolved by a nonjudicial settlement agreement include, but are not limited to:
- (1) The interpretation or construction of the terms of the trust;
 - (2) The approval of a trustee's report or accounting;
 - (3) Direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;
 - (4) The resignation or appointment of a trustee and the determination of a trustee's compensation;
 - (5) Transfer of a trust's principal place of administration;
 - (6) Liability of a trustee for an action relating to the trust;
 - (7) The extent or waiver of bond of a trustee;
 - (8) The governing law of the trust; and
 - (9) The criteria for distribution to a beneficiary where the trustee is given discretion.
- (d) Any qualified beneficiary or trustee may request the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in part 3 of this chapter was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.

COMMENT.

While the Tennessee Uniform Trust Code recognizes that a court may intervene in the administration of a trust to the extent its jurisdiction is invoked by interested persons or otherwise provided by law See T.C.A. § 35-15-201), resolution of disputes by nonjudicial means is encouraged. This section facilitates the making of such agreements by giving them the same effect as if approved by the court. To achieve such certainty, however, subsection (b) requires that the nonjudicial settlement must contain terms and conditions that a court could properly approve. Under this section, a nonjudicial settlement cannot be used to produce a result not authorized by law, such as to terminate a trust in an impermissible manner.

Trusts ordinarily have beneficiaries who are minors, incapacitated, unborn or unascertained. Because such beneficiaries cannot signify their consent to an agreement, binding settlements can ordinarily be achieved only through the application of doctrines such as virtual representation or appointment of a guardian ad litem, doctrines traditionally available only in the case of judicial settlements. The effect of this section and the Tennessee Uniform Trust Code more generally is to allow for such binding representation even if the agreement is not submitted for approval to a court. For the rules on representation, including appointments of representatives by the court to approve particular settlements, see title 35, part 3.

Under the Uniform Trust Code, all "interested persons" (as defined in section 111(a) thereof) were required to enter into a nonjudicial settlement in order for it to be binding.

Under the Tennessee Uniform Trust Code "the trustee and qualified beneficiaries" are the parties necessary to enter into and conclude a nonjudicial settlement agreement. Qualified beneficiary is defined in T.C.A. § 35-15-103. The Tennessee Uniform Trust Code only requires the agreement of trustee and qualified beneficiaries to effectuate a nonjudicial settlement agreement in order to avoid the required involvement of potential (or even unborn) beneficiaries whose interests are remote and who previously may have required the appointment of a representative by the court or otherwise obtaining representation virtually, thus limiting the objectives of having, as well as the access to, a nonjudicial settlement agreement process.

Though broader than the similar list in the Uniform Trust Code, the items enumerated in T.C.A. § 35-15-111(c) regarding matters to which a nonjudicial settlement may pertain are still nonexclusive. Other matters which may be made the subject of a nonjudicial settlement are discussed in the General Comment to part 3 contained at T.C.A. § 35-15-301. The fact that the trustee and beneficiaries may resolve a matter nonjudicially does not mean that beneficiary approval is required. For example, a trustee may resign pursuant to section T.C.A. § 35-15-705 solely by giving notice to the qualified beneficiaries, a living settlor, and any cotrustees. But a nonjudicial

settlement between the trustee and beneficiaries will frequently prove helpful in working out the terms of the resignation.

35-15-112. 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.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-110.

This section is patterned after Restatement (Third) of Trusts § 25(2) and comment e (Tentative Draft No. 1, approved 1996). Notwithstanding the preceding sentence, unlike the Restatement, the section fully and generally applies to irrevocable, as well as revocable, trusts unless specifically provided otherwise herein. Moreover, a general reference to the nature, use or purpose of either such type of trust does not imply inapplicability of this section to the other of such types of trusts.

The revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property upon the settlor's death. Given this functional equivalence between the revocable trust and a will, the rules for interpreting the disposition of property at death should be the same whether the individual has chosen a will or revocable trust as the individual's primary estate planning instrument. Over the years, the legislatures of the states and the courts have developed a series of rules of construction reflecting the legislative or judicial understanding of how the average testator would wish to dispose of property in cases where the will is silent or insufficiently clear. Few legislatures have yet to extend these rules of construction to revocable trusts, and even fewer to irrevocable trusts, although a number of courts have done so as a matter of judicial construction. See Restatement (Third) of Trusts § 25, Reporter's Notes to cmt. d and e (Tentative Draft No. 1, approved 1996).

The Tennessee Uniform Trust Code does not attempt to prescribe the exact rules to be applied to trusts but instead adopts the philosophy that the rules applicable to trusts generally should be the same as the rules applicable to wills, whatever those rules might be.

Rules of construction are not the same as constructional preferences. A constructional preference is general in nature, providing general guidance for resolving a wide variety of ambiguities. An example is a preference for a construction that results in a complete disposition and avoid illegality. Rules of construction, on the other hand, are specific in nature, providing guidance for resolving specific situations or construing specific terms. Unlike a constructional preference, a rule of construction, when applicable, can lead to only one result. See Restatement (Third) of Property: Donative Transfers § 11.3 and cmt. b (Tentative Draft No. 1, approved 1995).

Rules of construction attribute intention to individual donors based on assumptions of common intention. Rules of construction are found both in enacted statutes and in judicial decisions. Rules of construction can involve the meaning to be given to particular language in the document, such as the meaning to be given to "heirs" or "issue." Rules of construction also address situations the donor failed to anticipate. These include but are not limited to the following:

The required time period for surviving the settlor provided for in T.C.A. Section 31-3-120;

The failure to anticipate the predecease of a beneficiary;

The failure to specify the source from which expenses are to be paid.

Rules of construction can also concern assumptions as to how a donor would have revised donative

documents in light of certain events occurring after execution. These include but are not limited to the following:

Rules dealing with whether a specific devisee will receive a substitute gift if the subject matter of the devise is disposed of during the settlor's lifetime; and

The provisions of T.C.A. § 32-1-202 prescribing the effect of a divorce on bequests made to a former spouse pursuant to a trust executed during the marriage to such spouse. However, such provisions of such section will only apply to a trust with respect to which the settlor retained a power of revocation, a power to revest all the assets of the trust in such settlor or a power to change the beneficiaries of the trust.

Judicial Proceedings

GENERAL COMMENT.

This part, this general comment thereto and the other section comments under such part are subject to any rules or restrictions on jurisdiction or venue provided for directly or indirectly in T.C.A. §§ 35-15-107 and 35-15-108, together with the comments to the latter two such sections. Such latter two sections and their comments are controlling. This includes, but is not limited to, the preclusion of any adjudicative body of a foreign country obtaining jurisdiction or venue of a trust, any of its fiduciaries or any of its trustees when such trust contains a state jurisdiction provision designating the law of a jurisdiction other than such foreign country.

This part addresses selected issues involving judicial proceedings concerning trusts, particularly trusts with contacts in more than one state or country. This part is not intended to provide comprehensive coverage of court jurisdiction or procedure with respect to trusts. These issues are better addressed elsewhere, for example in the state's rules of civil procedure or as provided by court rule.

T.C.A. § 35-15-201 makes clear that the jurisdiction of the court is available as invoked by interested persons or as otherwise provided by law. Proceedings involving the administration of a trust normally will be brought in the court at the trust's principal place of administration. T.C.A. § 35-15-202 provides that the trustee and beneficiaries are deemed to have consented to the jurisdiction of the court at the principal place of administration as to any matter relating to the trust. T.C.A. §§ 35-15-203 and 35-15-204 contain provisions relating to subject matter jurisdiction and venue.

35-15-201. Role of court in administration of trust

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

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

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

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-201.

While the Tennessee Uniform Trust Code encourages the resolution of disputes without resort to the courts by providing such options as the nonjudicial settlement authorized by section T.C.A. § 35-15-111, the court is always available to the extent its jurisdiction is invoked by interested persons. The jurisdiction of the court with respect to trust matters is inherent and historical and also includes the ability to act on its own initiative, to appoint a special master to investigate the facts of a case, and to provide a trustee with instructions even in the absence of an actual dispute.

Contrary to the trust statutes in some states, the Tennessee Uniform Trust Code does not create a system of routine or mandatory court supervision. While subsection (b) authorizes a court to direct that a particular trust be subject to continuing court supervision, the court's intervention will normally be confined to the particular matter brought before it.

Subsection (c) makes clear that the court's jurisdiction may be invoked even absent an actual dispute. Traditionally, courts in equity have heard petitions for instructions and have issued declaratory judgments if there is a reasonable doubt as to the extent of the trustee's powers or duties. The court will not ordinarily instruct trustees on how to exercise discretion, however. See Restatement (Second) of Trusts §§ 187, 259 (1959). Moreover,

In furtherance of the rule of Restatement (Second) of Trusts § 187 (1959), T.C.A. § 35-15-814 provides that the court may only exercise jurisdiction in limited circumstances to review a trustee's discretion or force a distribution. Other than as specifically provided otherwise in the Tennessee Uniform Trust Code, this section does not limit the court's equity jurisdiction. Beyond mentioning petitions for instructions and actions to declare rights, subsection (c) does not attempt to list the types of judicial proceedings involving trust administration that might be brought by a trustee or beneficiary.

According to ULC--NCCUSL, such an effort is made in California Probate Code § 17200. Further according to ULC--NCCUSL, excluding matters not germane to the Uniform Trust Code, the California statute lists the following as items relating to the "internal affairs" of a trust: determining questions of construction; determining the existence or nonexistence of any immunity, power, privilege, duty, or right; determining the validity of a trust provision; ascertaining beneficiaries and determining to whom property will pass upon final or partial termination of the trust; settling accounts and passing upon the acts of a trustee, including the exercise of discretionary powers (such jurisdiction being limited by T.C.A. § 35-15-814); instructing the trustee; compelling the trustee to report information about the trust or account to the beneficiary; granting powers to the trustee; fixing or allowing payment of the trustee's compensation or reviewing the reasonableness of the compensation; appointing or removing a trustee; accepting the resignation of a trustee; compelling redress of a breach of trust by any available remedy; approving or directing the modification or termination of a trust; approving or directing the combination or division of trusts; and authorizing or directing transfer of a trust or trust property to or from another jurisdiction. In light of this paragraph being other law as such is defined in the comments to T.C.A. § 35-15-101, such is not controlling to the extent it is in conflict with the Tennessee Uniform Trust Code, the Tennessee trust statutes or Tennessee law in general.

35-15-202. Jurisdiction over trustee and beneficiary

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

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

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

COMMENT.

T.C.A. § 35-15-202 and these comments thereto are subject to any rules or restrictions on jurisdiction provided for directly or indirectly in T.C.A. §§ 35-15-107 and 35-15-108, together with the comments to the latter two such sections. Such latter two sections and their comments are controlling. This includes, but is not limited to, the preclusion of any adjudicative body of a foreign country obtaining jurisdiction of a trust, any of its fiduciaries or any of its trustees when such trust contains a state jurisdiction provision designating the law of a jurisdiction other than such foreign country.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-202.

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

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

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

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

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

35-15-203. Subject matter jurisdiction

Chancery courts and other courts of record having probate jurisdiction:

(1) To the exclusion of all other courts, have concurrent jurisdiction over proceedings in this state brought by a trustee or beneficiary concerning the administration of a trust; and

(2) Have concurrent jurisdiction with other courts of record in this state over other proceedings involving a trust.

COMMENT.

This section provides a means for distinguishing the jurisdiction of the court having primary jurisdiction for trust matters from other courts in this state that may on occasion resolve disputes concerning trusts. For an explanation of types of proceedings which may be brought concerning the administration of a trust, see the Section Comment to T.C.A. § 35-15-201.

35-15-204. Venue

(a) Except as otherwise provided in subsection (b), venue for a judicial proceeding involving a trust is in the county of this state in which the trust's principal place of administration is or will be located and, if the trust is created by will and the estate is not yet closed, in the county in which the decedent's estate is being administered.

(b) If a trust has no trustee, venue for a judicial proceeding for the appointment of a trustee is in a county of this state in which a beneficiary resides, in a county in which any trust property is located, and if the trust is created by will, in the county in which the decedent's estate was or is being administered.

COMMENT.

T.C.A. § 35-15-204 and these comments thereto are subject to any rules or restrictions on venue provided for directly or indirectly in T.C.A. §§ 35-15-107 and 35-15-108, together with the comments to the latter two such sections. Such latter two sections and their comments are controlling. This includes, but is not limited to, the preclusion of any adjudicative body of a foreign country obtaining venue of a trust, any of its fiduciaries or any of

its trustees when such trust contains a state jurisdiction provision designating the law of a jurisdiction other than such foreign country.

General rules governing venue continue to apply in cases not covered by this section. This includes most proceedings where jurisdiction over a trust, trust property, or parties to a trust is based on a factor other than the validity, construction or administration of a trust. The general rules governing venue also apply when the principal place of administration of a trust is in another locale, but jurisdiction is proper in this state.

Representation

GENERAL COMMENT.

The provisions of this part in some ways diverge significantly from the Uniform Trust Code and the restatements. To the extent this part is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

Representation under this part is allowed except to the extent there is a material conflict of interest with respect to the particular matter or dispute. The Tennessee Uniform Trust Code diverges from the Uniform Trust Code in that the Tennessee Uniform Trust Code only requires that there be no material conflict of interest (as opposed to requiring no conflict of interest) between the one representing and one represented. Therefore, it is not necessary that no conflict, whatsoever, exist in order to avail oneself of representation, only that no material conflict exist. This divergence from the Uniform Trust Code makes representation and virtual representation available in far more cases under the Tennessee Uniform Trust Code, thereby adding flexibility.

This part deals with representation of beneficiaries, both representation by fiduciaries (personal representatives, trustees, guardians, and conservators) and in some cases by their ancestors, as well as what is known as virtual representation. Representation is a topic not adequately addressed under the trust law of most states. Representation is addressed in the Restatement (First) of Property §§ 180-186 (1936), but the coverage of this part is more complete. Notwithstanding, the preceding reference to such restatement, in light of the divergence of the Tennessee Uniform Trust Code in this area, to the extent the Tennessee Uniform Trust Code is contra to such restatement, such restatement is rejected by the Tennessee Uniform Trust Code.

T.C.A. § 35-15-301 is the introductory section, laying out the scope of the part. The representation principles of this part have numerous applications under the Tennessee Uniform Trust Code. Such representation principles of this part apply in numerous circumstances, including but not limited to: for purposes of settlement of disputes, whether by a court or nonjudicially; for the giving of required notices; and for the giving of consents to certain actions.

T.C.A. §§ 35-15-302--35-15-305 cover the different types of representation. T.C.A. § 35-15-302 deals with representation by the holder of a general testamentary power of appointment. (Revocable trusts and presently exercisable general powers of appointment are covered by T.C.A. § 35-15-603, which grant the settlor or holder of the power all rights of the beneficiaries or persons whose interests are subject to the power). T.C.A. § 35-15-303 deals with representation by a fiduciary, whether of an estate, trust, conservatorship, or guardianship. The section also allows a person without a material conflict of interest to represent and bind a minor or unborn descendant. T.C.A. § 35-15-303 grants broader powers of representation than does Uniform Trust Code section 303, as follows:

Under the Uniform Trust Code, only a "parent" (as opposed to a "person") can represent only that parent's minor or unborn "child" (as opposed to that person's minor or unborn "descendant").

T.C.A. § 35-15-303 (unlike the Uniform Trust Code) also allows a settlor or the beneficiaries to designate a person to represent such beneficiaries.

T.C.A. § 35-15-304 is the virtual representation provision. It provides for representation of and the giving of a binding consent by another person having a substantially identical interest with respect to the particular issue. T.C.A. § 35-15-305 authorizes the court to appoint a representative to represent the interests of unrepresented persons or persons for whom the court concludes the other available representation might be inadequate.

The provisions of this part are subject to modification in the terms of the trust. See T.C.A. § 35-15-105. Settlers are free to specify their own methods for providing substituted notice and obtaining substituted consent.

Moreover, the Tennessee Uniform Trust Code's robust provisions for trust advisors and trust protectors further the methods for providing such notice and obtaining such consent.

35-15-301. Representation -- Basic effect

(a) Notice to a person who may represent and bind another person under this chapter has the same effect as if notice were given directly to the other person.

(b) The consent of a person who may represent and bind another person under this chapter is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.

(c) Except as otherwise provided in §§ 35-15-411 and 35-15-602, a person who under this chapter may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor's behalf.

(d) A settlor may not represent and bind a beneficiary under this chapter with respect to the termination or modification of a trust under § 35-15-411(a).

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-301.

This section is general and introductory, laying out the scope of the part.

Subsection (a) validates substitute notice to a person who may represent and bind another person as provided in the succeeding sections of this part. Notice to the substitute has the same effect as if given directly to the other person. Subsection (a) does not apply to notice of a judicial proceeding. Pursuant to T.C.A. § 35-15-109, notice of a judicial proceeding must be given as provided in the applicable rules of civil procedure, which may require that notice not only be given to the representative but also to the person represented. Subsection (a) may be used to facilitate the giving of notice to the requisite beneficiaries in many circumstances, including but not limited to: of a proposed transfer of principal place of administration under T.C.A. § 35-15-108; of a proposed trust combination or division under T.C.A. § 35-15-417; of a temporary assumption of duties without accepting trusteeship directly by a trustee, or the same by a trust advisor or trust protector indirectly, under T.C.A. § 35-15-701; of a trustee's resignation directly, or the same by a trust advisor or trust protector indirectly, under T.C.A. § 35-15-705; and of a trustee's report under T.C.A. § 35-15-813.

Subsection (b) deals with the effect of a consent, whether by actual or virtual representation. Subsection (b) may be used to facilitate consent of the requisite beneficiaries in many circumstances, including but not limited to: to modification or termination of a trust under T.C.A. § 35-15-411; agreement of the requisite beneficiaries on appointment of a successor trustee of a noncharitable trust T.C.A. § 35-15-704 (or of a trust advisor or trust protector under T.C.A. § 35-15-713); and a beneficiary's consent to or release or affirmance of the actions of a trustee T.C.A. § 35-15-1009. A consent by a representative bars a later objection by the person represented, but a consent is not binding if the person represented raises an objection prior to the date the consent would otherwise become effective. The possibility that a beneficiary might object to a consent given on the beneficiary's behalf will not be germane in many cases because the person represented will be unborn or unascertained. However, the representation principles of this part will sometimes apply to adult and competent beneficiaries. For example, while the trustee of a revocable trust entitled to a pour-over devise has authority under T.C.A. § 35-15-303 to approve the personal representative's account on behalf of the trust beneficiaries, such consent would not be binding on a trust beneficiary who registers an objection.

Subsection (c) implements the policy of T.C.A. §§ 35-15-411 and 35-15-602 requiring express authority in the power of attorney or approval of court before the settlor's agent, conservator or guardian may consent on behalf of the settlor to the termination or revocation of the settlor's revocable trust.

Subsection (d) is a tax-savings provision. Because of the ability of a settlor under T.C.A. § 35-15-301 to represent and bind a beneficiary with respect to a termination or modification of an irrevocable trust, T.C.A. § 35-15-411(a) might result in inclusion of the trust in the settlor's gross estate. Subsection (d) eliminates the possibility of such representation.

35-15-302. Representation by holder of general testamentary power of appointment

To the extent there is no material conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-302.

The provisions of this section in some ways diverge significantly from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

Representation under this section is allowed except to the extent there is a *material* conflict of interest with respect to the particular matter or dispute. The Tennessee Uniform Trust Code diverges from the Uniform Trust Code in that the Tennessee Uniform Trust Code only requires that there be no material conflict of interest (as opposed to requiring no conflict of interest) between the one representing and one represented. Therefore, it is not necessary that no conflict, whatsoever, exist in order to avail oneself of representation, only that no material conflict exist. This divergence from the Uniform Trust Code makes representation and virtual representation available in far more cases under the Tennessee Uniform Trust Code, thereby adding flexibility.

This section specifies the circumstances under which a holder of a general testamentary power of appointment may receive notices on behalf of and otherwise represent and bind persons whose interests are subject to the power, whether as permissible appointees, takers in default, or otherwise.

Typically, the holder of a general testamentary power of appointment is also a life income beneficiary of the trust, oftentimes of a trust intended to qualify for the federal estate tax marital deduction. See *I.R.C. § 2056(b)(5)* [26 U.S.C. 2056(b)(5)]. Without the exception for material conflict of interest, the holder of the power could act in a way that could enhance the holder's income interests to the detriment of the appointees or takers in default, whoever they may be (taking such action would likely rise to the level of the creation of a conflict of interest that was material).

In determining whether the representative has a material conflict with the person sought to be represented, the following may be indicia of such conflict:

The action to be approved may cause the trustee or co-trustee to operate the trust in a manner that would generally be considered imprudent;

The action to be approved if submitted to a court would generally not be approved; and

The action to be approved if subject to review by a court appointed guardian ad litem, would not generally be recommended for approval;

All of the above to be determined under T.C.A. § 35-15-105, which diverges significantly from the Uniform Trust Code.

If any of these or other indicia of a material conflict exists, the representative seeking to exercise a representative position has the burden to demonstrate that notwithstanding the indicia of a material conflict, the proposed action is in the best interest of the represented beneficiary.

35-15-303. Representation by fiduciaries and parents

To the extent there is no material conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

- (1) A conservator may represent and bind the estate that the conservator controls;
- (2) A guardian may represent and bind the ward if a conservator of the ward's estate has not been appointed;
- (3) An agent having authority to act with respect to the particular question or dispute may represent and bind the principal;
- (4) A trustee may represent and bind the beneficiaries of the trust;
- (5) A personal representative of a decedent's estate may represent and bind persons interested in the estate;
- (6) A person may represent and bind the person's minor or unborn descendant if a guardian for the descendant has not been appointed;
- (7) A person designated by the settlor in the trust instrument or in a writing delivered to the trustee to represent the beneficiaries of the trust may represent and bind such beneficiaries; and
- (8) A person designated by the beneficiaries of the trust to represent them may represent and bind such beneficiaries.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-303.

The provisions of this section in some ways diverge significantly from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

Representation under this section is allowed except to the extent there is a *material* conflict of interest with respect to the particular matter or dispute. The Tennessee Uniform Trust Code diverges from the Uniform Trust Code in that the Tennessee Uniform Trust Code only requires that there be no material conflict of interest (as opposed to requiring no conflict of interest) between the one representing and one represented. Therefore, it is not necessary that no conflict, whatsoever, exist in order to avail oneself of representation, only that no material conflict exist. This divergence from the Uniform Trust Code makes representation and virtual representation available in far more cases under the Tennessee Uniform Trust Code, thereby adding flexibility.

This section allows for representation of persons by their fiduciaries (conservators, guardians, agents, trustees, and personal representatives), a principle that has long been part of the law. Subdivision (6) allows a person to represent his or her descendant. This includes the person's child, as under the Uniform Trust Code, but unlike the Uniform Trust Code, the Tennessee Uniform Trust Code extends this ability to the representation of other descendants as well. Note that this section is not limited to representation of beneficiaries. It also applies to representation of the settlor. Representation is not available if the fiduciary or parent is in a material conflict position with respect to the particular matter or dispute, however. A typical material conflict could exist in cases where the fiduciary or parent seeking to represent the beneficiary is either the trustee or holds an adverse beneficial interest.

Subdivision (2) authorizes a guardian to bind and represent a ward if a conservator of the ward's estate has not been appointed. Granting a guardian authority to represent the ward with respect to interests in the trust can

avoid the need to seek appointment of a conservator. This grant of authority to act with respect to the ward's trust interest may broaden the authority of a guardian. Under the Tennessee law, a "conservator" is appointed by the court to manage the ward's property and to make decisions with respect to a ward's personal affairs. The reference to a "guardian" was left in the statute because Tennessee does have provisions for the appointment of Veterans guardians which guardians speak for adult wards.

Subdivision (3) authorizes an agent to represent a principal only to the extent the agent has authority to act with respect to the particular question or dispute. Pursuant to T.C.A. § 35-15-602, an agent may represent a settlor with respect to the amendment, revocation or termination of a revocable trust only to the extent this authority is expressly granted either in the trust or the power. Otherwise, depending on the particular question or dispute, a general grant of authority in the power may be sufficient to confer the necessary authority.

Subdivisions (7) and (8) deal with situation where a settlor or one or more beneficiaries appoint a trust advisor, trust protector or other person to exercise certain powers on behalf of a beneficiary.

Subdivisions (7) and (8) clarify that such persons may designate a person or persons to represent beneficiaries; in the case of the settlor, in the trust instrument, and in the case of all such person provided for in subdivisions (7) and (8), in a separate written document that is delivered to the trustee. A written designation of a representative by a settlor or a beneficiary may occur subsequent to the execution of the trust instrument. If the designated representative is an individual, the settlor would be wise to designate a successor or establish a procedure for selecting a successor. The designated representative should be given specific duties that might include receipt of any required notice under T.C.A. § 35-15-813 (a) or (b) or under any other section of the Tennessee Uniform Trust Code.

In all cases regarding representation, the Tennessee Uniform Trust Code only requires that no material conflict of interest exist between the person representing and the person represented.

In determining whether the representative has a material conflict with the person sought to be represented, the following may be indicia of such conflict:

The action to be approved may cause the trustee or co-trustee to operate the trust in a manner that would generally be considered imprudent;

The action to be approved if submitted to a court would generally not be approved; and

The action to be approved if subject to review by a court appointed guardian ad litem, would not generally be recommended for approval;

All of the above to be determined under T.C.A. § 35-15-105, which diverges significantly from the Uniform Trust Code.

If any of these or other indicia of a material conflict exists, the representative seeking to exercise a representative position has the burden to demonstrate that notwithstanding the indicia of a material conflict, the proposed action is in the best interest of the represented beneficiary.

35-15-304. Representation by person having substantially identical interest

Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no material conflict of interest between the representative and the person represented.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or

such portion of, T.C.A. § 35-15-304.

The provisions of this section in some ways diverge significantly from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

Representation under this section is allowed except to the extent there is a material conflict of interest with respect to the particular matter or dispute. The Tennessee Uniform Trust Code diverges from the Uniform Trust Code in that the Tennessee Uniform Trust Code only requires that there be no material conflict of interest (as opposed to requiring no conflict of interest) between the one representing and one represented. Therefore, it is not necessary that no conflict, whatsoever, exist in order to avail oneself of representation, only that no material conflict exist. This divergence from the Uniform Trust Code makes representation and virtual representation available in far more cases under the Tennessee Uniform Trust Code, thereby adding flexibility.

This section authorizes a person with a substantially identical interest with respect to a particular question or dispute to represent and bind an otherwise unrepresented minor, incapacitated or unborn individual, or person whose location is unknown and not reasonably ascertainable. This section is derived from section 1-403(2)(iii) of the Uniform Probate Code, but with several modifications. Unlike the UPC, this section does not expressly require that the representation be adequate. Furthermore, this section extends the doctrine of virtual representation to representation of minors and incapacitated individuals. Finally, this section does not apply to the extent there is a material conflict of interest between the representative and the person represented.

Restatement (First) of Property §§ 181 and 185 (1936) provide that virtual representation is inapplicable if the interest represented was not sufficiently protected. Representation is deemed sufficiently protective as long as it does not appear that the representative acted in hostility to the interest of the person represented. Restatement (First) of Property § 185 (1936). Evidence of inactivity or lack of skill is material only to the extent it establishes such hostility. Restatement (First) of Property § 185 cmt. b (1936). To the extent the fact that the Tennessee Uniform Trust Code only requires that no material conflict of interest exist between the person representing and the person represented is contra with the views of such restatement, such restatement is rejected by the Tennessee Uniform Trust Code.

Typically, the interests of the representative and the person represented will be identical. A common example would be a trust providing for distribution to the settlor's children as a class, with an adult child being able to represent the interests of children who are either minors or unborn. Exact identity of interests is not required, only substantial identity with respect to the particular question or dispute. Whether such identity is present may depend on the nature of the interest. For example, a presumptive remaindermen may be able to represent alternative remaindermen with respect to approval of a trustee's report but not with respect to interpretation of the remainder provision or termination of the trust. Even if the beneficial interests of the representative and person represented are identical, representation is not allowed in the event of material conflict of interest. The representative may have interests outside of the trust that are adverse to the interest of the person represented, such as a prior relationship with the trustee or other beneficiaries. See Restatement (First) of Property § 185 cmt. d (1936). Relative to the Tennessee Uniform Trust Code's requirement of materiality regarding conflicts of interest and the effect such may have on the above expressed view of the restatement versus Tennessee law, see the immediately preceding paragraph.

In all cases regarding representation, the Tennessee Uniform Trust Code only requires that no material conflict of interest exist between the person representing and the person represented.

In determining whether the representative has a material conflict with the person sought to be represented, the following may be indicia of such conflict:

The action to be approved may cause the trustee or co-trustee to operate the trust in a manner that would

generally be considered imprudent;

The action to be approved if submitted to a court would generally not be approved; and

The action to be approved if subject to review by a court appointed guardian ad litem, would not generally be recommended for approval;

All of the above to be determined under T.C.A. § 35-15-105, which diverges significantly from the Uniform Trust Code.

If any of these or other indicia of a material conflict exists, the representative seeking to exercise a representative position has the burden to demonstrate that notwithstanding the indicia of a material conflict, the proposed action is in the best interest of the represented beneficiary.

35-15-305. Appointment of representative

(a) If the court determines that an interest is not represented under this chapter, or that the otherwise available representation might be inadequate, the court may appoint a representative to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown. A representative may be appointed to represent several persons or interests.

(b) A representative may act on behalf of the individual represented with respect to any matter arising under this chapter, whether or not a judicial proceeding concerning the trust is pending.

(c) In making decisions, a representative may consider general benefit accruing to the living members of the individual's family.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-305.

This section is derived from section 1-403(4) of the Uniform Probate Code. However, this section substitutes "representative" for "guardian ad litem" to signal that a representative under this Code serves a different role. Unlike a guardian ad litem, under this section a representative can be appointed to act with respect to a nonjudicial settlement or to receive a notice on a beneficiary's behalf. Furthermore, in making decisions, a representative may consider general benefit accruing to living members of the family. The court may appoint a representative to act for a person even if the person could be represented under another section of this part.

Creation, Validity, Modification, and Termination of Trust

GENERAL COMMENT.

The provisions of this chapter in some ways diverge significantly from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

Sections 401 through 409 [see §§ 35-15-305, TN ST § 35-15- which specify the requirements for the creation of a trust, largely codify traditional doctrine, though arguably the net effect of these sections is to provide more flexibility regarding such creation.

T.C.A. § 35-15-401 specifies the methods by which trusts are created, that is, by transfer of property, self-declaration, exercise of a power of appointment or by a court pursuant to its statutory or equitable powers. Whatever method may have been employed, other requirements, including intention, capacity and, for certain types of trusts, an ascertainable beneficiary, also must be satisfied before a trust is created. These requirements are listed in T.C.A. § 35-15-402, which unlike the laws of certain states (e.g., Florida) do not require either a revocable or irrevocable trust with testamentary provisions be made with the formalities of a will.

T.C.A. § 35-15-403 addresses the validity in the enacting jurisdiction of trusts created in other jurisdictions. A trust not created by will is validly created if its creation complied with the law of specified jurisdictions in which the settlor or trustee had the requisite contact.

T.C.A. § 35-15-404 forbids trusts for illegal or impossible purposes, but unlike the Uniform Trust Code, does not require that a trust purpose “not be contrary to public policy.” Moreover, T.C.A. § 35-15-404 requires that a trust and its terms must be for the benefit of its beneficiaries and pursuant to T.C.A. § 35-15-105, requires the “benefit of the beneficiaries to be determined solely considering how such interests “are defined in the terms of the trust.” This is designed to further enforcement of settlor’s intent and freedom of disposition, both of which are overriding goals of the Tennessee trust statutes.

T.C.A. § 35-15-405 recites the permitted purposes of a charitable trust. As under T.C.A. § 35-15-404, there is no prohibition against purposes contrary to public policy. Moreover, when exercising cy pres under T.C.A. § 35-15-413, the court is required to fulfill as nearly as possible the settlor’s charitable intent (as such were defined in the terms of the trust).

T.C.A. § 35-15-406 lists some of the grounds for contesting a trust. T.C.A. § 35-15-407 validates oral trusts.

The remaining sections address what are often referred to as “honorary” (sometimes called “purpose”) trusts. Such trusts are valid and enforceable under the Tennessee Uniform Trust Code. T.C.A. § 35-15-408 covers a trust for the care of an animal and unlike under the Uniform Trust Code, such can last up to 90 years. T.C.A. § 35-15-409 allows creation of a trust for another noncharitable purpose (a “purpose” trust) for any valid non-charitable purpose. Again unlike the Uniform Trust Code, purpose trusts can last up to ninety (90) years under the Tennessee Uniform Trust Code. Moreover, in the case of special types of trusts for which a perpetual purpose exists, such as maintenance of a cemetery lot, there is no time limit on such trust.

T.C.A. §§ 35-15-410--35-15-417 provide a series of interrelated rules on when a trust may be terminated or modified other than by its express terms. The overall objective of these sections is to enhance flexibility consistent with the principle that preserving the settlor’s intent as such is defined under the terms of the trust is paramount. This provisions covered by these sections in some ways diverge significantly from the Uniform Trust Code and the restatements.

Note that a trust advisor or trust protector may have the power to directly or indirectly modify a trust without

being subject to T.C.A. §§ 35-15-410-35-15-412 and 35-15-414.

Also note that, in cases where the existence or non-existence of a material purpose of a trust is relevant to the power to terminate or modify a trust, it is far easier for a purpose of a trust to rise to “material” status under the Tennessee Uniform Trust Code than under the Uniform Trust Code. This is due to T.C.A. § 35-15-105(c), differences between the language to the section comment of T.C.A. § 35-15-103 relative to the definition of “spendthrift provision” and the comment to the definition of “spendthrift provision” in Uniform Trust Code section 103(16), as well as the omission of a provision similar to Uniform Trust Code section 411(c) and the comments thereunder in T.C.A. § 35-15-411 and the comments thereto. Notwithstanding the preceding portions of this paragraph, it is beneficial to state that Tennessee desires the flexibility provided by T.C.A. §§ 35-15-410-35-15-417. However under the Tennessee Uniform Trust Code such flexibility must be balanced with the Tennessee Uniform Trust Code’s goals of assuring settlor’s intent and freedom of disposition.

The methodology for termination or modification of a noncharitable irrevocable trust by consent under the Tennessee Uniform Trust Code is significantly different than such methodology under the Uniform Trust Code and readers are directed to T.C.A. § 35-15-411 and the section comment thereunder for those differences, as well as an explanation of them.

Although the language in T.C.A. § 35-15-412, concerning modification or termination because of unanticipated circumstances or inability to administer trust effectively, is virtually identical to that contained in Uniform Trust Code section 412, the Tennessee Uniform Trust Code’s view of the meaning and effect of such language diverges, in some cases significantly, from that of the Uniform Trust Code. Readers are directed to the section comment to T.C.A. § 35-15-412 for a discussion of such divergence and the reasoning behind it.

Relative to T.C.A. § 35-15-414, concerning modification or termination of uneconomic trusts, both the language and the intent of such diverges from that of the Uniform Trust Code section 414. Readers are directed to the language contained in T.C.A. § 35-15-414, as well as to its section comment for a discussion of such divergence and the reasoning behind it.

T.C.A. §§ 35-15-415 and 35-15-416 (concerning reformation to correct mistakes and modification to achieve settlor’s tax objectives), together with the section comments thereunder, generally follow Uniform Trust Code sections 415 and 416 and their comments. However, the section comments to both Tennessee sections stress the emphasis of interpreting, to the extent possible, the interests of beneficiaries “as the interests of such beneficiaries are defined under the terms of the trust” as required by T.C.A. § 35-15-105(b)(3).

Although containing somewhat different language, under both T.C.A. § 35-15-417 and Uniform Trust Code section 417, trusts may be combined or divided. However, see the section comment to T.C.A. § 35-15-417 for reasons why additional language contained in T.C.A. § 35-15-417 provides more flexibility.

Under T.C.A. § 35-15-410, a trustee or beneficiary has standing to petition the court with respect to the actions described in T.C.A. §§ 35-15-411-35-15-416 and 35-15-417.

T.C.A. § 35-15-413 codifies and at the same time modifies the doctrine of cy pres, at least as such is applied in most states. The Tennessee Uniform Trust Code authorizes the court to apply cy pres not only if the original means becomes impossible or unlawful but also if the means become impracticable obsolete or ineffective (rejecting the Uniform Trust Code language of “wasteful,” such believed to be too vague and subject to too broad of interpretation). T.C.A. § 35-15-413 also creates a presumption of general charitable intent. Upon failure of the settlor’s original plan, the court cannot divert the trust property to a noncharity unless the terms of the trust expressly so provide. Again deviating from the Uniform Trust Code, when modifying or terminating a charitable trust in favor of a charitable interest, such must be done in a manner “that fulfills as nearly as possible the settlor’s intent and purposes.” Furthermore, absent a contrary provision in the terms of the trust, limits are placed on when a gift over to a noncharity can take effect upon failure or impracticability of the original charitable purpose. The gift over is effective only if, when the provision takes effect, the trust property is to revert to the settlor and the settlor

is still living, or fewer than 21 years have elapsed since the date of the trust's creation. A reader is directed to the section comment to T.C.A. § 35-15-413 to determine the extent of such section's deviation from Uniform Trust Code section 413 and the comments thereunder. In addition to the persons listed in the Uniform Trust Code, under the Tennessee Uniform Trust Code, a trust advisor or trust protector holding the power to do so may maintain an action to enforce a charitable trust or to apply cy pres.

The requirements for a trust's creation, such as the necessary level of capacity and the requirement that a trust have a legal purpose, are controlled by statute and common law, not by the settlor. But note that Tennessee has no requirement that a trust not have a purpose contrary to public policy or that a trustee need be required to act in good faith. Moreover, note the stricter standard by which a settlor's intent relative to the interests for the benefit of beneficiaries is to be determined. T.C.A. § 35-15-105(b)(1)-35-15-105(b)(3) and T.C.A. § 35-15-404. A settlor may not negate the court's ability to modify or terminate a trust to the extent provided for in T.C.A. §§ 35-15-410--35-15-416. See T.C.A. § 35-15-105(b)(4). However, a settlor is free to restrict or modify the trustee's power to terminate an uneconomic trust as provided in T.C.A. § 35-15-414, and the trustee's power to combine and divide trusts as provided in T.C.A. § 35-15-417.

35-15-401. Methods of creating trust

A trust may be created by:

- (1) The transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;
- (2) The 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; or
- (4) A court pursuant to its statutory or equitable powers.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-401.

This section is based on Restatement (Third) of Trusts § 10 (Tentative Draft No. 1, approved 1996), and Restatement (Second) of Trusts § 17 (1959). Under the methods specified for creating a trust in this section, a trust is not created until it receives property. For what constitutes an adequate property interest, see Restatement (Third) of Trusts §§ 40-41 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts §§ 74-86 (1959). The property interest necessary to fund and create a trust need not be substantial. A revocable designation of the trustee as beneficiary of a life insurance policy or employee benefit plan has long been understood to be a property interest sufficient to create a trust. See T.C.A. § 35-15-103 for the definition of "property." Furthermore, the property interest need not be transferred contemporaneously with the signing of the trust instrument. A trust instrument signed during the settlor's lifetime is not rendered invalid simply because the trust was not created until property was transferred to the trustee at a much later date, including by contract after the settlor's death. A pour-over devise to a previously unfunded trust is also valid and may constitute the property interest creating the trust. See Uniform Testamentary Additions to Trusts Act § 1 (1991), codified at Uniform Probate Code § 2-511 (pour-over devise to trust valid regardless of existence, size, or character of trust corpus). See also Restatement (Third) of Trusts § 19 (Tentative Draft No. 1, approved 1996).

While this section refers to transfer of property to a trustee, a trust can be created even though for a period of time no trustee is in office. See Restatement (Third) of Trusts § 2 cmt. g (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 2 cmt. i (1959). A trust can also be created without notice to or acceptance by a trustee or beneficiary. See Restatement (Third) of Trusts § 14 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 35-36 (1959).

Though the list of methods specified in this section is not an exclusive list, it is more exhaustive than that contained in section 401 of the Uniform Trust Code in that this section also specifically provides for the creation of a trust by a court pursuant to its statutory or equitable powers in accord with T.C.A. § 35-15-102. For methods of creating a trust in general, see Restatement (Third) of Trusts § 1 cmt. a (Tentative Draft No. 1, approved 1996); Uniform Probate Code § 2-212 (elective share of incapacitated surviving spouse to be held in trust on terms specified in statute); Uniform Probate Code § 5-411(a)(4) (conservator may create trust with court approval); Restatement (Second) of Trusts § 17 cmt. i (1959) (trusts created by statutory right to bring wrongful death action).

A trust can also be created by a promise that creates enforceable rights in a person who immediately or later holds these rights as trustee. See Restatement (Third) of Trusts § 10(e) (Tentative Draft No. 1, approved 1996). A trust thus created is valid notwithstanding that the trustee may resign or die before the promise is fulfilled. Unless expressly made personal, the promise can be enforced by a successor trustee. For examples of trusts created by means of promises enforceable by the trustee, see Restatement (Third) of Trusts § 10 cmt. g (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 14 cmt. h, 26 cmt. n (1959).

A trust created by self-declaration is best created by reregistering each of the assets that comprise the trust into the settlor's name as trustee. However, such reregistration is not necessary to create the trust. See, Restatement (Third) of Trusts § 10 cmt. e (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 17 cmt. a (1959). A declaration of trust can be funded merely by attaching a schedule listing the assets that are to be subject to the trust without executing separate instruments of transfer. But such practice can make it difficult to later confirm title with third party transferees and for this reason is not recommended.

While a trust created by will may come into existence immediately at the testator's death and not necessarily only upon the later transfer of title from the personal representative, T.C.A. § 35-15-701 makes clear that the nominated trustee does not have a duty to act until there is an acceptance of the trusteeship, express or implied. Moreover, T.C.A. § 35-15-701 makes it clear that a unless accepted, a nominated trustee has a reasonable time after knowing both that they have been designated as a trustee, as well as the nature of the assets that comprise the trust to reject such appointment. To avoid an implied acceptance, a nominated testamentary trustee who is monitoring the actions of the personal representative but who has not yet made a final decision on acceptance should inform the beneficiaries that the nominated trustee has assumed only a limited role. The failure so to inform the beneficiaries could result in liability if misleading conduct by the nominated trustee causes harm to the trust beneficiaries. See Restatement (Third) of Trusts § 35 cmt. b (Tentative Draft No. 2, approved 1999).

While this subsection (c) of this section confirms the familiar principle that a trust may be created by means of the exercise of a power of appointment the Tennessee Uniform Trust Code does not legislate comprehensively on the subject of powers of appointment but addresses only selected issues. See T.C.A. § 35-15-302 (representation by holder of any power of appointment and not just a general testamentary power of appointment as in the Uniform Trust Code) and T.C.A. § 35-15-603 concerning the rights of holder of power of withdrawal. For the law on powers of appointment generally, see Restatement (Second) of Property: Donative Transfers §§ 11.1-24.4 (1986); Restatement (Third) of Property: Wills and Other Donative Transfers (in progress). Notwithstanding the references to the respective restatements, The provisions of the Tennessee Uniform Trust Code relative to powers of appointment diverge significantly from such restatements. To the extent the Tennessee Uniform Trust Code is in conflict with any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

35-15-402. Requirements for creation

(a) A trust is created only if:

- (1) The settlor has capacity to create a trust;
- (2) 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 § 35-15-408; or
- (C) A trust for a noncharitable purpose, as provided in § 35-15-409;
- (4) The trustee has duties to perform; and
- (5) The same person is not the sole trustee and sole beneficiary.

(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.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-402.

Subsection (a) codifies the basic requirements for the creation of a trust. To create a valid trust, the settlor must indicate an intention to create a trust. See Restatement (Third) of Trusts § 13 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 23 (1959). But only such manifestations of intent as are admissible as proof in a judicial proceeding may be considered. See section T.C.A. § 35-15-103 for the definition of "terms of a trust."

To create a trust, a settlor must have the requisite mental capacity. To create a revocable or testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have capacity during lifetime to transfer the property free of trust. See T.C.A. § 35-15-601 (capacity of settlor to create revocable trust), and See generally Restatement (Third) of Trusts § 11 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 18-22 (1959); and Restatement (Third) of Property: Wills and Other Donative Transfers § 8.1 (Tentative Draft No. 3, 2001).

Note that under the Tennessee Uniform Trust Code and unlike under the law of some states (e.g., Florida), neither a revocable or irrevocable trust (pour-over or non-pour-over), even one containing testamentary dispositions, need be made with the formalities of a will. T.C.A. § 35-15-601.

Subdivision (a)(3) requires that a trust, other than a charitable trust, a trust for the care of an animal, or a trust for another valid noncharitable purpose, have a definite beneficiary. While some beneficiaries will be definitely ascertained as of the trust's creation, subsection (b) recognizes that others may be ascertained in the future as long as this occurs within the applicable perpetuities period. The definite beneficiary requirement does not prevent a settlor from making a disposition in favor of a class of persons. Class designations are valid as long as the membership of the class will be finally determined within the applicable perpetuities period. For background on the definite beneficiary requirement, see Restatement (Third) of Trusts §§ 44-46 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts §§ 112-122 (1959).

Subdivision (a)(4) recites standard doctrine that a trust is created only if the trustee has duties to perform. See Restatement (Third) of Trusts § 2 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 2 (1959). Trustee duties are usually active, but a validating duty may also be passive, implying only that the trustee has an obligation not to interfere with the trustee's enjoyment of the trust property. Such passive trusts, while valid under the Tennessee Uniform Trust Code, may be terminable if this state recognizes the common law Statute of Uses. Whether Tennessee ever recognized such statute is not clear and different compendiums of older Tennessee law disagree, see *The Encyclopedic Digest of Tennessee Reports: Being a Complete Encyclopedia and Digest of All the Tennessee Case Law Up to and Including Vol. 115 Tennessee Reports*, Cooper's Chancery Reports, Shannon's Tennessee Cases, and the Tennessee Chancery Appeals Reports, Volume 12, Michie Company (1908) at 125 (now only available by Google eBook) and *A Treatise on the Law of Trusts and Trustees*, 7th Ed., Vol. 1., by

Jairus Ware Perry, revised and enlarged by Raymond C. Baldes (1929) at 529 (available by Google eBooks). In the latter publication it states "In Tennessee, the statute of uses seems to be in force." Citing: *Hughes v. Farmers' Sav. & Bldg. & Loan Ass'n*, 46 S.W. 362 (Tenn. Ch. App. 1897); *Temple v. Ferguson*, 110 Tenn. 84 (Tenn. 1903); *Hart v. Bayliss*, 97 Tenn. 72 (Tenn. 1896). See Restatement (Third) of Trusts § 6 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 67-72 (1959).

Subdivision (a)(5) addresses the doctrine of merger, which, as traditionally stated, provides that a trust is not created if the settlor is the sole trustee and sole beneficiary of all beneficial interests. The doctrine of merger has been inappropriately applied by the courts in some jurisdictions to invalidate self-declarations of trust in which the settlor is the sole life beneficiary but other persons are designated as beneficiaries of the remainder. The doctrine of merger is properly applicable only if all beneficial interests, both life interests and remainders, are vested in the same person, whether in the settlor or someone else. An example of a trust to which the doctrine of merger would apply is a trust of which the settlor is sole trustee, sole beneficiary for life, and with the remainder payable to the settlor's probate estate. On the doctrine of merger generally, see Restatement (Third) of Trusts § 69 (Tentative Draft No. 3, 2001); Restatement (Second) of Trusts § 341 (1959).

Subsection (c) allows a settlor to empower the trustee to select the beneficiaries even if the class from whom the selection may be made cannot be ascertained. Such a provision would fail under traditional doctrine; it is an imperative power with no designated beneficiary capable of enforcement. Such a provision is valid, however, under both the Tennessee Uniform Trust Code and the restatement, if there is at least one person who can meet the description. If the trustee does not exercise the power within a reasonable time, the power fails and the property will pass by resulting trust. See Restatement (Third) of Trusts § 46 (Tentative Draft No. 2, approved 1999). See also Restatement (Second) of Trusts § 122 (1959); Restatement (Second) of Property: Donative Transfers § 12.1 cmt. e (1986).

35-15-403. Trusts created in other jurisdictions

A trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation:

- (1) The settlor was domiciled, had a place of abode, or was a national;
- (2) A trustee was domiciled or had a place of business; or
- (3) Any trust property was located.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-403.

The validity of a trust created by will is ordinarily determined by the law of the decedent's domicile. No such certainty exists with respect to determining the law governing the validity of inter vivos trusts. Generally, at common law a trust was created if it complied with the law of the state having the most significant contacts to the trust. Contacts for making this determination include the domicile of the trustee, the domicile of the settlor at the time of trust creation, the location of the trust property, the place where the trust instrument was executed, and the domicile of the beneficiary. See 5A Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* §§ 597, 599 (4th ed. 1987). Furthermore, if the trust has contacts with two or more states, one of which would validate the trust's creation and the other of which would deny the trust's validity, the tendency is to select the law upholding the validity of the trust. See 5A Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* 600 (4th ed. 1987).

This section extends the common law rule by validating a trust if its creation complies with the law of any of a variety of states in which the settlor or trustee had the requisite contacts. Pursuant to this section, a trust not

created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation the settlor was domiciled, had a place of abode, or was a national; the trustee was domiciled or had a place of business; or any trust property was located.

This section is somewhat comparable to section 2-506 of the Uniform Probate Code, which validates wills executed in compliance with the law of a variety of places in which the testator had a significant contact. Unlike the Uniform Probate Code, however, this section is not limited to execution of the instrument but applies to the entire process of a trust's creation, including compliance with the requirement that there be trust property. In addition, unlike the Uniform Probate Code, this section validates a trust valid under the law of the domicile or place of business of the designated trustee, or if valid under the law of the place where any of the trust property is located.

The section does not supersede any requirements of this state relative to the valid transfer of real property.

35-15-404. Trust purposes

A trust may be created only to the extent its purposes are lawful and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries as the interests of such beneficiaries are defined under the terms of the trust.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-404.

The provisions of this section in some ways diverge significantly from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

This section requires that the purposes of a trust be lawful and possible to achieve. It also requires that a trust and its terms be for the benefit of its beneficiaries.

Unlike the Uniform Trust Code and the restatements, this section does not contain a prohibition of purposes "contrary to public policy." The Tennessee Uniform Trust Code recognizes that some purposes may be so noxious as to truly offend public policy. However, the existence of an offense rising to such level should not be easily found, and under the Tennessee trust statutes such existence is likely more difficult to find than under the Uniform Trust Code, some other jurisdictions' laws and the various restatements. This view is in keeping with primary objectives of the Tennessee trust statutes that a settlor's intent be the lodestar by which a trust is interpreted, that such intent be carried out and that settlors have the freedom to dispose of their assets to whom and in the manner they wish, all to the greatest extent constitutionally allowable, as provided by T.C.A. § 35-15-105.

Moreover, unlike under the Uniform Trust Code, T.C.A. § 35-15-105 requires that a determination of whether a trust and its terms are "for the benefit of its beneficiaries," be made solely considering how such "interests of such beneficiaries are defined under the terms of the trust." [emphasis added]

Pursuant to T.C.A. § 35-15-402, a trust must have an identifiable beneficiary unless the trust is of a type that does not have beneficiaries in the usual sense, such as a charitable trust or, as provided in T.C.A. §§ 35-15-408 and 35-15-409, trusts for the care of an animal or other valid noncharitable purpose. The general purpose of trusts having identifiable beneficiaries is to benefit those beneficiaries in accordance with their interests as such interest is defined in the terms of the trust.

While a settlor has considerable latitude in specifying how a particular trust purpose is to be pursued, the

administrative and other nondispositive trust terms must reasonably relate to this purpose and not divert the trust property to achieve a trust purpose that is invalid, such as one which is frivolous or capricious.

The provision of T.C.A. § 35-15-412 that allows the court to modify administrative terms that are impracticable, wasteful (but relative to the use in this section of the word “wasteful,” see the interpretation given to such word in the section comment to T.C.A. § 35-15-412, resulting in such word being interpreted to mean “obsolete or ineffective,” such interpretation arguably being applicable to this section as well), or impair the trust’s administration, is a specific application of the requirement that a trust and its terms be for the benefit of the beneficiaries as the interests of such beneficiaries are defined in the terms of the trust. The fact that it is determined that a settlor suggests or directs an unlawful or other inappropriate means for performing a trust does not invalidate the trust if the trust has a substantial purpose that can be achieved by other methods. See Restatement (Third) of Trusts § 28 cmt. e (Tentative Draft No. 2, approved 1999).

Persons interpreting T.C.A. §§ 35-15-412 and 35-15-413 to examine if the terms meet the standards therein for modification or termination are directed to this section, T.C.A. §§ 35-15-105, as well as the overriding emphasis of the Tennessee Uniform Trust Code on settlor’s intent and freedom of disposition. In all of the above ways, the Tennessee Uniform Trust Code diverges significantly from the Uniform Trust Code and from certain portions of the restatements. In all such cases of divergence, Tennessee law controls.

35-15-405. Charitable purposes -- Enforcement

(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 (1) 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.

COMMENT.

Unless provided otherwise hereinafter, any reference to “section,” “subsection” or “subdivision” means all, or such portion of, T.C.A. § 35-15-405.

Under the Tennessee Uniform Trust Code, the law relative to charitable trusts diverges somewhat from the Uniform Trust Code and the restatements. To the extent this section or other provisions of the law concerning charitable trusts under the Tennessee Uniform Trust Code is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

The required purposes of a charitable trust specified in subsection (a) restate the well-established categories of charitable purposes listed in Restatement (Third) of Trusts § 28 (Tentative Draft No. 3, approved 2001), and Restatement (Second) of Trusts § 368 (1959), which ultimately derive from the Statute of Charitable Uses, 43 Eliz. I, c.4 (1601). The directive to the courts to validate purposes the achievement of which are beneficial to the community has proved to be remarkably adaptable over the centuries.

Charitable trusts are subject to the restriction in T.C.A. § 35-15-404 that a charitable trust purpose must be legal. Unlike the Uniform Trust Code, T.C.A. § 35-15-404 does not require that a trust purpose not be contrary to public policy. See the section comment to T.C.A. § 35-15-404 for the effect of this under the Tennessee Uniform Trust Code.

Under subsection (b), a trust that states a general charitable purpose does not fail if the settlor neglected to

specify a particular charitable purpose or organization to receive distributions. The court may instead validate the trust by specifying particular charitable purposes or recipients, or delegate to the trustee the framing of an appropriate scheme. See Restatement (Second) of Trusts § 397 cmt. d (1959). Subsection (b) of this section is a corollary to T.C.A. § 35-15-413, which states the doctrine of cy pres. But note that, a court's ability to apply cy pres under T.C.A. § 35-15-413 is subject to a stricter standard than that afforded by the Uniform Trust Code. Under T.C.A. § 35-15-413, a trust failing to state a general charitable purpose does not fail upon failure of the particular means specified in the terms of the trust. However, the court must instead apply the trust property in a manner that fulfills as nearly as possible the settlor's charitable intent and purposes to the extent they can be ascertained. On the other hand, the Uniform Trust Code only requires that the court apply the trust property in a manner consistent with the settlor's charitable purposes to the extent they can be ascertained. The language of the Tennessee Uniform Trust Code contained in T.C.A. § 35-15-413 is designed to restrict, to the greatest extent possible, the likelihood that application of trust property strays far from a settlor's intent, to the extent it can be ascertained, and therefore results in an application in favor of some watered down, vague and general charitable purpose. See section comment T.C.A. § 35-15-413 for a further discussion.

Subsection (b) does not apply to the long-established estate planning technique of delegating to the trustee the selection of the charitable purposes or recipients. In that case, judicial intervention to supply particular terms is not necessary to validate the creation of the trust. The necessary terms instead will be supplied by the trustee. See Restatement (Second) of Trusts § 396 (1959). Judicial intervention under subsection (b) will become necessary only if the trustee fails to make a selection. See Restatement (Second) of Trusts § 397 cmt. d (1959). Pursuant to subsection T.C.A. § 35-15-110, the charitable organizations selected by the trustee would not have the rights of qualified beneficiaries under the Tennessee Uniform Trust Code because they are not expressly designated to receive distributions under the terms of the trust. However, it is possible that a trust advisor or trust protector might have such rights, as well as the right to enforce the trust.

Contrary to Restatement (Second) of Trusts § 391 (1959), subsection (c) grants a settlor standing to maintain an action to enforce a charitable trust. The grant of standing to the settlor does not negate the right of the state attorney general to enforce either the trust and relevant interests thereto. For the law on the enforcement of charitable trusts, see Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. Hawaii L. Rev. 593 (1999).

Under the Tennessee Uniform Trust Code, a trust advisor or trust protector, given the power to do so, may also seek to enforce a charitable trust or for the application of cy pres.

35-15-406. Creation of trust induced by fraud, duress, or undue influence

A trust is void to the extent its creation was induced by fraud, duress, or undue influence.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-406.

This section is a specific application of Restatement (Third) of Trusts § 12 (Tentative Draft No. 1, approved 1996), and Restatement (Second) of Trusts § 333 (1959), which provide that a trust can be set aside or reformed on the same grounds as those which apply to a transfer of property not in trust, among which include undue influence, duress, and fraud, and mistake. This section addresses undue influence, duress, and fraud. For reformation of a trust on grounds of mistake, see T.C.A. § 35-15-415. See also Restatement (Third) of Property: Wills and Other Donative Transfers § 8.3 (Tentative Draft No. 3, approved 2001), which closely tracks the language above. Similar to a will, the invalidity of a trust on grounds of undue influence, duress, or fraud may be in whole or in part.

35-15-407. Evidence of oral trust

Except as required by a statute other than this chapter, a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-407.

While it is always advisable for a settlor to reduce a trust to writing, this section of the Tennessee Uniform Trust Code follows established law in recognizing oral trusts. Such trusts are viewed with caution, however. The requirement of this section that an oral trust can be established only by clear and convincing evidence is a higher standard than is in effect in many states. See Restatement (Third) of Trusts § 20 Reporter's Notes (Tentative Draft No. 1, approved 1996).

Absent some other specific statutory provision of this state, including but limited to such provisions requiring that transfers of real property be in writing, a trust need not be evidenced by a writing.

For a discussion of the general law concerning the Statute of Frauds, see Restatement (Second) of Trusts §§ 40-52 (1959). For a description of what the writing must contain, assuming that a writing is required, see Restatement (Third) of Trusts § 22 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 46-49 (1959). For a discussion of when the writing must be signed, see Restatement (Third) of Trusts § 23 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 41-42 (1959). For the law of oral trusts, see Restatement (Third) of Trusts § 20 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 43-45 (1959).

35-15-408. Trust for care of animal

(a) A trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one (1) animal alive during the settlor's lifetime, upon the death of the last surviving animal. The trust may not be enforced for more than ninety (90) years.

(b) A trust authorized by this section may be enforced by any of the following who are appointed under the terms of a trust: a trustee, trust advisor, trust protector or other person or, if no person is so appointed, by a person appointed by the court. In addition, 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) Property of a trust authorized by this section may be applied only to its intended use, 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 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.

COMMENT.

T.C.A. §§ 35-15-408 and 35-15-409 validate so called honorary trusts. Unlike honorary trusts created pursuant to the common law of trusts, which are arguably no more than powers of appointment, the trusts created by such two sections are valid and enforceable as trusts for a period of up to ninety (90) years. For a discussion of the common law doctrine, see Restatement (Third) of Trusts § 47 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 124 (1959).

T.C.A. §§ 35-15-408 addresses a particular type of honorary trust, the trust for the care of an animal. T.C.A. § 35-15-409 specifies the requirements for trusts without ascertainable beneficiaries that are created for other noncharitable purposes, often called "purpose trusts."

A trust for the care of an animal may last for the life of the animal. While the animal will ordinarily be alive on the date the trust is created, an animal may be added as a beneficiary after that date as long as the addition is made prior to the settlor's death. Animals in gestation but not yet born at the time of the trust's creation may also be covered by its terms. A trust authorized by this section may be created to benefit one designated animal or several designated animals. Subsection (a) provides that, regardless of the length of the life or lives of the animal(s), a trust for the care of an animal can only be enforced for a period of ninety (90) years.

T.C.A. §§ 35-15-408(b) and 35-15-409(2) address enforcement. Noncharitable trusts ordinarily may be enforced by their beneficiaries. However, for reasons similar to those applying to charitable trusts, no animal under a trust for the care of an animal as provided by T.C.A. § 35-15-408, nor anyone (person, entity or otherwise) benefiting from or having an interest in the purpose for which a trust is established under T.C.A. § 35-15-409 are beneficiaries as that term is defined in the Tennessee Uniform Trust Code. Moreover, relative to trusts controlled by T.C.A. §§ 35-15-408 and 35-15-409, there are no qualified beneficiaries under the Tennessee Uniform Trust Code.

At common law, a trust for the care of an animal or a trust without an ascertainable beneficiary created for a noncharitable purpose was unenforceable because there was no person authorized to enforce the trustee's obligations. T.C.A. §§ 35-15-408 and 35-15-409 close this gap. The intended use of a trust authorized by either section may be enforced by a person designated in the terms of the trust, which under the Tennessee Uniform Trust Code (but arguably not under the Uniform Trust Code, such not providing specifically for same) can include a trust advisor or trust protector. If no such person exists, a trust created under either section can be enforced by a person appointed by the court. Notwithstanding the above, in either case, such person, due solely to holding such enforcement power, is not a qualified beneficiary under the Tennessee Uniform Trust Code.

If the trust is created for the care of an animal, a person with an interest in the welfare of the animal also has standing to petition for an appointment to the court for someone to enforce the trust (and also has standing to so petition, but for removal of any such person). The person appointed by the court to enforce the trust should also be a person who has exhibited an interest in the animal's welfare. The concept of granting standing to a person with a demonstrated interest in the animal's welfare is derived from the Uniform Guardianship and Protective Proceedings Act, which allows a person interested in the welfare of a ward or protected person to file petitions on behalf of the ward or protected person. See, e.g., Uniform Probate Code §§ 5-210(b), 5-414(a).

T.C.A. §§ 35-15-408(c) and 35-15-409(3) address the problem of excess funds. If the court determines that the trust property exceeds the amount needed for the intended purpose and that the terms of the trust do not direct the disposition, a resulting trust is ordinarily created in the settlor or settlor's successors in interest. See Restatement (Third) of Trusts § 47 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 124 (1959). Successors in interest include the beneficiaries under the settlor's will, if the settlor has a will, or in the absence of an effective will provision, the settlor's heirs. The settlor may also anticipate the problem of excess funds by directing their disposition in the terms of the trust. The disposition of excess funds is within the settlor's control. See T.C.A. § 35-15-105(a). While a trust for an animal or for a noncharitable trust without ascertainable beneficiary is often not created until the settlor's death, T.C.A. §§ 35-15-408(a) and 35-15-409(1) allow either such type of trust to be created during the settlor's lifetime. Accordingly, if the settlor is still living, T.C.A. §§ 35-15-408(c) and 35-15-409(3) provide for distribution of excess funds to the settlor, and not to the settlor's successors in interest.

Should the means chosen not be particularly efficient, a trust created for the care of an animal can also be terminated by the trustee or court under T.C.A. § 35-15-414. Due to the nature of a trust for the care of an animal and the fact such trust has no beneficiaries, it is not possible to distribute the trust property "to the or for the benefit of the beneficiaries]" as provided in such section. Therefore, termination of a trust under such section, requires that the trustee or court develop an alternative means for carrying out the trust purposes in a manner that conforms as nearly as possible to the intention of the settlor.

T.C.A. §§ 35-15-408 and 35-15-409 are suggested by section 2-907 of the Uniform Probate Code, but much of such enumerated sections is new.

35-15-409. Noncharitable trust without ascertainable beneficiary

Except as otherwise provided in § 35-15-408 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 ninety (90) years;

(2) A trust authorized by this section may be enforced by any of the following who are appointed under the terms of a trust: a trustee, trust advisor, trust protector or other person; or if no person is so appointed, by a person appointed by the court; and

(3) Property of a trust authorized by this section may be applied only to its intended use, 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 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.

COMMENT.

T.C.A. § 35-15-409 authorizes two types of trusts without ascertainable beneficiaries; trusts for general but noncharitable purposes, and trusts for a specific noncharitable purpose other than the care of an animal, the latter of which is controlled by T.C.A. § 35-15-408.

Such trusts are often referred to as "purpose trusts."

Examples of trusts for general noncharitable purposes include a bequest of money to be distributed to such objects of benevolence as the trustee might select. Unless such attempted disposition was interpreted as charitable, at common law the disposition was honorary only and did not create a trust.

Under T.C.A. § 35-15-409, however, the disposition under this form of purpose trust is enforceable as a trust for a period of up to ninety (90) years, which is significantly longer than the Uniform Trust Code default of twenty-one (21) years.

Although there are numerous types of trusts for specific noncharitable purposes, such purposes being virtually unlimited, a common example of a such type of trust is a trust for the care of a cemetery plot. The lead-in language to the section recognizes that some special purpose trusts, particularly those for care of cemetery plots, are subject to other statutes. Such legislation will typically endeavor to facilitate perpetual care as opposed to care limited to ninety (90) years as under this section.

For the requirement that a trust, particularly the type of trust authorized by this section, must have a purpose that is not capricious, see T.C.A. § 35-15-404 and the comments thereunder. However, note that unlike under the Uniform Trust Code, T.C.A. § 35-15-404 and the comments thereunder contain no requirement that the purpose of a trust "not be contrary to public policy."

For examples of the types of trusts authorized by this section, see Restatement (Third) of Trusts § 47 (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts § 62 cmt. w and § 124 (1959). The case law on capricious purposes is collected in 2 Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 124.7 (4th ed. 1987).

T.C.A. § 35-15-409 is similar to section T.C.A. § 35-15-408, although the comments under the former section are less detailed than those under the latter section. Much comment to T.C.A. § 35-15-408 also applies to this section and in many cases the comments to T.C.A. § 35-15-408 specifically refer their application to T.C.A. § 35-15-409.

It should be noted that a noncharitable trust without ascertainable beneficiary is a type of trust that can likely

be benefitted greatly by the appointment of a trust advisor or trust protector pursuant to part 12 of the Tennessee Uniform Trust Code.

35-15-410. Modification or termination of trust -- Proceedings for approval or disapproval

(a) In addition to the methods of termination prescribed by §§ 35-15-411—35-15-414, 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 or impossible to achieve.

(b) A proceeding to approve or disapprove a proposed modification or termination under §§ 35-15-411 -- 35-15-416, or trust combination or division under § 35-15-417, may be commenced by a trustee or beneficiary. The settlor of a charitable trust may maintain a proceeding to modify the trust under § 35-15-413.

(c) Nothing in this section or this chapter is intended to create or imply a duty for a trustee to make or seek approval of a modification, termination, combination or division, and a trustee is not liable for not making or seeking approval of a modification, termination, combination or division.

(d) No modification, termination, combination or division may be made pursuant to §§ 35-15-411 -- 35-15-417 that:

(1) Results in the trust not qualifying for the federal or state marital or charitable income, gift, estate or inheritance tax deduction if the trust would qualify but for the modification, termination, combination or division;

(2) Results in the trust being subject to the federal or state generation-skipping transfer tax if the trust would not be subject to the generation-skipping transfer tax but for the modification, termination, combination or division; or

(3) Results in an overall increase in federal or state estate, inheritance, gift or generation-skipping transfer taxes.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-410.

The provisions of this section in some ways diverge significantly from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

Terminations under subsection (a) may be in either in whole or in part.

Note that unlike Uniform Trust Code section 410:

T.C.A. § 35-15-410 contains no provision that a trust terminates to the extent the purposes of the trust have become contrary to public policy. For a discussion of the reason for this, as well as the Tennessee Uniform Trust Code's view regarding "public policy," see the section comment to T.C.A. § 35-15-404.

It is far easier for a purpose of a trust to rise to being "material" under the Tennessee Uniform Trust Code than under the Uniform Trust Code. This is due to T.C.A. § 35-15-105(c), differences between the language to the section comment of T.C.A. § 35-15-103 relative to the definition of "spendthrift provision" and the comment to the definition of "spendthrift provision" in Uniform Trust Code section 103(16), as well as the omission of a provision similar to Uniform Trust Code section 411(c) in T.C.A. § 35-15-411 and differences in the comments under such respective versions of such section.

Other types of terminations, all of which require action by a court, trustee, or beneficiaries, are covered in T.C.A. §§ 35-15-411--35-15-414, which also address trust modification. Of these sections, all but T.C.A. § 35-15-411

apply to charitable trusts and all but T.C.A. § 35-15-413 apply to noncharitable trusts.

Withdrawal of the trust property is not an event terminating a trust. The trust remains in existence although the trustee has no duties to perform unless and until property is later contributed to the trust.

Subsection (b) specifies the persons who have standing to seek court approval or disapproval of proposed trust modifications, terminations, combinations, or divisions. An approval or disapproval may be sought for an action that does not require court permission, including a petition questioning the trustee's distribution upon termination of a trust under one hundred thousand dollars (\$100,000) under T.C.A. § 35-15-414, and a petition to approve or disapprove a proposed trust division or consolidation under T.C.A. § 35-15-417. Unlike under the Uniform Trust Code, under this subsection (b) a settlor has no right or power to commence a judicial proceeding to approve or disapprove a proposed modification or termination of a noncharitable irrevocable trust under T.C.A. § 35-15-411. Contrary to Restatement (Second) of Trusts § 391 (1959), subsection (b) grants a settlor standing to petition the court under T.C.A. § 35-15-413 to apply cy pres to modify the settlor's charitable trust.

Subsection (c) does not have a Uniform Trust Code equivalent and clarifies that a trustee has no duty to make or seek approval of any modification, termination, combination, or division of any trust and cannot be held liable for failing to do so.

Subsection (d) does not have a Uniform Trust Code equivalent and prohibits a modification, termination, combination, or division that would cause adverse tax consequences.

Note that under the Tennessee Uniform Trust Code, a trust advisor or trust protector may have the power to directly or indirectly modify a trust without being subject to T.C.A. §§ 35-15-410-35-15-412 and 35-15-414.

35-15-411. Modification or termination of noncharitable irrevocable trust by consent

(a) During the settlor's lifetime, a noncharitable irrevocable trust may be modified or terminated by the trustee upon consent of all qualified beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust if the settlor does not object to the proposed modification or termination. The trustee shall notify the settlor of the proposed modification or termination not less than sixty (60) days before initiating the modification or termination. The notice of modification or termination must include:

- (1) An explanation of the reasons for the proposed modification or termination;
- (2) The date on which the proposed modification or termination is anticipated to occur; and
- (3) The date, not less than sixty (60) days after the giving of the notice, by which the settlor must notify the trustee of an objection to the proposed modification or termination.

(b) Following the settlor's death, a noncharitable irrevocable trust may be terminated upon consent of all of the qualified 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 qualified beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.

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

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

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

(e) Solely for purposes of this section, the term "noncharitable irrevocable trust" refers to a trust that is not revocable by the settlor with respect to which:

(1) No federal or state income, gift, estate or inheritance tax charitable deduction was allowed upon transfers to the trust; and

(2) The value of all interests in the trust owned by charitable organizations does not exceed five percent (5%) of the value of the trust.

(f) Notwithstanding subsection (a), the trustee may seek court approval of a modification or termination.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-411.

The provisions of this section in some ways diverge significantly from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

This section describes the circumstances in which termination or modification of a noncharitable irrevocable trust may be compelled by the qualified beneficiaries, with or without the objection of the settlor. For provisions governing modification or termination of trusts without the need to seek beneficiary consent, see T.C.A. § 35-15-412 (modification or termination due to unanticipated circumstances or inability to administer trust effectively), T.C.A. § 35-15-414 (termination or modification of uneconomic noncharitable trust), and T.C.A. § 35-15-416 (modification to achieve settlor's tax objectives). If the trust is revocable by the settlor, the method of revocation specified in T.C.A. § 35-15-602 applies.

Subsection (a) states the requirements under this section for termination or modification by consent of the trustee and all qualified beneficiaries during the settlor's life. Note that the procedure under subsection (a) is significantly different than under either option contained in Uniform Trust Code section 411(a). First the action to modify or terminate cannot be brought by the settlor and does not require the settlors pre-consent thereto. Likewise it does not require court intervention or approval. Moreover, it does not require consent of all beneficiaries. Under this subsection (a), upon the agreement of the trustee and all qualified beneficiaries such trust can be terminated or modified, even if such action is inconsistent with a material purpose of the trust. The settlor's interests are protected by requiring specified notice be given to the settlor sixty (60) days prior to the effective date of the action. The settlor must notify the trustee of an objection to the action within such sixty (60) days or such action is effective. Should the settlor file such objection, such action will not take place. There is no alternative method under T.C.A. § 35-15-411 to effect such modification or termination during a settlor's life if the settlor so objects (though such may be available under other sections of part 4 of the Tennessee Uniform Trust Code and a trust advisor or trust protector, if such holds the power to do so, may effect such action regardless of the requirements of subsection (a)).

Subsection (b) states the requirements under this section for termination or modification upon consent of all qualified beneficiaries by the court following the settlor's death. Note that the Tennessee Uniform Trust Code only requires consent of all qualified beneficiaries and not of all beneficiaries as under Uniform Trust Code section 411(b). Moreover, unlike Uniform Trust Code section 411(b), such subsection (b) only applies after the settlor's death. Uniform Trust Code section 411(b) applies whether or not a settlor is alive.

Under subsection (b), a trust may be modified or terminated over a trustee's objection (but unlike under Uniform Trust Code section 411(b), not over the objection of a settlor while the settlor is living). Regardless, pursuant to T.C.A. § 35-15-410, a trustee has standing to object to a proposed termination or modification under subsection (b).

Although, concurrent with the 2007 amendments to the Tennessee Uniform Trust Code consideration was given to allowing the trustee and qualified beneficiaries to consent to modification or termination after the

settlor's death, the consensus of the drafters of the Tennessee Uniform Trust Code was that requiring court approval was a beneficial protection.

Any requirement by this section of court approval does not apply to matters specifically authorized to be handled by nonjudicial settlement under T.C.A. § 35-15-111. The actions authorized under T.C.A. § 35-15-111 are not an exclusive list. Nonjudicial settlement agreements between the trustee and the qualified beneficiaries should be applicable to the resolution of any matter of an administrative nature that does not alter a beneficiary's income or principal interest in the trust. Any proposed change that alters a beneficiary's income or principal interest in the trust must be submitted for court approval. A proposal to extend the term of a trust or to convert the trust to a total return trust in compliance with T.C.A. § 35-6-101 et seq. is not an alteration of a beneficiary's income or principal interest in the trust.

Subsection (c) directs how the trust property is to be distributed following a termination under either subsection (a) or (b). Note that the Tennessee Uniform Trust Code only requires agreement as to distribution by all qualified beneficiaries and not by all beneficiaries, as is required by Uniform Trust Code section 411(c).

The provisions of part 3 [T.C.A. §§ 35-15-301--35-15-305] on representation, virtual representation and the appointment and approval of representatives appointed by the court apply to the determination of whether the required beneficiaries have signified consent under this section. The authority to consent on behalf of another person, however, does not include authority to consent over the other person's objection. See T.C.A. § 35-15-301(b). Regarding the persons who may consent on behalf of a beneficiary, see T.C.A. §§ 35-15-302--35-15-305. Note that unlike under the Uniform Trust Code, a consent given by a representative is invalid only to the extent there is a material conflict of interest between the representative and the person represented. The Uniform Trust Code requires no conflict of interest. Due to the Tennessee Uniform Trust Code's "materiality" requirement regarding conflicts of interest and the availability of representation, virtual representation of a beneficiary's interest by another beneficiary pursuant to section T.C.A. § 35-15-304 should be much more readily available in a trust termination case than under Uniform Trust Code section 304 (to which the comments thereto state such representation is "rarely" available in a trust termination case). It should likewise be routinely available in cases involving trust modification, such as a grant to the trustee of additional powers. If virtual or other form of representation is unavailable (such being much less likely under the Tennessee Uniform Trust Code than under the Uniform Trust Code), T.C.A. § 35-15-305 permits the court to appoint a representative who may give the necessary consent to the proposed modification or termination on behalf of the minor, incapacitated, unborn, or unascertained beneficiary. The ability to use virtual and other forms of representation to consent on a beneficiary's behalf to a trust termination or modification has not traditionally been part of the law, although there are some notable exceptions. Compare Restatement (Second) § 337(1) (1959) (beneficiary must not be under incapacity), with *Hatch v. Riggs National Bank*, 361 F.2d 559 (D.C. Cir. 1966) (guardian ad litem authorized to consent on beneficiary's behalf).

Termination under subsection (a) does not require a finding that the trust no longer serves a material purpose.

On the other hand, subsection (b) does require that a court conclude that no material purpose exists that requires the trust to continue, the finding of such, therefore, blocking termination. Moreover, it is far easier for a purpose of a trust to rise to "material" status under the Tennessee Uniform Trust Code than under the Uniform Trust Code. This is due to T.C.A. § 35-15-105(c), differences between the language to the section comment of T.C.A. § 35-15-103 relative to the definition of "spendthrift provision" and the comment to the definition of "spendthrift provision" in Uniform Trust Code section 103(16), as well as the omission of a provision similar to Uniform Trust Code section 411(c), as well as the language relevant thereto, in T.C.A. § 35-15-411 and the comments thereunder.

Notwithstanding the previous paragraph, subsection (b) will still allow the qualified beneficiaries to compel termination of a trust that still serves a material purpose if the reasons for termination outweigh the continuing material purpose.

Moreover, subject to the potentially higher likelihood that a material trust purpose exists as discussed in the paragraph above, subsection (b), similar to Restatement Third but not Restatement Second, allows modification by the qualified beneficiaries of any term of the trust if the court concludes that modification is not inconsistent with a material purpose of the trust. Restatement Third, though, goes further than the Tennessee Uniform Trust Code in also allowing the qualified beneficiaries to use trust modification as a basis for removing the trustee if removal would not be inconsistent with a material purpose of the trust. Such is not the case under the Tennessee Uniform Trust Code. This is because T.C.A. § 35-15-706 is the exclusive provision regarding removal of trustees. T.C.A. § 35-15-706(b)(4) recognizes that a request for removal upon unanimous agreement of the qualified beneficiaries is a factor for the court to consider, but before removing the trustee the court must also find that such action best serves the interests of all the beneficiaries, that removal is not inconsistent with a material purpose of the trust, and that a suitable cotrustee or successor trustee is available. Compare T.C.A. § 35-15-706(b)(4), with Restatement (Third) Section 65 cmt. f (Tentative Draft No. 3, approved 2001).

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

Subsection (c) recognizes that the qualified beneficiaries' power to compel termination of the trust includes the right to direct how the trust property is to be distributed. Once termination has been approved, how the trust property is to be distributed is solely subject to the agreement of the qualified beneficiaries.

Note that while no gift tax consequences result from a termination as long as the beneficiaries agree to distribute the trust property in accordance with the value of the beneficiary's respective proportionate interests, significant gift taxes can occur if such beneficiaries do not so agree, or in any event distribute the property in a manner not so in accordance.

Subsection (d) creates a procedure for judicial approval of a proposed termination or modification during the settlor's life when, although the settlor did not object after being provided with the requisite notice, less than all of the qualified beneficiaries consented to such termination or modification.

Subsection (d) also, similar to Restatement (Third) of Trusts § 65 cmt. c (Tentative Draft No. 3, approved 2001), and Restatement (Second) of Trusts §§ 338(2) & 340(2) (1959), addresses situations after the settlor's death in which a termination or modification is requested by less than all the qualified beneficiaries, either because a qualified beneficiary objects, the consent of a qualified beneficiary cannot be obtained, or representation is either unavailable or its application uncertain.

In either case, subsection (d) allows the court to fashion an appropriate order protecting the interests of the nonconsenting qualified beneficiaries while at the same time permitting the remainder of the trust property to be distributed without restriction. The order of protection for the nonconsenting qualified beneficiaries might include partial continuation of the trust, the purchase of an annuity, or the valuation and cashout of the interest.

Note that relative to all the provisions of subsection (d), only the qualified beneficiaries and their interests are subject to consideration. This is unlike Uniform Trust Code section 411(e) (the corresponding provision in the Uniform Trust Code), under which the all beneficiaries and their interests are subject to consideration.

Subsection (e) is not contained in the Uniform Trust Code. It is a tax savings provision and clarifies that this section applies to trusts with a small charitable interest if no charitable tax deduction was allowed with respect to the funding of the trust.

Subsection (f) is not contained in the Uniform Trust Code. It gives a trustee the right to always seek court approval of a modification or termination under subsection (a), even though such is not otherwise required.

Note that under the Tennessee Uniform Trust Code a trust advisor or trust protector may have the power to directly or indirectly modify a trust without being subject to T.C.A. §§ 35-15-410-35-15-412 and 35-15-414.

35-15-412. Modification or termination because of unanticipated circumstances or inability to administer trust effectively

(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.

(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.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-412.

This section broadens the court's ability to apply equitable deviation to terminate or modify a trust. Subsection (a) allows a court to modify the dispositive provisions of the trust as well as its administrative terms. For example, modification of the dispositive provisions to increase support of a beneficiary might be appropriate if the beneficiary has become unable to provide for support due to poor health or serious injury. Subsection (a) is similar to Restatement (Third) of Trusts § 66(1) (Tentative Draft No. 3, approved 2001), except that this section, unlike the Restatement, does not impose a duty on the trustee to petition the court if the trustee is aware of circumstances justifying judicial modification. The purpose of the "equitable deviation" authorized by subsection (a) is not to disregard the settlor's intent but to modify inopportune details to effectuate better the settlor's broader purposes. Nevertheless, in light of T.C.A. § 35-15-105(b)(3) and other portions of the Tennessee Uniform Trust Code that repeatedly stress the importance of settlor's intent, when exercising its equitable powers under subsection (a), a court should deviate in a manner that fills as nearly as possible the settlor's intent and purposes.

Among other things, equitable deviation may be used to modify administrative or dispositive terms due to the failure to anticipate economic change or the incapacity of a beneficiary. For numerous illustrations, see Restatement (Third) of Trusts § 66 cmt. b (Tentative Draft No. 3, approved 2001). While it is necessary that there be circumstances not anticipated by the settlor before the court may grant relief under subsection (a), the circumstances may have been in existence when the trust was created. This section thus complements T.C.A. § 35-15-415, which allows for reformation of a trust based on mistake of fact or law at the creation of the trust.

Subsection (b) broadens the court's ability to modify the administrative terms of a trust. The standard under subsection (b) is similar to the standard for applying *cy pres* to a charitable trust. See T.C.A. § 35-15-413(a).

Note that, relative to applying *cy pres*, unlike in the Uniform Trust Code and the Restatement (Third) of Trusts, T.C.A. § 35-15-413(a) does not contain the word "wasteful," and substitutes the words "obsolete or ineffective" as grounds for modification or termination because the word "wasteful" is believed to be too vague and subject to too broad of interpretation.

Although the literal language of subsection (b) uses the Uniform Trust Code word "wasteful," it is the opinion of the drafters of the Tennessee Uniform Trust Code, that the proper way to interpret the word "wasteful" in this section is to mean "obsolete or ineffective." Such drafters state this for several reasons. First, the purposes of subsection (b) and of T.C.A. § 35-15-413(a) are virtually identical, with the former applying to non-charitable trusts and the latter to charitable trusts and therefore should be subject to the same standard. The most recent legislative expression of that standard is contained in T.C.A. § 35-15-413(a), such having been amended in 2013 while subsection (b) has not ever been amended since the original adoption of the Tennessee Uniform Trust Code. Finally, while recognizing that at times trusts need modification, the Tennessee trust statutes have a very high

regard to settlor's intent. This last sentence would indicate the exercise of judicial restraint throughout the interpretation and implementation of this section.

Subsections (a) and (b) are not mutually exclusive. Many situations justifying modification of administrative terms under subsection (a) will also justify modification under subsection (b). Subsection (b) is also an application of the requirement in T.C.A. § 35-15-404 that a trust and its terms must be for the benefit of its beneficiaries augmented pursuant to the standard required by the provisions of T.C.A. § 35-15-105(b) that such "benefit of its beneficiaries" must be interpreted "as the interests of such beneficiaries are defined under the terms of the trust." Such provisions of T.C.A. § 35-15-105(b) are controlling throughout the Tennessee Uniform Trust Code and should, therefore, always be deemed to modify the phrase "that a trust and its terms must be for the benefit of its beneficiaries," regardless of where such phrase is found in the Tennessee Uniform Trust Code. See section comment to T.C.A. § 35-15-105(b)(3).

In general, due to its overriding emphasis on settlor's intent and freedom of disposition, the Tennessee Uniform Trust Code greatly limits, and to a significant extent, rejects, the views contained in the comment to Uniform Trust Code section 412, referencing the restatements, that are contained in the immediately following paragraph. It is the view of the Tennessee Uniform Trust Code that such following comment of the Uniform Trust Code is overly broad. For a few examples of how the view of the Tennessee Uniform Trust Code diverge from that of the Uniform Trust Code (and the restatements) see T.C.A. § 35-15-105(a) and (c) and the section comments thereto; T.C.A. § 35-15-404 and the section comment thereto; as well as the entire comments to T.C.A. § 35-15-101.

Such divergent views held by the comment to Uniform Trust Code section 412 are as follows:

"See also, Restatement (Third) of Trusts § 27(2) & cmt. b (Tentative Draft No. 2, approved 1999). Although the settlor is granted considerable latitude in defining the purposes of the trust, the principle that a trust have a purpose which is for the benefit of its beneficiaries precludes unreasonable restrictions on the use of trust property. An owner's freedom to be capricious about the use of the owner's own property ends when the property is impressed with a trust for the benefit of others. See Restatement (Second) of Trusts § 124 cmt. g (1959). Thus, attempts to impose unreasonable restrictions on the use of trust property will fail. See Restatement (Third) of Trusts § 27 Reporter's Notes to cmt. b (Tentative Draft No. 2, approved 1999). Subsection (b), unlike subsection (a), does not have a direct precedent in the common law."

While Tennessee desires the flexibility provided by T.C.A. § 35-15-412, such flexibility must be balanced with settlor's intent and freedom of disposition.

Upon termination of a trust under this section, subsection (c) requires that the trust be distributed in a manner consistent with the purposes of the trust, as the interests of such beneficiaries are defined under the terms of the trust. As under the doctrine of cy pres, effectuating a distribution consistent with the purposes of the trust, as the interests of such beneficiaries are defined under the terms of the trust, requires an examination of what will fulfill as nearly as possible the settlor's intent and purposes had the settlor been aware of the unanticipated circumstances. Typically, such terminating distributions will be made to the qualified beneficiaries, often in proportion to the actuarial value of their interests, although the section does not so prescribe. For the definition of qualified beneficiary, see T.C.A. § 35-15-103.

Modification under this section, because it does not require beneficiary action, is not necessarily precluded by a spendthrift provision. However, the court is urged to consider whether a spendthrift (or any other) provision is a material purpose of the trust and if it finds such purpose should be reluctant to terminate the trust, balancing the benefit of any such material purpose with the perceived need to terminate the trust. Moreover, under T.C.A. § 35-15-105(c), "Any purpose enunciated as a material purpose of a trust in that trust's trust instrument shall be treated as a material purpose of that trust for all purposes of this chapter and chapter 16."

Note that under the Tennessee Uniform Trust Code a trust advisor or trust protector may have the power to

directly or indirectly modify a trust without being subject to T.C.A. §§ 35-15-410--35-15-412 and 35-15-414.

35-15-413. Cy pres

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

(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 that fulfills as nearly as possible the settlor's charitable intent and 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 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 twenty-one (21) years have elapsed since the date of the trust's creation.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-413.

The provisions of this section in some ways diverge from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

Subsection (a) codifies the court's inherent authority to apply cy pres. The power may be applied to modify an administrative or dispositive term. The court may order the trust terminated and distributed to other charitable entities. Partial termination may also be ordered if the trust property is more than sufficient to satisfy the trust's current purposes. Subsection (a), which is similar to Restatement (Third) of Trusts § 67 (Tentative Draft No. 3, approved 2001), modifies the doctrine of cy pres by presuming that the settlor had a general charitable intent when a particular charitable purpose becomes impossible or impracticable to achieve. Traditional doctrine did not supply that presumption, leaving it to the courts to determine whether the settlor had a general charitable intent. If such an intent is found, the trust property is applied to other charitable purposes. If not, the charitable trust fails. See Restatement (Second) of Trusts § 399 (1959). In the great majority of cases the settlor would prefer that the property be used for other charitable purposes. Courts are usually able to find an appropriate charitable purpose to which to apply the property, no matter how vaguely such purpose may have been expressed by the settlor.

In keeping with the primary objectives of the Tennessee trust statutes that a settlor's intent be the lodestar by which a trust is interpreted, that such intent be carried out and that settlors have the freedom to dispose of their assets to whom and in the manner they wish, all to the greatest extent constitutionally allowable, subsection (a) states if the particular purpose for which the trust was created becomes impracticable, unlawful, impossible to achieve, obsolete or ineffective, the trust does not fail. The court instead must either: (a) modify the terms of the trust; or (b) distribute the property of the trust; in either case in a manner that fulfills as nearly as possible the settlor's charitable intent and purposes.

Unlike in the Uniform Trust Code and the Restatement (Third) of Trusts, subsection (a) of this section does not contain the word "wasteful," and substitutes the words "obsolete or ineffective" as grounds for modification or termination because the word "wasteful" is believed to be too vague and subject to too broad of interpretation.

Also unlike the Uniform Trust Code, which only requires that the manner of any modification or termination be "consistent with the settlor's charitable purposes," subsection (a) requires that any such modification or

termination be effected in a manner “that fulfills as nearly as possible the settlor’s intent and purposes.” The Tennessee Uniform Trust Code believes that such requirement of subsection (a) is far less likely to effect a modification or termination that strays from a settlor’s intent and purposes and therefore results in favoring some watered down, vague and general, charitable purpose.

The settlor, with one exception, may mandate that the trust property pass to a noncharitable beneficiary upon failure of a particular charitable purpose (as such is defined in subsection (a) of this section). Responding to concerns about the clogging of title and other administrative problems caused by remote default provisions upon failure of a charitable purpose (as such is defined in subsection (a) of this section), subsection (b) invalidates a gift over to a noncharitable beneficiary upon such failure unless the trust property is to revert to a still living settlor or fewer than 21 years have elapsed since the trust’s creation. Subsection (b) will not apply to a charitable lead trust, under which a charity receives payments for a term certain with a remainder to a noncharity. In the case of a charitable lead trust, the settlor’s particular charitable purpose does not fail upon completion of the specified trust term and distribution of the remainder to the noncharity. Upon completion of the specified trust term, the settlor’s particular charitable purpose has instead been fulfilled. For a discussion of the reasons for a provision such as subsection (b), see Ronald Chester, *Cy Pres of Gift Over: The Search for Coherence in Judicial Reform of Failed Charitable Trusts*, 23 Suffolk U. L. Rev. 41 (1989).

The doctrine of cy pres is applied not only to trusts, but also to other types of charitable dispositions, including those to charitable corporations. This section does not control dispositions made in nontrust form. However, in formulating rules for such dispositions, the courts often refer to the principles governing charitable trusts, which would include the Tennessee Uniform Trust Code.

For the definition of charitable purpose, see T.C.A. § 35-15-405.

Pursuant to T.C.A. §§ 35-15-405 and 35-15-410, a petition requesting a court to enforce a charitable trust or to apply cy pres may be maintained by a settlor. Under the Tennessee Uniform Trust Code, such action can also be maintained by a cotrustee, the Tennessee attorney general, or by a person having a special interest in the charitable disposition. See Restatement (Second) of Trusts § 391 (1959). Moreover, under the Tennessee Uniform Trust Code, such action can also be maintained by a trust advisor or trust protector, if either holds the power to do so.

35-15-414. Modification or termination of uneconomic trust

(a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value less than one hundred thousand dollars (\$ 100,000) may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.

(b) The court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.

(c) Upon the termination of a trust under this section, the trustee shall distribute the trust property to or for the benefit of the beneficiaries, in such shares as the trustee, or the court if a court proceeding, determines, after taking into account the interests of income and remainder beneficiaries so as to conform as nearly as possible to the intention of the settlor, but a trust that qualified for the marital deduction for tax purposes shall only be distributed to the spouse of the settlor for whom the trust was created.

(d) This section does not apply to an easement for conservation or preservation.

(e) This section shall not limit the right of a trustee, acting alone, to terminate a trust in accordance with applicable provisions of the governing instrument.

COMMENT.

Unless provided otherwise hereinafter, any reference to “section,” “subsection” or “subdivision” means all, or

such portion of, T.C.A. § 35-15-414.

The provisions of subsection (c) of this section in some ways diverge significantly from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

Subsection (a) assumes that a trust with a value of one hundred thousand dollars (\$100,000) or less is sufficiently likely to be inefficient to administer that a trustee should be able to terminate it without the expense of a judicial termination proceeding. Because subsection (a) is a default rule, a settlor is free to set a higher or lower figure or to specify different procedures or to prohibit termination without a court order. See T.C.A. § 35-15-105 and the general comment to chapter 4 at T.C.A. § 35-15-401.

Subsection (b) allows the court to modify or terminate a trust if the costs of administration would otherwise be excessive in relation to the size of the trust. The court may terminate a trust under this section even if the settlor has forbidden it. See T.C.A. § 35-15-105(b)(4). Judicial termination under this subsection may be used whether or not the trust is larger or smaller than one hundred thousand dollars (\$100,000).

When considering whether to terminate a trust under either subsection (a) or (b), the trustee or court should consider the purposes of the trust and whether any material purposes exist relative to the trust. Termination under this section is not always wise. Even if administrative costs may seem excessive in relation to the size of the trust, protection of the assets from beneficiary mismanagement or from a beneficiary's creditors may indicate that the trust be continued. The court may be able to reduce the costs of administering the trust by appointing a new trustee.

Upon termination of a trust under this section, subsection (c) requires that the trust property be distributed in a manner that conforms as nearly as possible to the intention of the settlor. Often, distribution under this section will be made to the qualified beneficiaries in proportion to the actuarial value of their interests. However, subsection (c) states that a trust that qualified for the marital deduction for tax purposes shall only be distributed to the spouse of the settlor for whom the trust was created. Overall the provisions of subsection (c) are stricter than those in the Uniform Trust Code and such provisions are designed to further settlor's intent and freedom of disposition.

In addition to outright distribution to the beneficiaries, T.C.A. § 35-15-816(21) authorizes payment may be made to a variety of alternate payees.

Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the "trustee" could constitute a breach of trust. The drafters of the Tennessee Uniform Trust Code concluded that easements for conservation or preservation are sufficiently different from the typical cash and securities found in small trusts that they should be excluded from this section, and subsection (d) so provides. Most creators of such easements, it was surmised, would prefer that the easement be continued unchanged even if the easement, and hence the trust, has a relatively low market value. For the law of conservation easements, see Restatement (Third) of Property: Servitudes § 1.6 (2000).

Subsection (e) is not contained in the Uniform Trust Code. It reinforces a trustee's power, acting alone, to terminate a trust in accordance with the terms contained in a trust instrument.

While this section is not directed principally at honorary or purpose trusts, it may be so applied. See T.C.A. §§ 35-15-408 and 35-15-409.

Because termination of a trust under this section is initiated by the trustee or ordered by the court, it is not

necessarily precluded by a spendthrift provision. However, the court is urged to consider whether a spendthrift (or any other) provision is a material purpose of the trust and if it finds such purpose should be reluctant to terminate the trust, balancing the benefit of any such material purpose with the perceived need to terminate the trust. Moreover, under T.C.A. § 35-15-105(c), "Any purpose enunciated as a material purpose of a trust in that trust's trust instrument shall be treated as a material purpose of that trust for all purposes of this chapter and chapter 16."

Note that under the Tennessee Uniform Trust Code a trust advisor or trust protector may have the power to directly or indirectly modify a trust without being subject to T.C.A. §§ 35-15-410--35-15-412 and 35-15-414.

35-15-415. 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 that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-415.

Reformation of inter vivos instruments to correct a mistake of law or fact is a long-established remedy. Restatement (Third) of Property: Donative Transfers § 12.1 (Tentative Draft No. 1, approved 1995), which this section copies, clarifies that this doctrine also applies to wills.

This section applies whether the mistake is one of expression or one of inducement. A mistake of expression occurs when the terms of the trust misstate the settlor's intention, fail to include a term that was intended to be included, or include a term that was not intended to be included. A mistake in the inducement occurs when the terms of the trust accurately reflect what the settlor intended to be included or excluded but this intention was based on a mistake of fact or law. See Restatement (Third) of Property: Donative Transfers § 12.1 cmt. i (Tentative Draft No. 1, approved 1995). Mistakes of expression are frequently caused by scriveners' errors while mistakes of inducement often trace to errors of the settlor.

Reformation is different from resolving an ambiguity. Resolving an ambiguity involves the interpretation of language already in the instrument. Reformation, on the other hand, may involve the addition of language not originally in the instrument, or the deletion of language originally included by mistake, if necessary to conform the instrument to the settlor's intent. Because reformation may involve the addition of language to the instrument, or the deletion of language that may appear clear on its face, reliance on extrinsic evidence is essential. To guard against the possibility of unreliable or contrived evidence in such circumstance, the higher standard of clear and convincing proof is required. See Restatement (Third) of Property: Donative Transfers § 12.1 cmt. e (Tentative Draft No. 1, approved 1995).

In determining the settlor's original intent, the court may consider evidence relevant to the settlor's intention even though it contradicts an apparent plain meaning of the text. The objective of the plain meaning rule, to protect against fraudulent testimony, is satisfied by the requirement of clear and convincing proof. See Restatement (Third) of Property: Donative Transfers § 12.1 cmt. d and Reporter's Notes (Tentative Draft No. 1, approved 1995). See also John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. Pa. L. Rev. 521 (1982).

For further discussion of the rule of this section and its application to illustrative cases, see Restatement (Third) of Property: Donative Transfers § 12.1 cmts. and Reporter's Notes (Tentative Draft No. 1, approved 1995).

Notwithstanding the language above in this comment, a court considering reformation should be mindful of

and balance the Tennessee Uniform Trust Code's emphasis on interpreting the interests of beneficiaries using the standard, "as the interests of such beneficiaries are defined under the terms of the trust," which is provided for in T.C.A. § 35-15-105(b)(3).

35-15-416. Modification to achieve settlor's tax 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. The court may provide that the modification has retroactive effect.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-416.

This section is copied from Restatement (Third) of Property: Donative Transfers § 12.2 (Tentative Draft No. 1, approved 1995). "Modification" under this section is to be distinguished from the "reformation" authorized by T.C.A. § 35-15-415. Reformation under T.C.A. § 35-15-415 is available when the terms of a trust fail to reflect the donor's original, particularized intention. The mistaken terms are then reformed to conform to this specific intent. The modification authorized here allows the terms of the trust to be changed to meet the settlor's tax-saving objective as long as the resulting terms, particularly the dispositive provisions, are not inconsistent with the settlor's probable intent. The modification allowed by this subsection is similar in concept to the cy pres doctrine for charitable trusts (see T.C.A. § 35-15-413), and the deviation doctrine for unanticipated circumstances T.C.A. § 35-15-412). Therefore the comments to such sections of the Tennessee Uniform Trust Code regarding honoring settlor's intent and effecting any necessary modification in a manner "that fulfills as nearly as possible the settlor's intent and purposes" are applicable to this section as well.

Whether a modification made by the court under this section will be recognized under federal tax law is a matter of federal law. Absent specific statutory or regulatory authority, binding recognition is normally given only to modifications made prior to the taxing event, for example, the death of the testator or settlor in the case of the federal estate tax. See Rev. Rul. 73-142, 1973-1 C.B. 405. Among the specific modifications authorized by the Internal Revenue Code or Service include the revision of split-interest trusts to qualify for the charitable deduction, modification of a trust for a noncitizen spouse to become eligible as a qualified domestic trust, and the splitting of a trust to utilize better the exemption from generation-skipping tax.

For further discussion of the rule of this section and the relevant case law, see Restatement (Third) of Property: Donative Transfers § 12.2 cmts. and Reporter's Notes (Tentative Draft No. 1, approved 1995).

Notwithstanding the language above in this comment, a court considering reformation should be mindful of and balance the Tennessee Uniform Trust Code's emphasis on interpreting the interests of beneficiaries using the standard, "as the interests of such beneficiaries are defined under the terms of the trust," which is provided for in T.C.A. § 35-15-105(b)(3).

35-15-417. Combination and division of trusts

After notice to the qualified beneficiaries, a trustee may combine two (2) or more trusts into a single trust or divide a trust into two (2) or more separate trusts, if the result does not impair rights of any beneficiary or adversely affect the achievement of the purposes of the trust. If the trusts to be combined or divided have different trustees, the trustees may negotiate the terms of the combined or divided trusts, including which trust or trusts will be the surviving trust or trusts, who will be the trustee or trustees of the surviving trust or trusts and any other matter relating to the operation of the surviving trust or trusts.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-417.

This section, which authorizes the combination or division of trusts, is subject to contrary provision in the terms of the trust. See T.C.A. § 35-15-105 and the general comment to chapter 4 contained at T.C.A. § 35-15-401. Many trust instruments and standardized estate planning forms include comprehensive provisions governing combination and division of trusts. Except for the requirement that the qualified beneficiaries receive advance notice of a proposed combination or division, this section is similar to Restatement (Third) of Trusts § 68 (Tentative Draft No. 3, approved 2001).

This section allows a trustee to combine two or more trusts even though their terms are not identical. Typically the trusts to be combined will have been created by different members of the same family and will vary on only insignificant details, such as the presence of different perpetuities savings periods. The more the dispositive provisions of the trusts to be combined differ from each other the more likely it is that a combination would impair some beneficiary's interest, hence the less likely that the combination will not be objected to by one of the beneficiaries. Combining trusts may prompt more efficient trust administration and is sometimes an alternative to terminating an uneconomic trust as authorized by T.C.A. § 35-15-414. Administrative economies promoted by combining trusts include a potential reduction in trustees' fees, particularly if the trustee charges a minimum fee per trust, the ability to file one trust income tax return instead of multiple returns, and the ability to invest a larger pool of capital more effectively. Particularly if the terms of the trust are identical, available administrative economies may suggest that the trustee should consider pursuing a combination. See T.C.A. § 35-15-805 (duty to incur only reasonable costs).

Notwithstanding the above, T.C.A. § 35-15-410(c), which does not have a Uniform Trust Code equivalent, makes it clear that, under the Uniform Trust Code, no trustee has a duty to make or seek approval of any modification or termination, including any combination or division, of any trust and cannot be held liable for failing to do so.

Division of trusts is often beneficial and, in certain circumstances, almost routine. Division of trusts is frequently undertaken due to a desire to obtain maximum advantage of exemptions available under the federal generation-skipping tax. While the terms of the trusts which result from such a division are identical, the division will permit differing investment objectives to be pursued and allow for discretionary distributions to be made from one trust and not the other. Given the substantial tax benefits often involved, a failure by the trustee to pursue a division might in certain cases be a breach of fiduciary duty. However, see the language from T.C.A. § 35-15-410(c) above, which tends to override the previous sentence, such previous sentence coming from the comments to Uniform Trust Code section 417, and as such is not controlling over contrary provisions of the Tennessee Uniform Trust Code. The opposite could also be true if the division is undertaken to increase fees or to fit within the small trust termination provision. See T.C.A. § 35-15-414.

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

This section does not require that a combination or division be approved either by the court or by the beneficiaries. Prudence may dictate, however, that court approval under T.C.A. § 35-15-410 be sought and beneficiary consent obtained whenever the terms of the trusts to be combined or the trusts that will result from a division differ substantially one from the other. For the provisions relating to beneficiary consent or ratification of a transaction, or release of trustee from liability, see T.C.A. § 35-15-1009.

While the consent of the beneficiaries is not necessary before a trustee may combine or divide trusts under

this section, advance notice to the qualified beneficiaries of the proposed combination or division is required. This is consistent with T.C.A. § 35-15-813, to the extent such section requires that the trustee keep certain beneficiaries reasonably informed of trust administration or that the trustee give advance notice to certain required beneficiaries of several specified actions that may have a major impact on their interests.

For a provision authorizing a trustee, in distributing the assets of the divided trust, to make non-pro-rata distributions, see T.C.A. § 35-15-816(b)(22).

Finally, the Tennessee Uniform Trust Code provides more flexibility than does the Uniform Trust Code regarding the mechanics with which an actual combination or division will be carried out. Under the Tennessee Uniform Trust Code, in cases where such trusts have or will have different trustees, the two trustees may negotiate the terms of the trust relative to such combination or division.

Creditor's Claims – Mandatory, Support and Discretionary Interests – Effect of Spendthrift Provision

GENERAL COMMENT.

The provisions of part five (5) of the Tennessee Uniform Trust Code diverge, in many cases significantly, from the provisions contained in Uniform Trust Code, as well as from the Restatement (Third) of Trusts, on which much of part 5 of the Uniform Trust Code was based. To the extent part 5 is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

Part five (5) of the Tennessee Uniform Trust Code offers far more creditor protection to trusts and their beneficiaries than does the Uniform Trust Code or the Restatement (Third) of Trusts. This is achieved in a number of ways, some of which are enumerated hereafter.

Relative to spendthrift trusts, T.C.A. § 35-15-503 contains no exception creditors other than the state of Tennessee, and then only to the extent that a statute of the state of Tennessee so provides. The protection given by the Tennessee Uniform Trust Code to discretionary trusts is far broader than that provided by the Uniform Trust Code and, unlike under the latter, there are no exception creditors relative to an interest held in a discretionary trust.

Under the Tennessee Uniform Trust Code, a discretionary interest held in a trust (a "discretionary trust") does not require a spendthrift provision in order to gain the protective benefits or attributes of a discretionary interest. Such protective benefits and attributes are inherent in such interest.

When combined with the Tennessee Uniform Trust Code's definition of what constitutes a discretionary trust, only a limited number of the types of trusts typically used for donative purposes do not obtain the benefit of such creditor protection. This is in keeping with the objective of the Tennessee trust statutes that a settlor should have the broadest freedom to dispose of their assets to whom, and in the manner, they wish (and to only those persons, and in only such manner, as a settlor wishes). Such creditor protection respects that the assets in the trust initially belonged to the settlor and not the beneficiary. When those assets are put in a discretionary trust, the beneficiary obtained only beneficial rights that do not rise to the status of a property interest and, therefore, cannot be reached by creditors, even absent a spendthrift provision. Under the Tennessee trust statutes, an irrevocable special needs trust is shielded from claims by creditors of the settlor regardless of whether or not such trust complies with the provisions of chapter 16, the Tennessee Investment Services Trust Act. Finally, any interest of a beneficiary under a support trust likewise does not rise to the status of a property interest and is therefore protected from creditors, even absent a spendthrift provision.

Notwithstanding the above, the Tennessee trust statutes still respect the right of beneficiaries of support and mandatory interests to obtain redress for a trustee's failure to respect such interests due such beneficiaries under them. However, no creditor of any such beneficiary has such right and can only reach a distribution made from such interests after the distribution is made and then in only specified circumstances.

The provisions of this part relating to the validity and effect of a spendthrift provision, as well as the rights of certain creditors and assignees to reach a spendthrift trust, or a mandatory, support or discretionary interest, may not be modified by the terms of the trust. See T.C.A. § 35-15-105(b).

This part does not generally supersede this state's exemption statutes nor this state's Uniform Fraudulent Transfers Act, T.C.A. title 66, chapter 3, part 3. Nevertheless, certain provisions of this part modify certain provisions of such act.

35-15-501. Application of part 5; rights of beneficiary's creditor or assignee

This part applies to a creditor's or assignee's claims and ability to reach mandatory, support and discretionary interests regardless of whether such interests are subject to a spendthrift provision. To the extent not otherwise prohibited by this part, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's distribution interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to such relief as is appropriate under the circumstances.

COMMENT.

The section generally describes the overall application of title 35, part 5.

It also states that, to the extent not otherwise prohibited by such part 5, a court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's distribution interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means.

Finally, it grants such court the discretion to limit any such award to any such creditor or assignee to such relief as is appropriate under the circumstances.

35-15-502. Spendthrift provision

(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) A spendthrift provision applies to all beneficial interests, including distribution interests and remainder interests.

(d) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and a creditor or assignee of the beneficiary may not reach any of, the interest, or a present, future or prospective distribution at the trust level. Similarly, no creditor or assignee of the beneficiary may force any distribution from the trust. This subsection remains applicable regardless of the beneficiary's potential right to force a distribution under § 35-15-814.

(e) Notwithstanding any other provision of this section to the contrary, regardless of whether a beneficiary has any outstanding creditor, a trustee, cotrustee or other fiduciary of a trust subject to a spendthrift provision may directly pay any expense on behalf of such beneficiary and may exhaust the income and principal of the trust for the benefit of such beneficiary. No trustee, cotrustee or other fiduciary is liable to any creditor for paying the expenses of a beneficiary under a trust subject to a spendthrift provision. This subsection remains applicable regardless of whether the beneficiary for whom such direct payment was made held a mandatory, support, discretionary or remainder interest.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-502.

This section addresses the effects of a spendthrift provision as such is defined in T.C.A. § 35-15-103, on any type of trust and on any type of beneficial interest under such trust.

The provisions of this section in some ways diverge significantly from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

Spendthrift provisions and the effects thereof are also discussed in other places throughout the Tennessee Uniform Trust Code and its comments. Two notable places a reader is directed are; the section comments related to the term "spendthrift provision" in T.C.A. § 35-15-103; and the comments under the heading "Part 5. Creditor's Claims; Spendthrift and Discretionary Trusts." in T.C.A. § 35-15-101.

Subsection (a) provides that for a spendthrift provision to be effective under the Tennessee Uniform Trust Code, it must prohibit both the voluntary and involuntary transfer of the beneficiary's interest. That is to say, a settlor may not allow a beneficiary to assign while prohibiting a beneficiary's creditor from collecting, and vice versa. See Restatement (Third) of Trusts § 58 cmt. b (Tentative Draft No. 2, approved 1999). See also Restatement (Second) of Trusts § 152(2) (1959). A spendthrift provision valid under the Tennessee Uniform Trust Code will also be recognized as valid in a federal bankruptcy proceeding. See 11 U.S.C. § 541(c)(2).

Subsection (b) allows a settlor to provide maximum spendthrift protection simply by stating in the instrument that all interests are held subject to a "spendthrift trust" or words of similar effect.

Subsection (c) provides that a settlor has the power to restrain the transfer of a beneficiary's interest, regardless of whether the beneficiary has a beneficial interest in income, in principal, or in both and regardless of whether such interest is or derives from any type of distribution interest (mandatory, support or discretionary) or is a remainder interest. A creditor of the beneficiary is prohibited from attaching a protected interest and may only attempt to collect directly from the beneficiary after payment is made.

Subsection (d) provides that a spendthrift provision blocks any creditor or assignee (hereinafter in the comments to this section, individually and collectively, simply "creditor") of a beneficiary from reaching any interest of such beneficiary, as well as any present, future or prospective distribution at the trust level. Likewise, no creditor can force any distribution from the trust. This remains true despite the fact that a beneficiary under mandatory and support interests may potentially force a distribution under T.C.A. § 35-15-814.

Subsection (e) provides that the existence of any creditor of any beneficiary of a trust with a spendthrift provision in no way impacts any trustee's, cotrustee's or other fiduciary's (hereinafter in the comments to this section, individually and collectively, simply "fiduciary") right or ability to directly pay any expense on behalf of such beneficiary; and such fiduciary may exhaust a trust for the benefit of such beneficiary. In other words a fiduciary need not make a distribution from a trust subject to a spendthrift provision directly to a beneficiary. Instead such fiduciary has the power to directly pay to a third party any expense for the benefit of such beneficiary and no creditor may reach such payment. If a fiduciary makes such a direct payment, it is not possible for such fiduciary to incur liability to any creditor for so doing. This remains true regardless of the beneficiary for which such payment was made held a mandatory, support, discretionary or remainder interest.

A disclaimer, because it is a refusal to accept ownership of an interest and not a transfer of an interest already owned, is not affected by the presence or absence of a spendthrift provision. Most disclaimer statutes expressly provide that the validity of a disclaimer is not affected by a spendthrift protection. See, e.g., Uniform Probate Code § 2-801(a). Releases and exercises of powers of appointment are also not affected because they are not transfers of property. See Restatement (Third) of Trusts § 58 cmt. c (Tentative Draft No. 2, approved 1999).

Except as otherwise provided in T.C.A. § 35-15-505, a spendthrift provision is ineffective against a beneficial interest retained by a settlor up to the maximum amount that can be distributed to or for such settlor's benefit.

A valid spendthrift provision makes it impossible for a beneficiary to make a legally binding assignment or transfer, but the appropriate fiduciary may voluntarily choose to honor such beneficiary's purported assignment or transfer, such being in reality a revocable direction or request to the trustee to pay amounts otherwise distributable to the beneficiary to the purported assignee. Note that under the immediately preceding sentence a beneficiary's purported assignment relative to a discretionary interest may have little if any practical effect. That is because the amounts "otherwise distributable to the beneficiary" are subject to the trustee's discretion. An appropriate fiduciary is protected, and is under no liability for, honoring such beneficiary's request, but must cease

doing so upon instruction from such beneficiary. Should an appropriate fiduciary decide to honor such beneficiary's request, such fiduciary can decide to cease to so honor it and may recommence distributions to the beneficiary at anytime. Moreover, because the beneficiary has not made a binding transfer, such beneficiary can withdraw the beneficiary's direction but only as to future payments. See Restatement (Third) of Trusts § 58 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 152 cmt. i (1959), but the extent such restatements are in conflict with this paragraph, this paragraph and the Tennessee Uniform Trust Code controls.

35-15-503. Exceptions to spendthrift provision

A spendthrift provision is unenforceable against a claim of this state to the extent a statute of this state so provides.

COMMENT.

This section exempts the claims of this state from the effects of a spendthrift provision, but only to the extent a statute of this state so allows. The claims of no other person are exempt from the effects of a spendthrift provision under the Tennessee Uniform Trust Code.

35-15-504. Discretionary trusts -- Effect of standard

(a) A discretionary interest is neither a property interest nor an enforceable right; it is a mere expectancy.

(b) Relative to a discretionary interest, whether or not a trust contains a spendthrift provision:

(1) No creditor or assignee shall force or otherwise reach a distribution with regard to a discretionary interest;

(2) No creditor or assignee shall require a trustee, cotrustee or other fiduciary to exercise the trustee's, cotrustee's or other fiduciary's discretion to make a distribution with regard to a discretionary interest;

(3) Regardless of whether a beneficiary has any outstanding creditors or assignees, a trustee, cotrustee or other fiduciary of a discretionary interest may directly pay any expense on behalf of such beneficiary and may exhaust the income and principal of the trust for the benefit of such beneficiary;

(4) No trustee, cotrustee or other fiduciary is liable to any creditor or assignee for paying the expenses of a beneficiary of a discretionary interest;

(5) (A) Regardless of whether a beneficiary holding a discretionary interest is also a trustee, cotrustee or other fiduciary, subdivisions (b)(1) through (b)(4) remain applicable if:

(i) The beneficiary-fiduciary does not have the discretion to make or participate in making distributions to himself or herself;

(ii) The beneficiary-fiduciary's discretion to make or participate in making distributions to himself or herself is limited by an ascertainable standard; or

(iii) The beneficiary-fiduciary's discretion to make or participate in making distributions to himself or herself is exercisable only with the consent of a cotrustee or another person holding an adverse interest.

(B) A creditor or assignee may compel or otherwise reach a distribution only to the extent the creditor or assignee may compel or otherwise reach a distribution if the beneficiary was not acting as a trustee, cotrustee or other fiduciary.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-504.

The provisions of this section diverge significantly from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

This section addresses the effect of a trust (a "discretionary trust") containing a distribution interest that is a discretionary interest. Unlike the Uniform Trust Code and Restatement (Third) of Trusts, the Tennessee Uniform Trust Code maintains the traditional common law distinction between a trust having a discretionary interest (a "discretionary trust") and a trust having a support interest (a "support trust").

These distinctions and the general effects thereof are also discussed in other places throughout the Tennessee Uniform Trust Code and its comments. Two notable places a reader is directed are; the section comments related to the term "discretionary interest" in T.C.A. § 35-15-103; and the comments under the heading "Part 5. Creditor's Claims; Spendthrift and Discretionary Trusts." in T.C.A. § 35-15-101.

Subsection (a) expresses the traditional common law rule that a discretionary interest under a trust is not a property interest. Therefore it is not an enforceable right, but only a mere expectancy. Because a discretionary interest is only an unenforceable expectancy and not a property interest, such can in no way "belong" to any beneficiary in their capacity as a beneficiary. The provisions of subsection (a) diverge significantly from the Uniform Trust Code and the restatements. To the subsection (a) is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

Subsection (b) expresses both the traditional common law view regarding the effects of, as well as what is simply the logical outcome of, the fact a discretionary interest is not a property interest, is not an enforceable right and is only an expectancy. The provisions of subsection (b) diverge significantly from the Uniform Trust Code and the restatements. To the subsection (b) is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

The traditional common law view regarding the effects of, as well as what is simply the logical outcome of, the fact a discretionary interest is not a property interest, is not an enforceable right and is only an expectancy follow Relative to a discretionary interest:

A spendthrift provision is not required in order to gain any protective benefits or attributes of a discretionary interest. Such protective benefits and attributes are inherent in such interest.

No creditor or assignee (hereinafter in the comments to this section, individually and collectively, simply "creditor") has the ability to force or otherwise reach a distribution.

No creditor has the ability to force a trustee, cotrustee or other fiduciary (hereinafter in the comments to this section, individually and collectively, simply "fiduciary") to exercise discretion relative to such interest.

The existence of any creditor of any beneficiary in no way impacts a fiduciary's right or ability to directly pay any expense on behalf of such beneficiary; and such fiduciary may exhaust a trust for the benefit of such beneficiary. In other words a fiduciary need not make a discretionary distribution to a beneficiary. Instead such fiduciary has the power to directly pay to a third party any expense for the benefit of such beneficiary and no creditor may reach such payment. If a fiduciary makes such a direct payment, it is not possible for such fiduciary to incur liability to any creditor for so doing.

Despite a beneficiary also being a fiduciary, all of the above holds trust so long as:

the beneficiary-fiduciary has no discretion to make or participate in making any distribution to such beneficiary-fiduciary; or

the beneficiary-fiduciary has discretion to make or participate in making any distribution to such beneficiary-fiduciary, but such discretion is limited by an ascertainable standard; or

the beneficiary-fiduciary has discretion to make or participate in making any distribution to such beneficiary-fiduciary, but such discretion is only exercisable with the consent of another fiduciary or another

person having an interest adverse to such beneficiary-fiduciary.

In any event, a creditor of a beneficiary-fiduciary cannot compel or otherwise reach a distribution to a greater extent than could such creditor compel or otherwise reach a distribution if the beneficiary was not also acting as a fiduciary.

35-15-505. Creditor's claims against settlor

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

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

(2) Except as provided in chapter 16 of this title regarding investment services trusts and subdivisions (a)(3) through (a)(5) regarding an irrevocable special needs trust, a creditor or assignee of the settlor of an irrevocable trust may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one (1) 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; and

(3) For the purposes of this section "irrevocable special needs trust" means an irrevocable trust established for the benefit of one or more disabled persons, which includes, but is not limited to, any individual who is disabled pursuant to 42 U.S.C. Section 1382c(a), as well as any individual who is disabled pursuant to any similar federal, state or other jurisdictional law or regulation, or has a condition that is substantially equivalent to one that qualifies them to be so disabled in accordance with any of the above even if not officially found to be so disabled by a governmental body if one of the purposes of the trust, expressed in the trust instrument or implied from the trust instrument, is to allow the disabled person to qualify or continue to qualify for public, charitable or private benefits that might otherwise be available to the disabled person. The existence of one or more nondisabled remainder beneficiaries of the trust shall not disqualify it as an irrevocable special needs trust for the purposes of this section.

(4) No creditor or assignee of the settlor of an irrevocable special needs trust, as defined in subdivision (a)(3), may reach or compel distributions from such special needs trust, to or for the benefit of the settlor of such special needs trust, or otherwise, regardless of whether or not such irrevocable special needs trust complies with the provisions of, and irrespective of the requirements of, Chapter 16 of this title.

(5) Notwithstanding any law to the contrary, neither a creditor nor any other person shall have any claim or cause of action against the trustee or other fiduciary, or an advisor of an irrevocable special needs trust. For purposes of this subdivision (a)(5), an advisor of an irrevocable special needs trust includes any person involved in the counseling, drafting, preparation, execution or funding of an irrevocable special needs trust.

(6) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable immediately preceding the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate and the expenses of the settlor's funeral and disposal of remains. With respect to claims, expenses, and taxes in connection with the settlement of the settlor's estate, any claim of a creditor that would be barred against the fiduciary of a settlor's estate, the estate of the settlor, or any creditor or beneficiary of the settlor's estate shall be barred against the trust property of a trust that was revocable at the settlor's death, the trustee of the revocable trust, and the creditors and beneficiaries of the trust. The provisions of § 30-2-317(a) detailing the priority of payment of claims, expenses, and taxes from the probate estate of a decedent shall apply to a revocable trust to the extent the assets of the settlor's probate estate are inadequate and the personal representative or creditor or taxing authority of the settlor's estate has perfected its right to collect from the settlor's revocable trust.

(b) For purposes of this section during the period a power of withdrawal may be exercised or upon the lapse, release, or waiver of the power, 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 (26 U.S.C. § 2041(b)(2) or § 2514(e)), or section 2503(b) of the Internal Revenue Code of 1986 (26 U.S.C. § 2503(b)), in each case as in effect on July 1, 2004, or as later amended.

(c) For purposes of subdivision (a)(2), the power of a trustee of an irrevocable trust, whether arising under the trust agreement or any other provision of the law, to make a distribution to or for the benefit of a settlor for the purpose of reimbursing the settlor in an amount equal to any income taxes payable on any portion of the trust principal and income that are includable in the settlor's personal income under applicable law, as well as distributions made by the trustee pursuant to such authority, shall not be considered an amount that may be distributed to or for the settlor's benefit.

(d) With respect to an irrevocable trust for which the settlor made a qualified election pursuant to 26 U.S.C. Section 2523(f), the power of a trustee, and any benefit resulting to the settlor from any exercise of such power, whether arising under the trust agreement or any other provision of the law, to make a distribution to or for the benefit of a settlor or to otherwise permit the settlor to use or benefit from trust property following the death of the settlor's spouse, shall not be considered an amount that may be distributed to or for the settlor's benefit for purposes of subdivision (a)(2). This subsection (d) shall not limit a creditor's remedies under the Uniform Fraudulent Transfer Act, compiled in Title 66, Chapter 3, Part 3, regarding the settlor's transfers to such trust.

(e) For purposes of subdivision (a)(2) and subsection (g), a person who is the holder of a power of withdrawal is not considered a settlor of the trust by failing to exercise that power of withdrawal or letting that power of withdrawal lapse.

(f) For purposes of subdivision (a)(2) and subsection (g), a person who becomes a beneficiary of a trust due to the exercise of a power of appointment by someone other than such person shall not be considered a settlor of the trust.

(g) (1) Notwithstanding § 66–3–310, no person shall bring an action with respect to a transfer of property to a spendthrift trust:

(A) If the person is a creditor when the transfer is made, unless the action is commenced within the later of two (2) years after the transfer is made or six (6) months after the person discovers or reasonably should have discovered the transfer; or

(B) If the person becomes a creditor after the transfer is made, unless the action is commenced within two (2) years after the transfer is made; and

(2) If subdivision (g)(1) applies:

(A) A person shall be deemed to have discovered the existence of a transfer at the time any public record is made of the transfer, including but not limited to, a conveyance of real property that is recorded in the office of the county register of deeds of the county in which the property is located or the filing of a financing statement under title 47, chapter 9, or the equivalent recording or filing of either with the appropriate person or official under the laws of a jurisdiction other than this state;

(B) No creditor shall bring an action with respect to a transfer of property to a spendthrift trust unless that creditor proves by clear and convincing evidence that the settlor's transfer to the trust was made with the intent to defraud that specific creditor; and

(i) Notwithstanding any law to the contrary, neither a creditor nor any other person shall have any claim or cause of action against the trustee or other fiduciary or an advisor of a spendthrift trust if that claim or cause of action is based in any way on any person availing themselves of the benefits of this subsection;

(ii) For purposes of subdivision (g)(2)(C), an advisor of a spendthrift trust includes, but is not limited to, any person involved in the counseling, drafting, preparation, execution or funding of a spendthrift trust;

(iii) For purposes of subdivision (g)(2)(C)(i), counseling, drafting, preparation, execution or funding of a spendthrift trust includes the counseling, drafting, preparation, execution and funding of a limited partnership, a limited liability company or any other type of entity if interests in the limited partnership, limited liability company or other entity are subsequently transferred to a spendthrift trust;

(3) Notwithstanding subdivision (g)(2)(C), in the same manner as provided other than by this section to trusts in general, a beneficiary, settlor, cotrustee, trust advisor or trust protector retains the right to bring a claim against

a trustee or against another cotrustee, trust advisor, trust protector or any of their predecessors; however, no such claim shall arise solely because a person availed themselves, or attempted to avail themselves, of the benefits of this subsection;

(4) If more than one transfer of property is made to a spendthrift trust, the subsequent transfer of property to the spendthrift trust shall be disregarded for the purpose of determining whether a person may bring an action pursuant to this subsection with respect to a prior transfer of property to the spendthrift trust; and any distribution to a beneficiary from the spendthrift trust shall be deemed to have been made from the most recent transfer made to the spendthrift trust;

(5) With the exception of any claim brought pursuant to subdivision (g)(3), notwithstanding any other provision of law, no action of any kind, including, without limitation, an action to enforce a judgment entered by a court or other body having adjudicative authority, shall be brought at law or in equity against the trustee, other fiduciary or advisor of a spendthrift trust if, as of the date such action is brought, an action by a creditor with respect to a transfer of property to the spendthrift trust would be barred pursuant to this subsection; and

(6) This subsection shall not abridge the rights of a creditor, to the extent otherwise provided by this section, to reach the maximum amount that can be distributed to or for the settlor's benefit under a spendthrift trust.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-505.

The provisions of this section in some ways diverge significantly from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

Subdivision (a)(1) states what is now a well accepted conclusion, that a revocable trust is subject to the claims of the settlor's creditors while the settlor is living. See Restatement (Third) of Trusts § 25 cmt. e (Tentative Draft No. 1, approved 1996). Such claims were not allowed at common law, however. See Restatement (Second) of Trusts § 330 cmt. o (1959).

Subdivision (a)(2), provides that a settlor who is also a beneficiary may not use the trust under which they have both capacities as a shield against the settlor's creditors, unless:

The settlor establishes an Investment Services Trust pursuant to title 35, chapter 16; or

The trust qualifies as an irrevocable special needs trust under subdivisions (a)(3) through (a)(5).

Outside of these two exceptions, a creditor of a settlor may reach the maximum amount that the trustee could have paid to the settlor-beneficiary, subject to adjustment should there be more than one (1) settlor. For the general definition of "settlor," see T.C.A. § 35-15-103. Regardless of such general definition of "settlor," subsections (e) and (f) of this section modify such general definition and expressly provide that persons described in subsections (e) and (f) are not "settlers" for the purposes of subdivision (a)(2), as well as for the purposes of subsection (g).

This section does not generally address possible rights against a settlor who was insolvent at the time of the trust's creation or was rendered insolvent by the transfer of property to the trust. This subject is instead left to this state's other applicable laws on fraudulent transfers. Notwithstanding the preceding two sentences, section (g) hereof modifies certain effects of T.C.A. § 66-3-310 relative to transfers of property to a spendthrift trust and T.C.A. § 35-16-104 modifies certain effects of T.C.A. § 66-3-310 relative to transfers of property to a Tennessee Investment Services Trust. Depending on the facts, a transfer to the trust by an insolvent settlor might also

constitute a voidable preference under federal bankruptcy law.

Subdivisions (a)(3)-(a)(5) govern the ability of creditors to reach irrevocable special needs trusts, as well the liability of trustees, other fiduciaries and the advisors of irrevocable special needs trusts. Under these subdivisions an irrevocable special needs trust is shielded from claims by creditors of the settlor regardless of whether or not such trust complies with the provisions of chapter 16, the Tennessee Investment Services Trust Act. Moreover, the trustees, other fiduciaries and the advisors of irrevocable special needs trusts are shielded from liability.

Subdivision (a)(6) recognizes that a revocable trust is usually employed as a will substitute. As such, the trust assets, following the death of the settlor, should be subject to the settlor's debts and other charges. However, in accordance with traditional doctrine, the assets of the settlor's probate estate must normally first be exhausted before the assets of the revocable trust can be reached. This section does not attempt to address the procedural issues raised by the need first to exhaust the decedent's probate estate before reaching the assets of the revocable trust. Subdivision (a)(6), however, does ratify the typical pour-over will, revocable trust plan. As long as the rights of the creditor are not impaired, the settlor is free to shift liability from the probate estate to the revocable trust. This section clarifies that claims against revocable trusts are subject to the same time limitations, and are subject to the same order of priority among creditors as are imposed on claims against probate estates. Regarding other issues associated with potential liability of nonprobate assets for unpaid claims, see section 6-102 of the Uniform Probate Code, which was added to that Code in 1998.

Subsection (b) deals with powers of withdrawal. As currently contained in the Tennessee Uniform Trust Code such subsection is the version originally adopted in 2004 and remains unamended. Notwithstanding the preceding two sentences, see subsection (e) and the comments to same below. Subsection (e) was adopted with the 2013 amendments to the Tennessee Uniform Trust Code, and it overrides the provisions of subsection (b) (for several reasons, including being adopted later in time) as such applies to either subdivision (a)(2) or to subsection (g).

On a related note, under the Tennessee Uniform Trust Code all powers of appointment, regardless of type, are held by the person to whom such power has been given solely in the capacity of a power holder and not by such power holder in a capacity as settlor. See the definition of "power of appointment" in T.C.A. § 35-15-103, as well as the section comments thereunder. Moreover, unlike the Uniform Trust Code, under the Tennessee Uniform Trust Code one holding a power of appointment is not a beneficiary. Contrast the definition of "beneficiary" in T.C.A. § 35-15-103, as well as the section comments thereunder, with the definition of "beneficiary" in Uniform Trust Code section 103, and the comments thereunder. Under the Tennessee Uniform Trust Code, definitionally, one holding a power of appointment is neither a settlor nor a beneficiary. They are merely a power holder. Therefore, property held subject to a power of appointment cannot be subject to the claims of the power holder's creditors. Moreover, in the case of a power of appointment subject to the Tennessee Uniform Trust Code, such power is held under the terms of a trust. Therefore, regardless of any allusion or reference thereto in the Restatement (Property) Second: Donative Transfers § 13.2 (1986), powers of appointment that are governed by the Tennessee Uniform Trust Code are not subject to T.C.A. § 66-1-106. Such section of the Tennessee Code requires that, in order to be subject to such section, any power of appointment must "not be accompanied by any trust," and any power of appointment under the Tennessee Uniform Trust Code is so accompanied by a trust. To the extent that any of the above is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such are not precedential or controlling and are rejected by the Tennessee Uniform Trust Code, which shall control.

Subsection (c) provides another exception to the general rule that creditors can reach the settlor's interest under an irrevocable trust to the extent it can be used for the settlor's benefit. Such exception provides that the payment of income taxes on behalf of the settlor of an irrevocable grantor trust will not make the trust available to creditors of the settlor.

Subsection (d) provides that the donor spouse's successor interests in an inter vivos QTIP trust do not cause the trust to lose spendthrift trust protection as to the donor spouse. Thus, if the donee spouse predeceases the

donor spouse, the trust will continue to be a spendthrift trust after the donor spouse becomes a successor beneficiary of the trust.

Subsection (e) provides another exception to the general rule that creditors can reach the settlor's interest under an irrevocable trust to the extent it can be used for the settlor's benefit. Such exception provides this by modifying the general definition of "settlor" found in T.C.A. § 35-15-103. Subsection(e) expressly provides that a person holding a power of withdrawal is not considered a settlor of a trust by failing to exercise that power or by letting such power lapse. This subsection was added by the 2013 amendments to Tennessee Uniform Trust Code. It overrides the provisions of subsection (b) (for several reasons, including being adopted later in time) as such applies to either subdivision (a)(2) or to subsection (g), discussed below.

Subsection (f) likewise by modifies the general definition of "settlor" found in T.C.A. § 35-15-103. Subsection (f) provides that a person who becomes a beneficiary of a trust due to the exercise of a power of appointment by someone other than such person is not considered under the Tennessee Uniform Trust Code to be a settlor of a trust. This is true even if the person who so became the beneficiary created and funded the trust and granted the power of appointment to another. The provisions of subsection (f) apply to subdivision (a)(2). Such subdivision provides the general rule that creditors can reach the settlor's interest under an irrevocable trust to the extent it can be used for the settlor's benefit. Therefore, a person who becomes a beneficiary of a trust due to the exercise of a power of appointment by someone other than such person is not subject to such general rule. Accordingly, if a person who becomes a beneficiary of a trust due to the exercise of a power of appointment by someone other than such person did not otherwise retain a beneficial interest in the trust that was otherwise reachable (e.g., the settlor did not name himself as a beneficiary of the trust at the time it was created), the mere fact that some other person exercises a power of appointment to later make such person a beneficiary will not create an interest that is reachable by the settlor's creditors. Subsection (f) also applies to subsection (g), discussed below.

In general, subsection (g) creates a limitations period relative to contesting the validity of transfers to spendthrift trusts, and is designed to bring certainty to transfers to third party trusts, such certainty being an overriding objective of the Tennessee Uniform Trust Code.

Such subsection does not abridge the rights of a creditor to reach the maximum amount that can be distributed to or for the settlor's benefit to the extent otherwise provided by this section.

Similarly, it does not abridge the ordinary rights of a beneficiary, settlor, cotrustee, trust advisor or trust protector to bring a claim against a trustee or against another cotrustee, trust advisor, trust protector or any of their predecessors relative to trust matters.

35-15-506. Overdue distribution

(a) Relative to a support interest, whether or not a trust contains a spendthrift provision:

(1) Although a beneficiary of a support interest has enforceable rights under § 35-15-814, those rights do not raise the beneficiary's support interest to the level of a property interest;

(2) No creditor or assignee shall reach that support interest until a distribution from the support interest is actually made to the beneficiary;

(3) After all or a portion of a support interest is distributed to the beneficiary, no portion of the distribution made from the support interest shall be reached by a creditor or assignee of the beneficiary except to the extent that the distribution made from the support interest exceeds the amount necessary for the health, education, maintenance and support of the beneficiary who received the distribution made from the support interest;

(4) In the case of a beneficiary who holds a support interest, the use or enjoyment of property belonging to the trust by that beneficiary shall not be transferred and shall not be reached by creditors or assignees of that beneficiary;

(5) Regardless of whether a beneficiary has any outstanding creditors or assignees, a trustee or other fiduciary of a support interest may directly pay any expense on behalf of such beneficiary and may exhaust the income and principal of the trust for the benefit of such beneficiary; and

(6) No trustee or other fiduciary is liable to any creditor or assignee for paying the expenses of a beneficiary of a support interest.

(b) Relative to a mandatory interest, whether or not a trust contains a spendthrift provision:

(1) While a court may order a trustee or other fiduciary to distribute a past due mandatory distribution to its beneficiary, no court shall order a trustee or other fiduciary to distribute such past due mandatory distribution directly to a creditor or assignee;

(2) Regardless of whether a beneficiary has any outstanding creditors or assignees, a trustee or other fiduciary of a mandatory interest may directly pay any expense on behalf of such beneficiary and may exhaust the income and principal of the trust for the benefit of such beneficiary;

(3) No trustee or other fiduciary is liable to any creditor or assignee for paying the expenses of a beneficiary of a mandatory interest.

(c) Although a remainder interest may be an enforceable right, where it is not absolutely certain based on the language of the trust that the remainder interest will be distributed within one (1) year, it shall not be classified as a property interest. This subsection does not affect eligibility for any public assistance program administered by the department of human services.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-506.

This section addresses the respective rights of creditors and beneficiaries relative to distributions from support, mandatory and certain remainder interests.

The provisions of this section in some ways diverge significantly from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

Subsection (a) only applies to support interests, and it applies to such interests regardless of whether or not the trust creating such interests contains a spendthrift provision. Relative to a support interest:

Such support interest is not a property interest. This is true even though a beneficiary of a support interest has certain enforceable rights as provided in T.C.A. § 35-15-814.

A spendthrift provision is not required in order to gain any protective benefits or attributes of a support interest. Such protective benefits and attributes are inherent in such interest.

No creditor or assignee (hereinafter in the comments to this section, individually and collectively, simply "creditor") has the ability to force or otherwise reach a support interest until a distribution from such interest is actually made to a beneficiary.

Even after such distribution from a support interest is made to a beneficiary, a creditor can only reach that portion of such distribution that exceeds the amount necessary for the health, education, maintenance and support of such beneficiary who received such distribution.

No beneficiary holding a support interest can transfer the use or enjoyment of property belonging to the trust. Moreover, no such use or enjoyment of property may be reached by the creditors of such beneficiary.

The existence of any creditor of any beneficiary in no way impacts the right or ability of a trustee, cotrustee or other fiduciary (hereinafter in the comments to this section, individually and collectively, simply "fiduciary") of a

support interest to directly pay any expense on behalf of such beneficiary; and such fiduciary may exhaust a trust for the benefit of such beneficiary. In other words a fiduciary need not make a distribution under a support interest to a beneficiary. Instead such fiduciary has the power to directly pay to a third party for any expense for the benefit of such beneficiary and no creditor may reach such payment. If a fiduciary makes such a direct payment, it is not possible for such fiduciary to incur liability to any creditor for so doing.

Subsection (b) only applies to mandatory interests, and it applies to such interests regardless of whether or not the trust creating such interests contains a spendthrift provision. Relative to a mandatory interest:

A court can only order a fiduciary to distribute any past due mandatory distribution to the beneficiary of that mandatory distribution.

A court cannot order a fiduciary to distribute such past due mandatory distribution directly to a creditor.

The existence of any creditor of any beneficiary in no way impacts the right or ability of a fiduciary of a mandatory interest to directly pay any expense on behalf of such beneficiary; and such fiduciary may exhaust a trust for the benefit of such beneficiary. In other words a fiduciary need not make a distribution under a mandatory interest to a beneficiary. Instead such fiduciary has the power to directly pay to a third party for any expense for the benefit of such beneficiary and no creditor may reach such payment. If a fiduciary makes such a direct payment, it is not possible for such fiduciary to incur liability to any creditor for so doing.

Subsection (c) only applies to remainder interests. Relative to a mandatory interest:

Although a remainder interest may be an enforceable right, unless it is absolutely certain based on the language of the trust that such interest will be distributed within one (1) year, it is not a property interest.

Regardless, subsection (c) does not affect eligibility for any public assistance program administered by the department of human services.

35-15-507. Personal obligations of trustee

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

COMMENT.

Because the beneficiaries of the trust hold the beneficial interest in the trust property and the trustee holds only legal title without the benefits of ownership, the creditors of the trustee have only a personal claim against the trustee. See Restatement (Third) § 5 cmt. k (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 12 cmt. a (1959). Similarly, a personal creditor of the trustee who attaches trust property to satisfy the debt does not acquire title as a bona fide purchaser even if the creditor is unaware of the trust. See Restatement (Second) of Trusts § 308 (1959). The protection afforded by this section is consistent with that provided by the Bankruptcy Code. Property in which the trustee holds legal title as trustee is not part of the trustee's bankruptcy estate. 11 U.S.C. § 541(d).

The exemption of the trust property from the personal obligations of the trustee is the most significant feature of Anglo-American trust law by comparison with the devices (e.g., fideicomisos, private foundations) available in civil law countries. A principal objective of the Hague Convention on the Law Applicable to Trusts and on their Recognition is to protect the Anglo-American trust with respect to transactions in civil law countries. See Hague Convention art. 11. See also Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. Rev. 434 (1998); John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J. 165, 179-80 (1997). Notwithstanding the above, it is important to note that the United States has not (as of May 2013) ratified such convention. Therefore, although such

convention may be binding on the member-states who have ratified it, such convention has no force and effect on the United States, any state or this state (as such terms are defined in T.C.A. § 35-15-103).

Notwithstanding that the United States has not ratified this treaty, (as of May 2013) such convention has been fully or partially entered into force by the following member-states whose legal systems are based all or in part on civil law: Italy, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, San Marino and Switzerland. Therefore these countries are highly likely to be influenced by the treaty relative to their respective honoring of trusts.

35-15-508. Removal or replacement power over trustee or other fiduciary not reachable by holder's creditors—Interests of beneficiary who is also a trustee or other fiduciary not reachable.

(a) No creditor or assignee of a beneficiary shall have the power to reach an interest of a beneficiary or any other person who holds an unconditional or conditional removal or replacement power over a trustee or other fiduciary. Such power over a trustee or other fiduciary is personal to the holder and shall not be exercised by the holder's creditors. No court shall direct a holder to exercise the power.

(b) Subject to § 35-15-504(b)(3):

(1) No creditor or assignee of a beneficiary may reach an interest of a beneficiary who is also a trustee, cotrustee or other fiduciary, or otherwise compel a distribution because the beneficiary is then serving as a trustee, cotrustee or other fiduciary; and

(2) No court may foreclose against a beneficiary's interest described in subdivision (b)(1).

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-508.

This section adds further creditor protection to the Tennessee Uniform Trust Code in two cases covered in subsections (a) and (b), respectively.

This section has no similar provision in the Uniform Trust Code. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

Subsection (a) provides that No creditor or assignee (hereinafter in the comments to this section, individually and collectively, simply "creditor") of a beneficiary can reach the interest of any beneficiary or other person who holds any power to remove or replace any trustee, cotrustee or other fiduciary (hereinafter in the comments to this section, individually and collectively, simply "fiduciary"). Such power is personal to the holder solely in their capacity as its holder and not as a beneficiary or other person having a relationship to the trust. The preceding also has the effect that no court can force any such holder to exercise such power.

Subsection (b) provides that, subject to the provisions of T.C.A. § 35-15-504(b)(5) (regarding beneficiaries under discretionary interests also serving as a fiduciary), the fact that a beneficiary is also serving as a fiduciary in no way lessens the creditor protection offered by the various provisions of the Tennessee Uniform Trust Code, even to the extent that no court may foreclose on any such beneficiary-fiduciary's interest.

35-15-509. Judicial foreclosure of beneficial interests, powers of appointment, and reserved powers prohibited—Certain reaches prohibited.

Regardless of whether or not a trust contains a spendthrift provision:

- (1) No beneficial interest, power of appointment, or reserved power in a trust shall be judicially foreclosed;
- (2) No creditor or assignee shall reach a power of appointment or a remainder interest at the trust level and such creditor or assignee shall wait until any funds are distributed relative to such power of appointment or remainder interest before such creditor or assignee may reach such funds; and
- (3) No power of appointment is a property interest.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-509.

This section adds further creditor protection to the Tennessee Uniform Trust Code.

This section has no similar provision in the Uniform Trust Code. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

The provisions of this section are not dependent on whether or not a trust contains a spendthrift provision and applies in both cases.

Subdivision (1) precludes a court from judicially foreclosing on any beneficial interest, power of appointment or reserved power contained in a trust.

Subdivision (2) precludes any creditor or assignee from reaching a power of appointment or a remainder interest at the trust level. Such creditor or assignee must wait until any funds are distributed relative to the power of appointment or remainder interest before reaching such funds.

Subdivision (3) precludes the possibility that any power of appointment is deemed in any way to be a property interest.

35-15-510. Husband and wife; tenants by the entirety; conveyance to trust; claims of separate creditors (Unofficial classification editorially supplied by West).

(a) As used in this section, "proceeds" means:

- (1) Property acquired by the trustee upon the sale, lease, license, exchange, or other disposition of property originally conveyed by a husband and wife as tenants by the entirety to a trustee or trustees;
- (2) Property collected by the trustee on, or distributed on account of, property originally conveyed by a husband and wife as tenants by the entirety to a trustee or trustees;
- (3) Rights arising out of property originally conveyed by a husband and wife as tenants by the entirety to a trustee;
- (4) Claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to, property originally conveyed by a husband and wife as tenants by the entirety to a trustee;
- (5) Insurance payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to, property originally conveyed by a husband and wife as tenants by the entirety to a trustee; or
- (6) Property held by the trustee that is otherwise traceable to property originally conveyed by a husband and wife as tenants by the entirety to a trustee or the property proceeds described in subdivisions (a)(1)-(5).

(b) Any property of a husband and wife that was held by them as tenants by the entirety and subsequently conveyed as tenants by the entirety to the trustee or trustees of one (1) or more trusts, and the proceeds of that property, shall have the same immunity from the claims of their separate creditors as would exist if the husband and wife had continued to hold the property or its proceeds as tenants by the entirety, so long as:

- (1)** The husband and wife remain married;
- (2)** The property or its proceeds continues to be held in trust by the trustee or trustees or their successors in trust;
- (3)** The trust or trusts are, while both settlers are living, revocable by either settlor or both settlers, acting together;
- (4)** Both the husband and the wife are permissible current beneficiaries of the trust or trusts while living; and
- (5)** The trust instrument, deed, or other instrument of conveyance provides that this section shall apply to the property or its proceeds.

(c) After the death of the first of the husband and wife to die, all property held in trust that was immune from the claims of their separate creditors under subsection (b) immediately prior to the individual's death shall continue to have the same immunity from the claims of the decedent's separate creditors as would have existed if the husband and wife had continued while both were alive to hold the property conveyed in trust, or its proceeds, as tenants by the entirety. To the extent that the surviving spouse remains a beneficiary of the trust and has the power, exercisable in the individual capacity of the surviving spouse, to vest in the surviving spouse individually title to the property that was immune from the claims of the separate creditors of the decedent under subsection (b), the property shall be subject to the claims of the separate creditors of the surviving spouse.

(d) The immunity from the claims of separate creditors under subsections (b) and (c) may be waived as to any specific creditor or any specifically described trust property, including all separate creditors of a husband and wife or all former tenancy by the entirety property conveyed to the trustee or trustees, by the express provisions of a trust instrument, deed, or other instrument of conveyance, or by the written consent of both the husband and the wife.

(e) (1) Except as provided in subdivision (e)(2), immunity from the claims of separate creditors under subsections (b) and (c) shall be waived if a trustee executes and delivers a financial statement for the trust that fails to disclose the requested identity of property held in trust that is immune from the claims of separate creditors.

(2) Immunity is not waived under this subsection (e) if the identity of the property that is immune from the claims of separate creditors and the fact of such immunity is otherwise reasonably disclosed by:

(A) A publicly recorded deed or other instrument of conveyance by the husband and wife to the trustee;

(B) A written memorandum by the husband and wife, or by a trustee, that is recorded among the land records or other public records in the county or other jurisdiction where the records of the trust are regularly maintained; or

(C) The terms of the trust instrument, including any schedule or exhibit attached to the trust instrument, if a copy of the trust instrument is provided with the financial statement.

(3) A waiver under this subsection (e) shall be effective only as to:

(A) The person to whom the financial statement is delivered by the trustee;

(B) The particular trust property held in trust for which the immunity from the claims of separate creditors is insufficiently disclosed on the financial statement; and

(C) The transaction for which the disclosure was sought.

(f) In any dispute relating to the immunity of trust property from the claims of a separate creditor of a husband or wife, the trustee has the burden of proving the immunity of the trust property from the creditor's claims.

(g) In the event that any transfer of real property held in tenancy by the entirety to a trustee of a trust as provided under subsection (b) is held invalid by any court of proper jurisdiction, or if the trust is revoked or dissolved by a court decree or operation of law, while both spouses are living, then immediately upon the occurrence of either event, absent a contrary provision in a court decree, all real property held in the trust automatically shall be deemed for all purposes to be held by both spouses as tenants by the entirety.

(h) No transfer by a husband and wife described in subsection (b) shall affect or change either settlor's marital property rights to the transferred property or interest therein immediately prior to such transfer in the event of dissolution of marriage of the spouses, unless both spouses otherwise expressly agree otherwise in writing. Upon entry of a decree granting divorce or annulment between the spouses, the immunity from the claims of separate creditors under subsection (b) shall terminate immediately.

(i) After a conveyance to a trustee described in subsection (b), the property transferred shall no longer be held by the husband and wife as tenants by the entirety.

(j) This section may not be construed to affect existing state law with respect to tenancies by the entirety. This section applies only to tenancy by the entirety property conveyed to a trustee or trustees on or after July 1, 2014.

Revocable Trusts

GENERAL COMMENT.

The provisions of this part in some ways diverge from the Uniform Trust Code and the restatements. To the extent this part is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

This part deals with issues of significance not totally settled under prior law. Because of the widespread use in recent years of the revocable trust as an alternative to a will, this short part is one of the more important parts of the Tennessee Uniform Trust Code. This part and the other parts of the Tennessee Uniform Trust Code treat the revocable trust as the functional equivalent of a will. T.C.A. § 35-15-601 provides that the capacity standard for wills applies in determining whether the settlor had capacity to create a revocable trust. T.C.A. § 35-15-602, after providing that a trust is presumed revocable unless stated otherwise, prescribes the procedure for revocation or amendment, whether the trust contains one or several settlors. T.C.A. § 35-15-603 provides that while a trust is revocable and the settlor has capacity, the rights of the beneficiaries are subject to the settlor's control. T.C.A. § 35-15-604 prescribes a statute of limitations on contest of revocable trusts.

T.C.A. §§ 35-15-601 and 35-15-604, because they respectively address requirements relating to creation of trusts and limitations of action, is not subject to alteration or restriction in the terms of the trust. See T.C.A. § 35-15-105. Notwithstanding the above, unlike the Uniform Trust Code, the Tennessee Uniform Trust Code provides that a no-contest (or similar) provision will generally be enforced according to its terms. See T.C.A. § 35-15-1014.

T.C.A. §§ 35-15-602 and 35-15-603 are fully subject to the settlor's control.

35-15-601. Capacity of settlor of revocable trust

The capacity required 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. To be effective as a post death disposition of property transferred during the transferor's life or by the transferor's will to a trust of which the transferor is the settlor or deemed to be the settlor, neither a revocable nor irrevocable trust existing on or executed after July 1, 2004, has to be executed with the formalities of a will.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-601.

This section is patterned after Restatement (Third) of Trusts § 11(1) (Tentative Draft No. 1, approved 1996). The revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property upon the settlor's death. To solidify the use of the revocable trust as a device for transferring property at death, the settlor usually also executes a pour-over will. The use of a pour-over will assures that property not transferred to the trust during life will be combined with the property the settlor did manage to convey. Given this primary use of the revocable trust as a device for disposing of property at death, the capacity standard for wills rather than that for lifetime gifts should apply. The application of the capacity standard for wills does not mean that the revocable trust must be executed with the formalities of a will. Moreover, the Tennessee Uniform Trust Code (unlike the law of some states, e.g., Florida), statutorily states in this section that neither a revocable or irrevocable trust (pour-over or non-pour-over), even one containing testamentary dispositions, need be made with the formalities of a will.

There are no execution requirements under this Code for a trust not created by will, and a trust not containing real property may be created by an oral statement. See T.C.A. § 35-15-407.

The Tennessee Uniform Trust Code does not explicitly spell out the standard of capacity necessary to create other types of trusts, although T.C.A. § 35-15-402 does require that the settlor have capacity. This section includes a capacity standard for creation of a revocable trust because of the uncertainty in the case law and the importance of the issue in modern estate planning. No such uncertainty exists with respect to the capacity standard for other types of trusts. To create a testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have the capacity that would be needed to transfer the property free of trust. See generally Restatement (Third) of Trusts § 11 (Tentative Draft No. 1, approved 1996); Restatement (Third) of Property: Wills and Other Donative Transfers § 8.1 (Tentative Draft No. 3, approved 2001).

35-15-602. Revocation or amendment of revocable trust

(a) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This subsection (a) does not apply to a trust created under an instrument executed before July 1, 2004.

(b) If a revocable trust is created or funded by more than one (1) settlor:

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

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

(3) At the death of one (1) settlor, each surviving settlor shall have the right to revoke the trust as to that surviving settlor's portion of the trust as determined by the type of property in accordance with subdivisions (b)(1) and (b)(2).

(c) The settlor may revoke or amend a revocable trust:

(1) By substantial compliance with a method provided in the terms of the trust; or

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

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

(B) Any other method manifesting clear and convincing evidence of the settlor's intent.

(d) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs. However, with respect to community property under subdivision (b)(1), the trustee shall deliver the property one-half (1/2) to each spouse unless the governing instrument specifically states otherwise.

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

(f) A conservator of the settlor or, if no conservator has been appointed, a guardian of the settlor may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only if the trust instrument specifically grants to the conservator or guardian the power to revoke or amend the trust or distribute trust property.

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

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-602.

The provisions of this section in some ways diverge from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

Subsection (a), which provides that a settlor may revoke or modify a trust unless the terms of the trust expressly state that the trust is irrevocable, changes the common law. After its effective date of July 1, 2004, the Tennessee Uniform Trust Code reverses the traditional common law rule that a trust is presumed irrevocable absent evidence of contrary intent. See Restatement (Second) of Trusts § 330 (1959). The Tennessee Uniform Trust Code presumes revocability when the instrument is silent because the instrument was likely drafted by a nonprofessional, who intended the trust as a will substitute. The most recent revision of the Restatement of Trusts similarly reverses the former approach. A trust is presumed revocable if the settlor has retained a beneficial interest. See Restatement (Third) of Trusts § 63 cmt. c (Tentative Draft No. 3, approved 2001). Because professional drafters habitually spell out whether or not a trust is revocable, subsection (a) will have limited application.

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

Subsection (b), differs from the Uniform Trust Code regarding default rules for revocation or amendment of a trust having several settlors. The settlor's authority to revoke or modify the trust depends on whether the trust contains community property. To the extent the trust contains community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses. The purpose of this provision, and the reason for the use of joint trusts in community property states, is to preserve the community character of property transferred to the trust. While Tennessee is not a community property state, contributions of community property to trusts created in noncommunity property states do occur. This is due to the mobility of settlors, and the fact that community property retains its community character when a couple moves from a community to a noncommunity state.

With respect to separate property contributed to the trust, or all property of the trust if none of the trust property consists of community property, subsection (b) provides that each settlor may revoke or amend the trust as to the portion of the trust contributed by that settlor. The rule is included because of the increasing use of joint trusts in noncommunity property states in recent years.

Subsection (b) does not address the many technical issues that can arise in determining the settlors' proportionate contribution to a joint trust. Most problematic are contributions of jointly-owned property. In the case of joint tenancies in real estate, each spouse would presumably be treated as having made an equal contribution because of the right to sever the interest and convert it into a tenancy in common. This is in contrast to joint accounts in financial institutions, ownership of which in most states is based not on fractional interest but on actual dollar contribution. See, e.g., Uniform Probate Code § 6-211. Most difficult may be determining a contribution rule for entireties property.

Unlike the Uniform Trust Code, subdivision (b)(3) does not explicitly require that the other settlor or settlors be notified if a joint trust is revoked by less than all of the settlors., but such notice would be required pursuant to T.C.A. § 35-15-603. While a trust is revocable and the settlor has capacity, T.C.A. § 35-15-603(a) provides that the duties of the trustee, including the duty to keep the beneficiaries informed of administrative developments, are owed exclusively to the settlor. With respect to trusts having several settlors, T.C.A. § 35-15-603(b) clarifies that the trustee's duties, including the duty to keep the certain beneficiaries informed of developments, are owed to all settlors having capacity. Notifying the other settlor or settlors of the revocation or amendment will place them in a better position to protect their interests. If the revocation or amendment by less than all of the settlors breaches an implied agreement not to revoke or amend the trust, those harmed by the action can sue for breach of contract. If the trustee fails to notify the other settlor or settlors of the revocation or amendment, the parties aggrieved by the trustee's failure can sue the trustee for breach of trust.

Subsection (c), which is similar to Restatement (Third) of Trusts § 63 cmt. h & i (Tentative Draft No. 3, approved 2001), specifies the method of revocation and amendment. Revocation of a trust differs fundamentally from revocation of a will. Revocation of a will, because a will is not effective until death, cannot affect an existing

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

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

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

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

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

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

Subsection (c) does not require that a trustee concur in the revocation or amendment of a trust. Such a concurrence would be necessary only if required by the terms of the trust. If the trustee concludes that an amendment unacceptably changes the trustee's duties, the trustee may resign as provided in T.C.A. § 35-15-705.

Subsection (d), providing that upon revocation the trust property is to be distributed as the settlor directs, codifies a provision commonly included in revocable trust instruments. If the trust contains community property, the trustee is required on revocation to distribute the property one-half (1/2) to each spouse unless the instrument directs otherwise.

A settlor's power to revoke is not terminated by the settlor's incapacity. The power to revoke may instead be exercised by an agent under a power of attorney as authorized in subsection (e), by a conservator or guardian as authorized in subsection (f), or by the settlor personally if the settlor regains capacity.

Subsection (e), which is similar to Restatement (Third) of Trusts § 63 cmt. 1 (Tentative Draft No. 3, approved 2001), authorizes an agent under a power of attorney to revoke or modify a revocable trust only to the extent the terms of the trust or power of attorney expressly so permit. An express provision is required because most settlors usually intend that the revocable trust, and not the power of attorney, to function as the settlor's principal property management device. The power of attorney is usually intended as a backup for assets not transferred to the revocable trust or to address specific topics, such as the power to sign tax returns or apply for government benefits, which may be beyond the authority of a trustee or are not customarily granted to a trustee.

Subsection (f) addresses the authority of a conservator to revoke or amend a revocable trust. Under Tennessee law a "conservator" is appointed by the court to manage the ward's party and to make decisions with respect to the ward's personal affairs. See T.C.A. § 35-15-103. Consequently, subsection (f) authorizes a conservator to exercise a settlor's power to revoke or amend a trust only if the instrument authorizes a conservator to have that power.

Steps a conservator can take to stem possible abuse is not limited to petitioning to revoke the trust. The conservator could petition for removal of the trustee under T.C.A. § 35-15-706. The conservator, acting on the settlor-beneficiary's behalf, could also bring an action to enforce the trust according to its terms. Pursuant to T.C.A. § 35-15-303, a conservator may act on behalf of the beneficiary whose estate the conservator controls whenever a consent or other action by the beneficiary is required or may be given under the Tennessee Uniform Trust Code.

35-15-603. Settlor's powers -- Powers of withdrawal

(a) While a trust is revocable and the settlor has capacity to revoke the trust, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

(b) If a revocable trust has more than one (1) settlor, the duties of the trustee are owed to all of the settlors having capacity to revoke the trust.

(c) 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.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-603.

This section has the effect of postponing enforcement of the rights of the beneficiaries of a revocable trust until the death or incapacity of the settlor or other person holding the power to revoke the trust. This section thus recognizes that the settlor of a revocable trust is in control of the trust and should have the right to enforce the trust.

Pursuant to this section, the duty under T.C.A. § 35-15-813 to inform and report to beneficiaries is owed to the settlor of a revocable trust as long as the settlor has capacity. In the case of a trust having several settlors, subsection (b) clarifies that this duty extends to all settlors having capacity. Should fewer than all settlors revoke or

modify their portion of the trust, the trustee must notify the other settlor or settlors of the action. See the section comment to T.C.A. § 35-15-602.

If the settlor loses capacity, subsection (a) no longer applies, with the consequence that the rights of the beneficiaries are no longer subject to the settlor's control. Certain beneficiaries are entitled to request information concerning the trust and the trustee must provide the beneficiaries with such information as may be required under T.C.A. § 35-15-813. However, because this section (and unlike under the Uniform Trust Code, significant portions of T.C.A. § 35-15-813) may be freely overridden in the terms of the trust (and relative to T.C.A. § 35-15-813 also by a writing of a settlor, a trust advisor or trust protector), a settlor is (and in some cases others are) free to deny the beneficiaries these rights, even to the point of directing the trustee not to inform them of the existence of the trust. Also, should an incapacitated settlor later regain capacity, the beneficiaries' rights will again be subject to the settlor's control. The cessation of the settlor's control upon the settlor's incapacity or death does not mean that the beneficiaries may reopen transactions the settlor approved while having capacity.

Typically, the settlor of a revocable trust will also be the sole or primary beneficiary of the trust. Upon the settlor's incapacity, any right of action the settlor-trustee may have against the trustee for breach of fiduciary duty will pass to the settlor's agent or conservator.

Subsection (c) makes clear that a holder of a power of withdrawal has the same powers over the trust as the settlor of a revocable trust. Equal treatment is warranted due to the holder's equivalent power to control the trust. For the definition of power of withdrawal, see T.C.A. § 35-15-103.

35-15-604. 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 immediately preceding the settlor's death within the earlier of:

(1) Two (2) years after the settlor's death; or

(2) One hundred twenty (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 immediately preceding the settlor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. The trustee is subject to liability for doing so if:

(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 sixty (60) days after the contestant sent the notification.

(c) A beneficiary of a trust that is determined by a court proceeding to be invalid is liable to return to the court any distribution received for proper distribution. If the beneficiary refuses to return the distribution after being ordered by the court, the beneficiary shall be liable for all costs incurred for recovery of the distribution.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-604.

This section provides finality to the question of when a contest of a revocable trust may be brought. The section is designed to allow an adequate time in which to bring a contest while at the same time permitting the expeditious distribution of the trust property following the settlor's death. The two (2) years is the same statute of limitations on contesting a will admitted to probate in common form.

Unlike the Uniform Trust Code, the Tennessee Uniform Trust Code provides that a no-contest (or similar)

provision will generally be enforced according to its terms. See T.C.A. § 35-15-1014. Subject to such section, a trust can be contested on a variety of grounds. For example, the contestant may allege that no trust was created due to lack of intent to create a trust or lack of capacity (see T.C.A. § 35-15-402), that undue influence, duress, or fraud was involved in the trust's creation (see T.C.A. § 35-15-406), or that the trust had been revoked or modified (see T.C.A. § 35-15-602). A "contest" is an action to invalidate all or part of the terms of the trust or of property transfers to the trustee. An action against a beneficiary or other person for intentional interference with an inheritance or gift, not being a contest, is not subject to this section. For the law on intentional interference, see Restatement (Second) of Torts § 774B (1979). Nor does this section preclude an action to determine the validity of a trust that is brought during the settlor's lifetime, such as a petition for a declaratory judgment, if such action is authorized by other law. See T.C.A. § 35-15-106 (Tennessee Uniform Trust Code supplemented by common law of trusts and principles of equity, subject to the exceptions contained in such section).

This section applies only to a revocable trust that becomes irrevocable by reason of the settlor's death. A trust that became irrevocable by reason of the settlor's lifetime release of the power to revoke is outside its scope. A revocable trust does not become irrevocable upon a settlor's loss of capacity. Pursuant to T.C.A. § 35-15-602, the power to revoke may be exercised by the settlor's agent, conservator, or guardian, or personally by the settlor if the settlor regains capacity.

Subsection (a) specifies a time limit on when a contest can be brought. A contest is barred upon the first to occur of two possible events. The maximum possible time for bringing a contest is two (2) years from the settlor's death. This should provide potential contestants with ample time in which to determine whether they have an interest that will be affected by the trust, even if formal notice of the trust is lacking. A trustee who wishes to shorten the contest period may do so by giving notice. Subdivision (a)(2) bars a contest by a potential contestant one hundred twenty (120) days after the date the trustee sent that person a copy of the trust instrument and informed the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a contest. The one hundred twenty (120) day period in subdivision (a)(2) is subordinate to the two-year bar in subdivision (a)(1). A contest is automatically barred two (2) years after the settlor's death even if notice is sent by the trustee less than one hundred twenty (120) days prior to the end of that period.

Because only a small minority of trusts are actually contested, trustees should not be restrained from making distributions because of concern about possible liability should a contest later be filed. Absent a protective statute, a trustee is ordinarily absolutely liable for misdelivery of the trust assets, even if the trustee reasonably believed that the distribution was proper. See Restatement (Second) of Trusts § 226 (1959). Subsection (b) addresses liability concerns by allowing the trustee, upon the settlor's death, to proceed expeditiously to distribute the trust property. The trustee may distribute the trust property in accordance with the terms of the trust until and unless the trustee receives notice of a pending judicial proceeding contesting the validity of the trust, or until notified by a potential contestant of a possible contest, followed by its filing within sixty (60) days.

Even though a distribution in compliance with subsection (b) discharges the trustee from potential liability, subsection (c) makes the beneficiaries of what later turns out to have been an invalid trust liable to return any distribution received. Issues as to whether the distribution must be returned with interest, or with income earned or profit made are not addressed in this section but are left to the law of restitution.

For purposes of notices under this section, the substitute representation principles of part 3 [T.C.A. § 35-15-301--35-15-305] are applicable. The notice by the trustee under subdivision (a)(2) or by a potential contestant under subdivision (b)(2) must be given in a manner reasonably suitable under the circumstances and likely to result in its receipt. See T.C.A. § 35-15-109.

This section does not address possible liability for the debts of the deceased settlor or a trustee's possible liability to creditors for distributing trust assets. For possible liability of the trust, see T.C.A. § 35-15-505 and its Section Comment.

Office of Trustee

GENERAL COMMENT.

This part contains a series of default rules dealing with the office of trustee. T.C.A. §§ 35-15-701 and 35-15-702 address the process for getting a trustee into office, including the procedures for indicating an acceptance and whether bond will be required. T.C.A. § 35-15-703 addresses cotrustees, permitting the cotrustees to act by majority action, specifying the extent to which one trustee may delegate to another and requiring that any trustee keep all other fiduciaries reasonably informed with information necessary for such other fiduciary to perform their respective duties. T.C.A. §§ 35-15-704--35-15-707 address changes in the office of trustee, specifying the circumstances when a vacancy must be filled, the procedure for resignation, the grounds for removal, and the process for appointing a successor. T.C.A. § 35-15-708 and 35-15-709 prescribe the standards for determining fiduciary compensation and reimbursement for expenses advanced.

The Tennessee Uniform Trust Code contains six (6) additional sections at T.C.A. §§ 35-15-710-35-15-715 not found in the Uniform Trust Code. These sections all relate to trustees and other fiduciaries serving under directed trusts as such are defined in T.C.A. 35-15-103 and as provided for in T.C.A. § 35-15-808. Each of the following govern fiduciaries other than a trustee or cotrustee when such other fiduciaries are serving:

T.C.A. § 35-15-710 details when a fiduciary will be an excluded fiduciary as such is defined in 35-15-103.

T.C.A. § 35-15-711, which deals with accepting or declining fiduciary appointments is analogous to T.C.A. § 35-15-701

T.C.A. § 35-15-712, which deals with fiduciary's bond is analogous to T.C.A. § 35-15-702

T.C.A. § 35-15-713, which deals with fiduciary vacancies is analogous to T.C.A. § 35-15-704

T.C.A. § 35-15-714, which deals with resignation of fiduciary is analogous to T.C.A. § 35-15-705

T.C.A. § 35-15-715, which deals with removal of fiduciary is analogous to T.C.A. § 35-15-706.

Except for:

the court's authority to require, dispense with, modify or terminate a bond under T.C.A. §§ 35-15-702 or 35-15-712; and

the power of a court to adjust a fiduciary's compensation specified in the terms of the trust which is unreasonably low or high under T.C.A. § 35-15-708; all of the provisions of this chapter are subject to modification in the terms of the trust. See T.C.A. § 35-15-105.

35-15-701. Accepting or declining trusteeship

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

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

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

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

(c) A person designated as trustee, 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.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-701.

This section, which specifies the requirements for a valid acceptance of the trusteeship, implicates many of the same issues that arise in determining whether a trust has been revoked. Consequently, the two provisions track each other closely. Compare subsection 701(a), with T.C.A. § 35-15-602(c) (procedure for revoking or modifying trust). Procedures specified in the terms of the trust are recognized, but only substantial, not literal compliance is required. A failure to meet technical requirements, such as notarization of the trustee's signature, does not result in a failure to accept. Ordinarily, the trustee will indicate acceptance by signing the trust instrument or signing a separate written instrument. However, this section validates any other method demonstrating the necessary intent, such as by knowingly exercising trustee powers, unless the terms of the trust make the specified method exclusive. This section also does not preclude an acceptance by estoppel. For general background on issues relating to trustee acceptance and rejection, see Restatement (Third) of Trusts § 35 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 102 (1959). Consistent with T.C.A. § 35-15-201(b), which emphasizes that continuing judicial supervision of a trust is the rare exception, not the rule, the Tennessee Uniform Trust Code does not require that a trustee qualify in court.

To avoid the inaction that can result if the person designated as trustee fails to communicate a decision either to accept or to reject the trusteeship, subsection (b) provides that a failure to accept within a reasonable time constitutes a rejection of the trusteeship. What will constitute a reasonable time depends on the facts and circumstances of the particular case. Unlike the Uniform Trust Code, the Tennessee Uniform Trust Code considers such facts and circumstances to include knowledge by the person designated trustee of both such designation and of the assets comprising the trust.

A major consideration is possible harm that might occur if a vacancy in a trusteeship is not filled in a timely manner. A trustee's rejection normally precludes a later acceptance but does not cause the trust to fail. See Restatement (Third) of Trusts § 35 cmt. c (Tentative Draft No. 2, approved 1999). Regarding the filling of a vacancy in the event of a rejection, see T.C.A. § 35-15-704.

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

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

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

liability for obligations arising from ownership or control of trust property, see T.C.A. § 35-15-1010.

35-15-702. Trustee's bond

(a) 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 state or national bank, savings institution, or trust company authorized to exercise fiduciary powers and regulated by the office of the comptroller of the currency, office of thrift supervision, the department of financial institutions or equivalent state banking supervisors need not give bond, even if required by the terms of the trust.

COMMENT.

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

Despite the ability of the court pursuant to T.C.A. § 35-15-105(b) to override a term of the trust waiving bond, the court should order bond in such cases only for good reasons. Similarly, the court should rarely dispense with bond if the settlor directed that the trustee give bond.

This section does not attempt to detail all of the technical bonding requirements that the court may impose. Typical requirements are listed in the Uniform Probate Code sections cited above. The amount of a bond otherwise required may be reduced by the value of trust property deposited in a manner that prevents its unauthorized disposition, and by the value of real property which the trustee, by express limitation of power, lacks power to convey without court authorization. The amount of bond otherwise required of a trustee acting as such in a directed trust setting may also depend on the extent to which such trustee is an excluded fiduciary relative to any such trustee's powers and duties. Similarly a court is mandated to consider such matters when considering the requirements of bonds for all fiduciaries other than a trustee. See T.C.A. § 35-15-712. Also, the court may excuse or otherwise modify a requirement of a bond, reduce or increase the amount of a bond, release a surety, or permit the substitution of another bond with the same or different sureties.

T.C.A. § 35-15-702(c) clarifies that a state or nationally regulated bank, savings institution or trust company authorized to exercise fiduciary powers need not provide bond for individual trusts. Such institutions must meet detailed financial responsibility requirements in order to do trust business in the state, thereby obviating the need to post bonds in individual trusts.

35-15-703. Cotrustees

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

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

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

(d) If a cotrustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid

injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.

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

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

(g) Each trustee shall exercise reasonable care to:

(1) Prevent a cotrustee from committing a serious breach of trust; and

(2) Compel a cotrustee to redress a serious breach of trust.

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

(i) A trustee shall keep each cotrustee and any other fiduciary reasonably informed about the administration of the trust, to the extent the trustee has knowledge that each such cotrustee or other fiduciary does not have such knowledge of the trustee's actions, or regarding other material information or the availability of such information, related to the administration of the trust that would be reasonably necessary for each such cotrustee or other fiduciary to perform his or her duties as a trustee or other fiduciary of the trust.

COMMENT.

This section contains most but not all of the Code's provisions on cotrustees. Other provisions relevant to cotrustees include sections T.C.A. § 35-15-704 (vacancy in trusteeship need not be filled if cotrustee remains in office), T.C.A. § 35-15-705 (notice of resignation must be given to cotrustee), T.C.A. § 35-15-706 (lack of cooperation among cotrustees as ground for removal), T.C.A. § 35-15-707 (obligations of resigning or removed trustee), , and T.C.A. § 35-15-1013 (whether all or less than all trustees are required to exercise signature authority to exercise various powers).

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

Cotrusteeship should not be called for without careful reflection. Division of responsibility among cotrustees is often confused, the accountability of any individual trustee is uncertain, obtaining consent of all trustees can be burdensome, and unless an odd number of trustees is named deadlocks requiring court resolution can occur. Potential problems can be reduced by addressing division of responsibilities in the terms of the trust. Like the other sections of this chapter, this section is freely subject to modification in the terms of the trust. See T.C.A. § 35-15-105.

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

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-703.

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

Restatement (Second) of Trusts § 383 (1959).

Under subsection (b), a majority of the remaining trustees may act for the trust when a vacancy occurs in a cotrusteeship. T.C.A. § 35-15-704 provides that a vacancy in a cotrusteeship need be filled only if there is no trustee remaining in office.

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

Subsection (e) addresses the extent to which a trustee may delegate the performance of functions to a cotrustee. The standard differs from the standard for delegation to an agent as provided in T.C.A. § 35-15-807 because the two situations are different. T.C.A. § 35-15-807, which is substantially similar to T.C.A. § 35-14-111 of the Tennessee Uniform Prudent Investor Act of 2002, recognizes that many trustees are not professionals. Consequently, trustees should be encouraged to delegate functions they are not competent to perform. Subsection (e) is premised on the assumption that the settlor selected cotrustees for a specific reason and that this reason ought to control the scope of a permitted delegation to a cotrustee. Subsection (e) prohibits a trustee from delegating to another trustee functions the settlor reasonably expected the trustees to perform jointly. The exact extent to which a trustee may delegate functions to another trustee in a particular case will vary depending on the reasons the settlor decided to appoint cotrustees. The better practice is to address the division of functions in the terms of the trust, as allowed by T.C.A. § 35-15-105. Subsection (e) is based on language derived from Restatement (Second) of Trusts § 171 (1959). This section of the Restatement Second, which applied to delegations to both agents and cotrustees, was superseded, as to delegation to agents, by Restatement (Third) of Trusts: Prudent Investor Rule § 171 (1992).

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

A cotrustee can always seek declaratory relief under T.C.A. § 29-14-105 when a deadlock exists among trustees or when a dissenting cotrustee fears that an action or omission of the majority could result in potential liability to the cotrustee.

A provision similar to T.C.A. § 35-15-703(i) is not contained in the Uniform Trust Code. Subsection (i) requires all trustees to keep all other fiduciaries reasonably informed about the administration of the trust to the extent such other fiduciaries do not have such knowledge. This requirement assures that all such fiduciaries have the material information necessary to perform their respective duties.

35-15-704. Vacancy in trusteeship -- Appointment of successor

(a) A vacancy in a trusteeship occurs if:

- (1) A person designated as trustee rejects the trusteeship;
- (2) A person designated as trustee cannot be identified or does not exist;

- (3) A trustee resigns;
- (4) A trustee is disqualified or removed;
- (5) A trustee dies; or
- (6) A conservator is appointed for an individual serving as trustee.

(b) If one (1) or more cotrustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustee.

(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 does not affirmatively object within thirty (30) days of receipt of notice of the person selected; 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.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-704.

This section lists the ways in which a trusteeship becomes vacant and the rules on filling the vacancy. See also T.C.A. § 35-15-701 (accepting or declining trusteeship), T.C.A. § 35-15-705 (resignation), and T.C.A. § 35-15-706 (removal). Good drafting practice suggests that the terms of the trust deal expressly with the problem of vacancies, naming successors and specifying the procedure for filling vacancies. This section applies only if the terms of the trust fail to specify a procedure.

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

Subsection (b) provides that a vacancy in the cotrusteeship must be filled only if the trust has no remaining trustee. If a vacancy in the cotrusteeship is not filled, T.C.A. § 35-15-703 authorizes the remaining cotrustees to continue to administer the trust. However, as provided in subsection (e), the court, exercising its inherent equity authority, may always appoint additional trustees if the appointment would promote better administration of the trust. See Restatement (Third) of Trusts § 34 cmt. e (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 108 cmt. e (1959).

Subsection (c) provides a procedure for filling a vacancy in the trusteeship of a noncharitable trust. Absent an effective provision in the terms of the trust, subdivision (c)(2) permits a vacancy in the trusteeship to be filled, without the need for court approval, by a person selected by unanimous agreement of the qualified beneficiaries. An effective provision in the terms of the trust for the designation of a successor trustee includes a procedure under which the successor trustee is selected by a person designated in those terms. Pursuant to T.C.A. § 35-15-705, the qualified beneficiaries may also receive the trustee's resignation. If a trustee resigns following notice as

provided in T.C.A. § 35-15-705, the trust may be transferred to a successor appointed pursuant to subdivision (c)(2) of this section, all without court involvement. Unlike with the Uniform Trust Code, only a qualified (and not any nonqualified) beneficiary who is displeased with the choice of the qualified beneficiaries may petition the court for removal of the trustee under T.C.A. § 35-15-706. Under such section, a settlor or cotrustee may also so petition for removal.

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

Subsection (d) specifies a procedure for filling a vacancy in the trusteeship of a charitable trust. Absent an effective designation in the terms of the trusts, a successor trustee may be selected by the charitable organizations expressly designated to receive distributions in the terms of the trusts if the attorney general does not affirmatively object within thirty days of receipt of the notice of the person selected. This is a different procedure than under the Uniform Trust Code, which requires the attorney general to actively concur. If the attorney general objects within the specified time frame, or if the trust does not designate a charitable organization to receive distributions, the vacancy may be filled only by a court.

In the case of a revocable trust, the appointment of a successor will normally be made directly by the settlor. As to the duties of a successor trustee with respect to the actions of a predecessor, see T.C.A. § 35-15-812.

35-15-705. Resignation of trustee

(a) A trustee may resign:

(1) Upon at least thirty (30) days' notice to the qualified beneficiaries, the settlor, if living, and all cotrustees; or

(2) With the approval of the court.

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

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

COMMENT.

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

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

Regarding the residual responsibilities of a resigning trustee until the trust property is delivered to a successor trustee, see T.C.A. § 35-15-707.

In the case of a revocable trust of which the settlor has the capacity to revoke, because the rights of the qualified beneficiaries are subject to the settlor's control (see T.C.A. § 35-15-603), resignation of the trustee is accomplished by giving notice to the settlor (instead of any qualified beneficiaries) and all cotrustees. In the case of a revocable trust of which the settlor does not currently have the capacity to revoke due to incapacity, resignation of the trustee is accomplished by giving notice to all cotrustees and to: the person or persons who are appointed as successor trustee(s) under the trust instrument; or if none, to any person holding a power under the trust instrument to appoint a successor trustee; or if none, to any agent under any durable power of attorney for such incapacitated settlor if such durable power of attorney grants the agent the power to accept same or to appoint successor trustees; or if none to the conservator or guardian of the property of the settlor. Should there be none of the above such persons, either the resigning trustee, a qualified beneficiary or a cotrustee can petition the court to approve such trustee's resignation.

35-15-706. Removal of trustee

(a) The settlor, a cotrustee, or a qualified beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.

(b) The court may remove a trustee if:

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

(c) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under § 35-15-1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-706.

Subsection (a), contrary to the common law, grants the settlor of an irrevocable trust the right to petition for removal of a trustee. The right to petition for removal does not give the settlor of an irrevocable trust any other rights, such as the right to an annual report or to receive other information concerning administration of the trust. The right of a qualified beneficiary to petition for removal does not apply to a revocable trust while the settlor has capacity. Pursuant to T.C.A. § 35-15-603, while a trust is revocable and the settlor has capacity, the rights of the beneficiaries are subject to the settlor's exclusive control.

Subsection (a) differs from Uniform Trust Code section 706(a) in that under such subsection, only a qualified (and not any nonqualified) beneficiary who is displeased with the choice of the qualified beneficiaries may petition the court for removal of the trustee. Under T.C.A. § 35-15-706, a settlor or cotrustee may also so petition for removal.

Trustee removal may be regulated by the terms of the trust. See T.C.A. § 35-15-105. In fashioning a removal provision for an irrevocable trust, the drafter should be cognizant of the danger that the trust may be included in the settlor's federal gross estate if the settlor retains the power to be appointed as trustee or to appoint someone who is not independent. See Rev. Rul. 95-58, 1995-2 C.B. 191.

Subsection (b) lists the grounds for removal of the trustee. The grounds for removal are similar to those found

in Restatement (Third) of Trusts § 37 cmt. e (Tentative Draft No. 2, approved 1999). A trustee may be removed for untoward action, such as for a serious breach of trust, but the section is not so limited. A trustee may also be removed under a variety of circumstances in which the court concludes that the trustee is not best serving the interests of the beneficiaries. The term “interests of the beneficiaries” means the beneficial interests as provided in the terms of the trust, not as defined by the beneficiaries. See T.C.A. § 35-15-103. Removal for conduct detrimental to the interests of the beneficiaries is a well-established standard for removal of a trustee. See Restatement (Third) of Trusts § 37 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 107 cmt. a (1959).

Subdivision (b)(1), consistent with Restatement (Third) of Trusts § 37 cmt. e and g (Tentative Draft No. 2, approved 1999), makes clear that not every breach of trust justifies removal of the trustee. The breach must be “serious.” A serious breach of trust may consist of a single act that causes significant harm or involves flagrant misconduct. A serious breach of trust may also consist of a series of smaller breaches, none of which individually justify removal when considered alone, but which do so when considered together. A particularly appropriate circumstance justifying removal of the trustee is a serious breach of the trustee’s duty to keep the beneficiaries reasonably informed of the administration of the trust or to comply with a beneficiary’s request for information to the extent required by T.C.A. § 35-15-813. Notwithstanding the immediately preceding sentence, unlike the Uniform Trust Code, the Tennessee Uniform Trust Code allows “quiet” trusts. If a trustee is not keeping the beneficiaries reasonably informed of the administration of the trust or does not comply with a beneficiary’s request for information because T.C.A. § 35-15-813(e) or (f) applies, or a beneficiary or other person has failed or refused to comply with the requirements of T.C.A. § 35-15-813(g), then the trustee’s action in not keeping a beneficiary, person, beneficiaries or persons so informed does not constitute any breach of trust whatsoever.

The lack of cooperation among trustees justifying removal under subdivision (b)(2) need not involve a breach of trust. The key factor is whether the administration of the trust is significantly impaired by the trustees’ failure to agree. Removal is particularly appropriate if the naming of an even number of trustees, combined with their failure to agree, has resulted in deadlock requiring court resolution. The court may remove one or more or all of the trustees. If a cotrustee remains in office following the removal, under T.C.A. § 35-15-704 appointment of a successor trustee is not required.

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

Subdivision (b)(3) authorizes removal for a variety of grounds, including unfitness, unwillingness, or persistent failure to administer the trust effectively. Removal in any of these cases is allowed only if it best serves the interests of the beneficiaries. The term “interests of the beneficiaries” means the beneficial interests as provided in the terms of the trust, not as defined by the beneficiaries. See T.C.A. § 35-15-103. “Unfitness” may include not only mental incapacity but also lack of basic ability to administer the trust. Before removing a trustee for unfitness the court should consider:

the extent to which the problem might be cured by a delegation of functions the trustee is personally incapable of performing; and

if the trustee is serving under a directed trust, the nature of the powers and duties held by the trustee, as well as the extent to which such trustee is an excluded fiduciary relative to other powers and duties.

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

It has traditionally been more difficult to remove a trustee named by the settlor than a trustee named by the

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

Subdivision (b)(4) also contains a specific but more limited application of T.C.A. § 35-15-411. T.C.A. § 35-15-411 allows the qualified beneficiaries, by unanimous agreement of such qualified beneficiaries, to compel modification of a trust if the court concludes that the particular modification is not inconsistent with a material purpose of the trust. T.C.A. § 35-15-706(b)(4) similarly allows the qualified beneficiaries to request removal of the trustee if the designation of the trustee was not a material purpose of the trust. Before removing the trustee the court must also find that removal will best serve the interests of the beneficiaries and that a suitable cotrustee or successor trustee is available.

Subsection (c) authorizes the court to intervene pending a final decision on a request to remove a trustee. Among the relief that the court may order under subsection T.C.A. § 35-15-1001 is an injunction prohibiting the trustee from performing certain acts and the appointment of a special fiduciary to perform some or all of the trustee's functions. Pursuant to T.C.A. § 35-15-1004, the court may also award attorney's fees as justice and equity may require.

35-15-707. Delivery of property by former trustee

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

(b) A trustee who has resigned or been removed shall, within a reasonable time, deliver the trust property within the trustee's possession to the cotrustee, successor trustee, or other person entitled to it.

COMMENT.

This section addresses the continuing authority and duty of a resigning or removed trustee. Subject to the power of the court to make other arrangements or unless a cotrustee remains in office, a resigning or removed trustee has continuing authority until the trust property is delivered to a successor. If a cotrustee remains in office, there is no reason to grant a resigning or removed trustee any continuing authority, and none is granted under this section.

There is ample authority in the Tennessee Uniform Trust Code for the appointment of a special fiduciary, an appointment which can avoid the need for a resigning or removed trustee to exercise residual powers until a successor can take office. See T.C.A. § 35-15-704(e) (court may appoint additional trustee or special fiduciary whenever court considers appointment necessary for administration of trust), T.C.A. § 35-15-705(b) (in approving resignation, court may impose conditions necessary for protection of trust property), T.C.A. § 35-15-706(c) (pending decision on petition for removal, court may order appropriate relief), and T.C.A. § 35-15-1001(b)(5) (to remedy breach of trust, court may appoint special fiduciary as necessary to protect trust property or interests of beneficiary).

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

T.C.A. § 35-15-707(b) recognizes that the process of changing trustees does not take place overnight. The resigning or removed trustee may have to sell proprietary mutual funds whose sale is limited to certain times each month; it may have to wait for a court order to become final; it may wish to have in hand releases from beneficiaries; and it may have to wait on the preparation and filing of deeds or other instruments of conveyance before transferring the trust property in its possession or under its control.

35-15-708. Compensation of trustee

(a) If the terms of a trust do not specify a trustee's, trust advisor's or trust protector's compensation, and if the settlor, if living, or otherwise a majority of the qualified beneficiaries as defined in § 35-15-103(24)(A), have not otherwise agreed, a trustee, trust advisor or trust protector is entitled to compensation that is reasonable under the circumstances.

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

(1) The duties of the trustee, trust advisor or trust protector 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.

(c) Factors for the court to consider in deciding upon a trustee's, trust advisor's or trust protector's compensation shall include the size of the trust, the nature and number of the assets, the income produced, the time and responsibility required, the expertise required, any management or sale of real property or closely held business interests, any involvement in litigation to protect trust property, and other relevant factors.

(d) Subject to the court's authority as provided in subsection (b), regardless of its form of entity, the fees set forth in the published fee schedule of a trustee, trust advisor or trust protector that is regulated by the department of financial institutions, the equivalent regulatory agency of another state, the office of the comptroller of the currency or the office of thrift supervision shall be presumed to be reasonable, unless otherwise provided by the terms of the trust

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-708.

Subsection (a) establishes a standard of reasonable compensation. Such standard applies to the extent that the terms of a trust, or a settlor if living, or otherwise a majority of the qualified beneficiaries as defined in T.C.A. 35-15-103 have not otherwise agreed

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

Because "trustee" as defined in T.C.A. § 35-15-103 includes not only an individual trustee but also cotrustees, each trustee, including a cotrustee, is entitled to reasonable compensation under the circumstances. The fact that a trust has more than one trustee does not mean that the trustees together are entitled to more compensation than had either acted alone. Nor does the appointment of more than one (1) trustee mean that the trustees are eligible to receive the compensation in equal shares. The total amount of the compensation to be paid and how it will be divided depend on the totality of the circumstances. Factors to be considered include the settlor's reasons for naming more than one (1) trustee and the level of responsibility assumed and exact services performed by each trustee. Often the fees of cotrustees will be in the aggregate higher than the fees for a single trustee because of the duty of each trustee to participate in administration and not delegate to a cotrustee duties the settlor expected the trustees to perform jointly. See Restatement (Third) of Trusts § 38 cmt. i (Tentative Draft No. 2, approved 1999). The trust may benefit in such cases from the enhanced quality of decision-making resulting from the collective deliberations of the trustees.

The same standard of reasonable compensation that applies to trustees and to cotrustees applies to trust protectors, trust advisors and any other fiduciary.

In setting compensation, the services actually performed and responsibilities assumed by the trustee should be closely examined. A downward adjustment of fees may be appropriate if a trustee has delegated significant duties to agents, such as the delegation of investment authority to outside managers. See T.C.A. § 35-15-807 (delegation by trustee). On the other hand, a trustee with special skills, such as those of a real estate agent, may be entitled to extra compensation for performing services that would ordinarily be delegated. See Restatement (Third) of Trusts § 38 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 242 cmt. d (1959).

Similarly, in setting compensation for any fiduciary serving under a directed trust, the powers held and duties owed, the services actually performed and responsibilities assumed by any fiduciary, as well as the extent to which such fiduciary is an excluded fiduciary should be closely examined and adjusted accordingly.

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

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

Subsection (b) permits the terms of the trust to override the reasonable compensation standard, subject to

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

The preceding paragraph also applies to any fiduciary serving under a directed trust.

Compensation may be set by agreement. A trustee may enter into an agreement with the settlor or a majority of the qualified beneficiaries for lesser or increased compensation, although an agreement increasing compensation is not binding on a nonconsenting beneficiary. See T.C.A. § 35-15-111 (matters that may be resolved by nonjudicial settlement). See also Restatement (Third) of Trusts § 38 cmt. f (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 242 cmt. i (1959). A trustee may also agree to waive compensation and should do so prior to rendering significant services if concerned about possible gift and income taxation of the compensation accrued prior to the waiver. See Rev. Rul. 66-167, 1966-1 C.B. 20. See also Restatement (Third) of Trusts § 38 cmt. g (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 242 cmt. j (1959).

The preceding paragraph also applies to any fiduciary serving under a directed trust.

T.C.A. § 35-15-816 grants the trustee authority to fix and pay its compensation without the necessity of prior court review, subject to the right of a beneficiary to object to the compensation in a later judicial proceeding. Allowing the trustee to pay its compensation without prior court approval promotes efficient trust administration but does place a significant burden on a beneficiary who believes the compensation is unreasonable. Unlike with the Uniform Trust Code, the Tennessee Uniform Trust Code does not require a trustee to provide the qualified beneficiaries with advance notice of any change in the method or rate of the trustee's compensation.

Under T.C.A. §§ 35-6-501 and 35-6-502 of the Tennessee Uniform Principal and Income Act, one half (1/2) of a trustee's regular compensation is charged to income and the other half (1/2) to principal. Chargeable to principal are fees calculated on principal for acceptance, distribution, or termination of the trust, and fees charged on disbursements made to prepare property for sale. However, several other sections of such act may modify this. T.C.A. § 35-6-104 provides a trustee the power to adjust between income and principal in certain cases. Moreover, under T.C.A. §§ 35-6-108 and 35-6-109, a trustee can respectively, convert a traditional trust to a unitrust and manage an express unitrust created in a trust instrument. In both cases, such types of trusts often require adjustments between income and principal.

35-15-709. Reimbursement of expenses

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

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

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

(b) An advance, either by the trustee, trust advisor or trust protector or by a person named in § 35-15-701(c)(1), of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or

such portion of, T.C.A. § 35-15-709.

A trustee has the authority to expend trust funds as necessary in the administration of the trust, including expenses incurred in the hiring of agents. See T.C.A. § 35-15-807 (delegation by trustee) and T.C.A. § 35-15-816 (trustee to pay expenses of administration from trust).

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

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

Subsection (b) implements T.C.A. § 35-15-802(k)(5), which creates an exception to the duty of loyalty for advances by the trustee for the protection of the trust if the transaction is fair to the beneficiaries.

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

All of the above provisions also apply to trust advisors, trust protectors and other fiduciaries serving under a directed trust.

35-15-710. Directed trusts.

If the terms of the trust, an agreement of the qualified beneficiaries, or a court order requires a trustee, trust advisor, or trust protector to follow the direction of a trust advisor or trust protector, and the trustee, trust advisor, or trust protector acts in accordance with such direction, then the trustee, trust advisor, or trust protector so directed shall be treated as an excluded fiduciary.

COMMENT.

This section deals with accepting or declining fiduciary appointments when such fiduciary is serving under a directed trust. It is analogous to T.C.A. § 35-15-701.

35-15-711. Directed Trusts; Accepting or declining fiduciary appointment.

(a) A trust advisor, trust protector or other fiduciary other than a cotrustee, such cotrustee already being provided for in § 35-15-701(a), may accept its appointment as such respective fiduciary in a like manner as provided for a trustee under § 35-15-701(a).

(b) A trust advisor, trust protector or other fiduciary other than a cotrustee, such cotrustee already being provided for in § 35-15-701(b), may reject its appointment as such respective fiduciary in a like manner as provided for a trustee under § 35-15-701(b).

(c) A trust advisor, trust protector or other fiduciary other than a cotrustee, such cotrustee already being provided for in § 35-15-701(c), may, without accepting its appointment as such respective fiduciary, carry out the appropriate activities relative to such respective fiduciary as are provided for a trustee under § 35-15-701(c).

COMMENT.

This section deals with accepting or declining fiduciary appointments when such fiduciary is serving under a directed trust. It is analogous to T.C.A. § 35-15-701.

35-15-712. Directed Trusts; Fiduciary's bond.

(a) Section 35-15-702 applies to trust advisors, trust protectors or other fiduciaries other than cotrustees, such cotrustees already being provided for in § 35-15-702.

(b) When exercising its powers under this section, the court shall consider the powers, duties and liabilities relative to such respective fiduciaries other than a cotrustee and whether any of such respective fiduciaries are excluded fiduciaries.

COMMENT.

This section deals with a fiduciary's bond when such fiduciary is serving under a directed trust. It is analogous to T.C.A. § 35-15-702. It directs a court to consider the respective powers and duties held by a fiduciary, as well as the extent to which such fiduciary is a excluded fiduciary, when determining matters related to fiduciary bonds.

35-15-713. Vacancy; Directed Trusts.

(a) Except as otherwise provided by the terms of the trust upon obtaining knowledge of a vacancy in the office of trust advisor or trust protector, the trustee shall be vested with any fiduciary power or duty that otherwise would be vested in the trustee but that by the terms of the trust was vested in the trust advisor or trust protector, until such time that the vacancy in the office of trust advisor or trust protector, as applicable is filled.

(b) Such vacancy shall be filled in the same manner as would a vacancy in trusteeship that is required to be filled, either as provided by § 35-15-704(c) if the trust is a noncharitable trust, or as provided by § 35-15-704(d) if the trust is a charitable trust. Section 35-15-704(e) shall also apply relative to trust advisors and trust protectors in the same manner as that subsection does to trustees and vacancies in trusteeship.

(c) Notwithstanding subsection (a), a trustee shall not be liable for failing to exercise or assume any power or duty held by a trust advisor or trust protector and conferred upon the trustee by subsection (a) for the sixty-day period immediately following the date the trustee obtains knowledge of such vacancy.

COMMENT.

This section deals with fiduciary vacancies when such fiduciary is serving under a directed trust. It is analogous to T.C.A. § 35-15-704.

35-15-714. Directed Trusts; Resignation of fiduciary.

(a) A trust advisor, trust protector or other fiduciary other than a cotrustee, such cotrustee's resignation already being provided for in § 35-15-705, may resign its appointment as such respective fiduciary in a like manner as provided for a trustee under § 35-15-705.

(b) When exercising its powers under this section relative to resignation, the court shall consider the powers, duties and liabilities relative to such respective fiduciaries other than a cotrustee and whether any of such respective fiduciaries are excluded fiduciaries.

COMMENT.

This section deals with resignation of a fiduciary when such fiduciary is serving under a directed trust. It is analogous to T.C.A. § 35-15-705. It directs a court to consider the respective powers and duties held by a fiduciary, as well as the extent to which such fiduciary is a excluded fiduciary, when exercising its powers relative to resignation.

35-15-715. Directed Trusts; Removal of fiduciary.

(a) A trust advisor, trust protector or other fiduciary other than a cotrustee, such cotrustee's removal already being provided for in § 35-15-706, may be removed as such respective fiduciary in a like manner as provided for a trustee under § 35-15-706.

(b) When exercising its powers under this section relative to removal of such respective fiduciary, the court shall consider the powers, duties and liabilities relative to such respective fiduciaries other than a cotrustee and whether any of such respective fiduciaries are excluded fiduciaries.

COMMENT.

This section deals with removal of a fiduciary when such fiduciary is serving under a directed trust. It is analogous to T.C.A. § 35-15-706. It directs a court to consider the respective powers and duties held by a fiduciary, as well as the extent to which such fiduciary is a excluded fiduciary, when exercising its powers relative to removal of any such fiduciary.

Duties and Powers of Trustee

GENERAL COMMENT.

The provisions of part 8 of the Tennessee Uniform Trust Code in some ways diverge significantly from the Uniform Trust Code and the restatements. To the extent such part is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

Part 8 of the Tennessee Uniform Trust Code states the fundamental duties of a trustee and lists the trustee's powers. Under T.C.A. § 35-15-808 and part 12 such powers may be removed from a trustee and directed to others, in which case the fiduciary from whom such powers were removed shall be an excluded fiduciary as such is defined in T.C.A. § 35-15-103. Part 8 also provides for how certain of such powers may be exercised and the judicial standards by which certain of those powers may be reviewed. The duties listed are not new, but how the particular duties are formulated and applied has changed over the years. Moreover, the Tennessee Uniform Trust Code allows far greater latitude than does the Uniform Trust Code in the exercise of discretion relative to certain of such duties, as well as who can and does hold such duties. This part was drafted where possible to conform with the Tennessee Uniform Prudent Investor Act. The Tennessee Uniform Prudent Investor Act prescribes a trustee's responsibilities with respect to the management and investment of trust property. The Tennessee Uniform Trust Code also addresses a trustee's duties with respect to distribution to beneficiaries and is far more flexible than is the Uniform Trust Code relative to such.

The Tennessee Uniform Prudent Investor Act of 2002, codified at title 35, part 14, has been incorporated by reference into the Tennessee Uniform Trust Code by T.C.A. § 35-15-901. Certain sections of this part 8 overlap with the Tennessee Uniform Prudent Investor Act. Those sections are T.C.A. § 35-15-802 (duty of loyalty), T.C.A. § 35-15-803 (impartiality), T.C.A. § 35-15-805 (costs of administration), T.C.A. § 35-15-806 (trustee's skills) and T.C.A. § 35-15-807 (delegation).

Unlike with the Uniform Trust Code, all of the provisions of this part of the Tennessee Uniform Trust Code may be overridden in the terms of the trust except for the trustee's fundamental obligation to act in accordance with the purposes of the trust, and for the benefit of the beneficiaries as the interests of such beneficiaries are defined under the terms of the trust. (See T.C.A. § 35-15-105).

35-15-801. Duty to administer trust

Upon acceptance of a trusteeship, the trustee shall administer the trust until such time as the trust terminates or a successor trustee is appointed and all assets are delivered in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this chapter.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-801.

In furtherance of the policy of the state of Tennessee and its overriding emphasis on settlor's intent and freedom of disposition, the Tennessee Uniform Trust Code governs a trustee's (or other fiduciary's) duties only to the extent such terms of a trust are silent or for some reason invalid on a particular issue. This section provides for the following default rules, which are only applicable to the extent of such silence or to the extent of such invalidity.

This section confirms that a primary duty of a trustee is to follow the terms and purposes of the trust and to do so in good faith. However, unlike with the Uniform Trust Code, the Tennessee Uniform Trust Code allows the

terms of a trust to remove from a trustee or other fiduciary the duty to act in good faith, see T.C.A. § 35-15-105.

In administering the trust, the trustee must not only comply with this section but also with the other duties specified in this part, particularly the obligation not to place the interests of others above those of the beneficiaries as provided in T.C.A. § 35-15-802 (but such section allows far more latitude than does section 802 of the Uniform Trust Code to deal with affiliates or in affiliated investments), the duty to act with prudence as provided in T.C.A. § 35-15-804, and the duty to keep certain beneficiaries and holders of powers of appointment reasonably informed about the administration of the trust as provided in T.C.A. § 35-15-813 (but under such section a fiduciary owes such duty to far fewer beneficiaries than under section 813 of the Uniform Trust Code, and unlike the latter, allows such duty to be removed either in the trust instrument or by any of a settlor, trust advisor or trust protector in a writing delivered to the trustee).

While a trustee generally must administer a trust in accordance with its terms and purposes, the purposes and particular terms of the trust can on occasion conflict. If such a conflict occurs because of circumstances not anticipated by the settlor, it may be appropriate for the trustee to petition under T.C.A. § 35-15-412 to modify or terminate the trust. Pursuant to section T.C.A. § 35-15-404, a trustee is not required to perform a duty prescribed by the terms of the trust if performance would be impossible or illegal. Unlike the Uniform Trust Code, T.C.A. § 35-15-404 contains no mention of public policy.

For background on the trustee's duty to administer the trust, see Restatement (Second) of Trusts §§ 164-169 (1959).

Certain of the above-cited sections of the Tennessee Uniform Trust Code diverge significantly from the Uniform Trust Code and the restatements. To the extent any of such cited sections are in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

This section also confirms that a trustee does not have a duty to act until the trustee has accepted the trusteeship. Such duty continues until the trust either terminates or a successor trustee is appointed and all assets of the trust are delivered to such successor trustee. For the procedure for accepting a trusteeship, see T.C.A. § 35-15-701. For the procedures relative to appointment of a successor trustee and delivery of property by a former trustee, see T.C.A. §§ 35-15-704 and 35-15-707, respectively. For procedures relative to trust advisors, trust protectors and other fiduciaries accepting such offices and providing for successors to such offices, see T.C.A. §§ 35-15-711 and 35-15-713, respectively.

35-15-802. Duty of loyalty

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

(b) Subject to the rights of persons dealing with or assisting the trustee as provided in § 35-15-1012 or as may otherwise be allowed under Tennessee law, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:

- (1)** The transaction was authorized by the terms of the trust;
- (2)** The transaction was approved by the court;
- (3)** The beneficiary did not commence a judicial proceeding within the time allowed by § 35-15-1005;
- (4)** The beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with § 35-15-1009; or
- (5)** The transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.

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

- (1)** The trustee's spouse;
- (2)** The trustee's descendants, siblings, parents, or their spouses;
- (3)** An agent or attorney of the trustee; or
- (4)** A corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

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

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

(f) In addition to all other permissible investments and delegatable duties listed in this title, so long as they are fairly priced and in accordance with the interest of the beneficiaries and the interests of the fiduciary's appointment and otherwise comply with Chapter 14 of this title, a fiduciary may purchase, sell, hold or otherwise deal with an affiliate or an interest in an affiliated investment, as well as delegate to an affiliate or other agent associated with the fiduciary and, upon satisfaction of the conditions stated in subsection (h), such fiduciary may receive fiduciary compensation from such account at the same rate as the fiduciary would otherwise be entitled to be compensated. Such activities shall occur without any presumption of a conflict between personal and fiduciary interests of the trustee or other fiduciary.

(g) As used in this section:

(1) "Affiliate" means any corporation or other entity that directly or indirectly through one or more intermediaries controls, is controlled by or is under common control with the fiduciary.

(2) "Affiliated investment" means an investment for which the fiduciary or an affiliate of the fiduciary acts as adviser, administrator, distributor, placement agent, underwriter, broker or in any other capacity for which it receives or has received a fee or commission from such investment or an investment acquired or disposed of in a transaction for which the fiduciary or an affiliate of the fiduciary receives or has received a fee or commission. "Affiliated investment" also means an investment in an insurance contract purchased from an insurance agency owned by, or affiliated with, the fiduciary, or any of its affiliates.

(3) "Delegate to an affiliate or associated agent" means a proper delegation of any duty of the fiduciary to any person or entity that is affiliated with, or associated with, the fiduciary. The action of doing any of the above shall be known as a "Delegation to an affiliate or associated agent".

(4) "Fee or commission" means compensation paid to a fiduciary or an affiliate thereof on account of its services to or on behalf of an investment.

(5) For purposes of this section, "fiduciary" means any fiduciary as defined in Section 35-15-103, as well as any other fiduciary; and

(6) "Investment" shall mean any security as defined in Section 2(a)(1) of the Securities Act of 1933, any contract of sale of a commodity for future delivery within the meaning of Section 2(i) of the Commodity Exchange Act, or any other asset permitted for fiduciary accounts pursuant to the terms of Chapter 14 of this title or by the terms of the governing instrument, including by way of illustration and not limitation: shares or interests in a public or private investment fund, which shall include, but not be limited to, a public or private investment fund organized as a limited partnership, limited liability company, statutory or common law business trust, real estate investment trust, joint venture or other general or limited partnership; or an open-end or closed-end management type investment company or investment trust registered under the Investment Company Act of 1940.

(h) A fiduciary seeking compensation pursuant to subsection (f) shall, as is applicable relative to the fiduciary's particular appointment, disclose either: to those persons entitled to be kept informed about the administration of a trust under Section 35-15-813(a)(1), subject to the provisions of subsections (d) and (e) of Section 35-15-813; to each principal in an agency relationship; or to all current recipients of statements of any other fiduciary account not described above; all fees or commissions paid or to be paid by the account, or received or to be received by an affiliate arising from such affiliated investment or delegation to an affiliate or associated agent. The disclosure required under this subsection may be given either in a copy of the prospectus or any other disclosure document prepared for the affiliated investment under federal or state securities laws or in a written summary that includes all fees or commissions received or to be received by the fiduciary or any affiliate of the fiduciary and an explanation of the manner in which such fees or commissions are calculated, either as a percentage of the assets invested or by some other method. Such disclosure shall be made at least annually unless there has been no increase in the rate at which such fees or commissions are calculated since the most recent disclosure. Notwithstanding this subsection (h), no such disclosure is required if the governing instrument or a court order expressly authorizes the fiduciary to invest the fiduciary account in affiliated investments or to perform the delegation to an affiliate or associated agent.

(i) A fiduciary that has complied with subsection (h), whether by making the applicable disclosure or by relying on the terms of a governing instrument or court order, shall have full authority to administer an affiliated investment, including the authority to vote proxies thereon, without regard to the affiliation between the fiduciary and the investment or the fiduciary and delegatee, as the case may be.

(j) 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.

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

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

(2) Payment of reasonable compensation to the trustee;

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

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

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

(l) 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.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-802.

The provisions of this section in some ways diverge significantly from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

This section addresses the duty of loyalty, perhaps the most fundamental duty of the trustee. Subsection (a) states the general principle, which is copied from Restatement (Second) of Trusts § 170(1) (1959). A trustee owes a duty of loyalty to the beneficiaries, a principle which is sometimes expressed as the obligation of the trustee not to place the trustee's own interests over those of the beneficiaries. Most but not all violations of the duty of loyalty concern transactions involving the trust property, but breaches of the duty can take other forms. For a discussion of the different types of violations, see George G. Bogert & George T. Bogert, *The Law of Trusts and*

Trustees § 543 (Rev. 2d ed. 1993); and 2A Austin W. Scott & William F. Fratcher, *The Law of Trusts* §§ 170-170.24 (4th ed. 1987). The “interests of the beneficiaries” to which the trustee must be loyal are the beneficial interests as provided in the terms of the trust. See T.C.A. § 35-15-103.

The duty of loyalty applies to both charitable and noncharitable trusts, even though the beneficiaries of charitable trusts are indefinite. In the case of a charitable trust, the trustee must administer the trust solely in the interests of effectuating the trust’s charitable purposes, as the purposes are defined under the terms of the trust. See Restatement (Second) of Trusts § 379 cmt. a (1959).

Duty of loyalty issues often arise in connection with the settlor’s designation of the trustee. For example, it is not uncommon that the trustee will also be a beneficiary. Or the settlor will name a friend or family member who is an officer of a company in which the settlor owns stock. In such cases, settlors should be advised to consider addressing in the terms of the trust how such conflicts are to be handled. T.C.A. § 35-15-105 authorizes a settlor to override an otherwise applicable duty of loyalty in the terms of the trust. Sometimes the override is implied. The grant to a trustee of authority to make a discretionary distribution to a class of beneficiaries that includes the trustee implicitly authorizes the trustee to make distributions for the trustee’s own benefit.

Subsection (b) states the general rule with respect to transactions involving trust property that are affected by a conflict of interest. A transaction affected by a conflict between the trustee’s fiduciary and personal interests is voidable by a beneficiary who is affected by the transaction. Subsection (b) carries out the “no further inquiry” rule by making transactions involving trust property entered into by a trustee for the trustee’s own personal account voidable without further proof. Such transactions are irrebuttably presumed to be affected by a conflict between personal and fiduciary interests. It is immaterial whether the trustee acts in good faith or pays a fair consideration. See Restatement (Second) of Trusts § 170 cmt. b (1959). Note that subsection (b) varies from section 802(b) of the Uniform Trust Code in that such subsection is subject not only to the rights of persons dealing with or assisting the trustee as provided in T.C.A. § 35-15-1012, but is also subject to any other right allowed under Tennessee law.

The rule is less severe with respect to transactions involving trust property entered into with persons who have close business or personal ties with the trustee. Under subsection (c), a transaction between a trustee and certain relatives and business associates is presumptively voidable, not void. Also presumptively voidable are transactions with corporations or other enterprises in which the trustee, or a person who owns a significant interest in the trustee, has an interest that might affect the trustee’s best judgment. The presumption is rebutted if the trustee establishes that the transaction was not affected by a conflict between 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 transacted with an independent party.

Even where the presumption under subsection (c) does not apply, a transaction may still be voided by a beneficiary if the beneficiary proves that a conflict between personal and fiduciary interests existed and that the transaction was affected by the conflict. The right of a beneficiary to void a transaction affected by a conflict of interest is optional. If the transaction proves profitable to the trust and unprofitable to the trustee, the beneficiary will likely allow the transaction to stand. For a comparable provision regulating fiduciary investments by national banks, see 12 C.F.R. § 9.12(a).

As provided in subsection (b), no breach of the duty of loyalty occurs if the transaction was authorized by the terms of the trust or approved by the court, or if the beneficiary failed to commence a judicial proceeding against the appropriate fiduciary within the time allowed or chose to ratify the transaction, either prior to or subsequent to its occurrence. In determining whether a beneficiary has consented to a transaction, the principles of representation from title 35, chapter 3 may be applied.

Subdivision (b)(5), which is derived from section 3-713(1) of the Uniform Probate Code, allows a trustee to implement a contract or pursue a claim that the trustee entered into or acquired before the person became or contemplated becoming trustee. While this subsection allows the transaction to proceed without automatically

being voidable by a beneficiary, the transaction is not necessarily free from scrutiny. In implementing the contract or pursuing the claim, the trustee must still complete the transaction in a way that avoids a conflict between the trustee's fiduciary and personal interests. Because avoiding such a conflict will frequently be difficult, the trustee should consider petitioning the court to appoint a special fiduciary, as authorized by subsection (l) of this section, to work out the details and complete the transaction.

Subsection (d) does not apply to a corporate trustee that makes a loan to or sells a financial product to a beneficiary in the ordinary course of business. Otherwise, subsection (d) creates a presumption that a transaction between a trustee and a beneficiary not involving trust property is an abuse by the trustee of a confidential relationship with the beneficiary. This subsection has limited scope. If the trust has terminated, there must be proof that the trustee's influence with the beneficiary remained. Furthermore, whether or not the trust has terminated, there must be proof that the trustee obtained an advantage from the relationship. The fact the trustee profited is insufficient to show an abuse if a third party would have similarly profited in an arm's length transaction. See 2A Austin W. Scott & William F. Fratcher § 170.25 (4th ed. 1987), which states the same principle in a slightly different form: "Where he deals directly with the beneficiaries, the transaction may stand, but only if the trustee makes full disclosure and takes no advantage of his position and the transaction is in all respects fair and reasonable."

Subsection (e), which allows a beneficiary to void a transaction entered into by the trustee that involved an opportunity belonging to the trust, is based on Restatement (Second) of Trusts § 170 cmt. k (1959). While normally associated with corporations and with their directors and officers, what is usually referred to as the corporate opportunity doctrine also applies to other types of fiduciary. The doctrine prohibits the trustee's pursuit of certain business activities, such as entering into a business in direct competition with a business owned by the trust, or the purchasing of an investment that the facts suggest the trustee was expected to purchase for the trust. For discussion of the corporate opportunity doctrine, see Kenneth B. Davis, Jr., *Corporate Opportunity and Comparative Advantage*, 84 Iowa L. Rev. 211 (1999); and Richard A. Epstein, *Contract and Trust in Corporate Law: The Case of Corporate Opportunity*, 21 Del. J. Corp. L. 5 (1996). See also *Principles of Corporate Governance: Analysis and Recommendations* § 5.05 (American Law Inst. 1994).

Subsections (f) through (i) diverge significantly from the Uniform Trust Code and the restatements. Subsections (f) through (i) clearly grant the express authority to use affiliates and related parties or affiliated delegates to manage assets and perform administrative functions. This increases flexibility and grants fiduciaries the ability to leverage expertise inside their broad organization. Versus the common law, the restatements, the Uniform Trust Code and Uniform Prudent Investor Act (as such uniform acts are proposed by ULC-NCCUSL), these provisions grant exceptions to the no further inquiry rule relative to conflicts of interests for investments and other transactions between affiliates so long as these transactions are fairly priced, are in accordance with the interests of the beneficiaries and the interests of the fiduciary appointment and otherwise comply with the Tennessee Uniform Prudent Investor Act. Under most circumstances, a fiduciary must disclose, at least annually (unless there has been no change) to the beneficiaries entitled to receive a copy of the trustee's annual report, the rate and method by which any additional compensation paid, earned or received from or by any affiliate was determined.

In furtherance of its overriding emphasis on settlor's intent and of freedom of disposition, under the Tennessee Uniform Trust Code, subsection (j) can be completely overridden by the terms of the trust. Moreover, under such code, the power to vote shares of stock or in exercising control over similar interests in other forms of enterprise may be removed from any trustee and placed in the hands of any other fiduciary as such is defined in T.C.A. § 35-15-103. When such occurs any fiduciary from which such powers were so removed is an excluded fiduciary as such is defined in T.C.A. § 35-15-103.

Absent the terms of a trust overriding subsection (j) as discussed in the immediately preceding paragraph, such subsection addresses an overlap between trust and corporate law. It is based on Restatement of Trusts (Second) § 193 cmt. a (1959), which provides that "[i]t is the duty of the trustee in voting shares of stock to use

proper care to promote the interest of the beneficiary,” and that the fiduciary responsibility of a trustee in voting a control block “is heavier than where he holds only a small fraction of the shares.” Similarly, the department of labor construes ERISA’s duty of loyalty to make share voting a fiduciary function. See 29 C.F.R. § 2509.94-2. When the trust owns the entirety of the shares of a corporation, the corporate assets are in effect trust assets that the trustee determines to hold in corporate form. The trustee may not use the corporate form to escape the fiduciary duties of trust law. Thus, for example, a trustee whose duty of impartiality would require the trustee to make current distributions for the support of current beneficiaries may not evade that duty by holding assets in corporate form and pleading the discretion of corporate directors to determine dividend policy. Rather, the trustee must vote for corporate directors who will follow a dividend policy consistent with the trustee’s trust-law duty of impartiality.

Subsection (k) contains several exceptions to the general duty of loyalty, which apply if the transaction was fair to the beneficiaries. Subdivisions (k)(1) and (k)(2) clarify that a trustee is free to contract about the terms of appointment and rate of compensation. Consistent with Restatement (Second) of Trusts § 170 cmt. r (1959), subdivision (k)(3) authorizes a trustee to engage in a transaction involving another trust of which the trustee is also trustee, a transaction with a decedent’s estate or a conservatorship estate of which the trustee is personal representative or conservator, or a transaction with another trust or other fiduciary relationship in which a beneficiary of the trust has an interest. The authority of a trustee to deposit funds in a financial institution operated by the trustee, as provided in subdivision (k)(4), is recognized in Restatement (Second) of Trusts § 170 cmt. m (1959). The power to deposit funds in its own institution does not negate the trustee’s responsibility to invest prudently, including the obligation to earn a reasonable rate of interest on deposits. Subdivision (k)(5) authorizes a trustee to advance money for the protection of the trust. Such advances usually are of small amounts and are made in emergencies or as a matter of convenience. Pursuant to T.C.A. § 35-15-709, the trustee has a lien against the trust property for any advances made.

35-15-803. Impartiality

If a trust has two (2) or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries’ respective interests.

COMMENT.

The duty of impartiality is an important aspect of the duty of loyalty. This section is very similar to T.C.A. § 35-14-108, except that this section also applies to all aspects of trust administration and to decisions by a trustee with respect to distributions. The Tennessee Uniform Prudent Investor Act Investor Act, in title 35, chapter 14, is limited to duties with respect to the investment and management of trust property. The differing beneficial interests for which the trustee must act impartially include those of the current beneficiaries versus those of beneficiaries holding interests in the remainder; and among those currently eligible to receive distributions. In fulfilling the duty to act impartially, the trustee should be particularly sensitive to allocation of receipts and disbursements between income and principal and should consider, in an appropriate case, a reallocation of income to the principal account and vice versa, as is allowable under the Tennessee Uniform Principal and Income Act in title 35, chapter 6.

The duty to act impartially does not mean that the trustee must treat the beneficiaries equally. Rather, the trustee must treat the beneficiaries equitably in light of the purposes and terms of the trust as such purposes and terms are stated therein. A settlor who prefers that the trustee, when making decisions, generally favor the interests of one beneficiary over those of others should provide appropriate guidance in the terms of the trust and is completely free to do so under the Tennessee trust statutes. See Restatement (Second) of Trusts § 183 cmt. a (1959).

35-15-804. Prudent administration

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

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-804.

The duty to administer a trust with prudence is a fundamental duty of the trustee. This duty does not depend on whether the trustee receives compensation. The duty may be freely altered by the terms of the trust. See T.C.A. § 35-15-105. This section is similar to language contained in T.C.A. § 35-14-104 and Restatement (Third) of Trusts: Prudent Investor Rule § 227 (1992).

The language of this section diverges from the language of the previous Restatement. The prior Restatement can be read as applying the same standard--"man of ordinary prudence would exercise in dealing with his own property"--regardless of the type or purposes of the trust. See Restatement (Second) of Trusts § 174 cmt. a (1959). This section appropriately bases the standard on the purposes and other circumstances of the particular trust.

Notwithstanding the references to restatements in the preceding two paragraph. to the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

Moreover, the duties imposed by this section may be freely altered or removed by the terms of the trust. See T.C.A. § 35-15-105. Nevertheless, any such alteration is subject to the prohibition in T.C.A. § 35-15-1008 regarding exculpation of trustees.

35-15-805. Costs of administration

In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-805.

This section is similar to T.C.A. § 35-14-109 and is consistent with the rules concerning costs in Restatement (Third) of Trusts: Prudent Investor Rule § 227(c)(3)(1992). For related rules concerning compensation and reimbursement of trustees, trust advisors or trust protectors, see T.C.A. §§ 35-15-708 and 35-15-709. The duty not to incur unreasonable costs applies when a trustee decides whether and how to delegate to agents, as well as to other aspects of trust administration. In deciding whether and how to delegate, the trustee must be alert to balancing projected benefits against the likely costs. To protect the beneficiary against excessive costs, the trustee should also be alert to adjusting compensation for functions which the trustee has delegated to others. The obligation to incur only necessary or appropriate costs of administration has long been part of the law of trusts. See Restatement (Second) of Trusts § 188 (1959). Notwithstanding the above, subject to the restrictions contained in T.C.A. § 35-15-105, the provisions of this section may be freely altered by the terms of the trust.

35-15-806. Trustee's skills

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

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-806.

This section is similar to language contained in T.C.A. § 35-14-104, in section 7-302 of the Uniform Probate Code, and in *Restatement (Second) of Trusts § 174* (1959). Nothing in this section minimizes the rights of a trustee, trust advisor or trust protector contained in T.C.A. §§ 35-15-708 and 35-15-709.

35-15-807. Delegation by trustee

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

(1) Selecting an agent;

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

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

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

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

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

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-807.

This section permits trustees to delegate various aspects of trust administration to agents, subject to the standards of the section. The language is derived from T.C.A. § 35-14-111. See also John H. Langbein, *Reversing the Nondelegation Rule of Trust-Investment Law*, 59 Mo. L. Rev. 105 (1994) (discussing prior law).

This section encourages and protects the trustee in making delegations appropriate to the facts and circumstances of the particular trust. Whether a particular function is delegable is based on whether it is a function that a prudent trustee might delegate under similar circumstances. For example, delegating some administrative and reporting duties might be prudent for a family trustee but unnecessary for a corporate trustee.

Moreover, subsection (c) clearly applies the provisions of this section to fiduciaries, as such are defined in T.C.A. § 35-15-103, from whom the duties relative to any item so delegated were removed and were placed in the hands of, or the power to so delegate was given to, another fiduciary, the fiduciary from whom such duties were removed being an excluded fiduciary as defined in T.C.A. § 35-15-103.

This section applies only to delegation to agents, not to delegation to a cotrustee. For the provision regulating delegation to a cotrustee, see T.C.A. § 35-15-703.

35-15-808. Powers to direct

(a) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust or contrary to the normal practice of the trustee in regard to the action requested.

(b) If the terms of a trust, an agreement of the qualified beneficiaries, or a court order, confer upon a person other than the settler of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power.

(c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

(d) Unless the terms of a trust provide otherwise, if a person holds a power to perform any act in reliance on §§ 35-3-122 and 35-3-123, and that power holder is other than a beneficiary, that person is a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to perform any act under this subsection is liable for any loss that results from breach of a fiduciary duty. In so following the directions of such person the trustee is protected from liability as provided in §§ 35-3-122 and 35-3-123.

(e) If a person holds a power to direct pursuant to part 12 of this chapter, that person is a trust advisor, trust protector or both. Such power holder is subject to all the provisions of part 12, including any duties prescribed by part 12 and any provisions that make the power holder a fiduciary. Any trustee or other person that under part 12 is relieved of any duty or any liability, or is otherwise protected under part 12, shall be so relieved and otherwise protected.

(f) Transitional provisions applicable to this section shall be as follows:

(1) Powers to direct or perform any act held in reliance on or that are subject to §§ 35-3-122 and 35-3-123 that are in existence prior to July 1, 2013, remain effective thereafter and remain subject to the provisions of those sections and their protections;

(2) Notwithstanding subdivision (f)(1), should any power that is described in part 12 of this chapter be held under a trust instrument that was in existence or became irrevocable before July 1, 2013, and that power is not held in reliance on nor is it subject to §§ 35-3-122 and 35-3-123, then from July 1, 2013, all law relative to such power shall be controlled by and subject to part 12 of this chapter, along with any amendments made to this chapter in furtherance of the implementation and effectiveness of such part 12; and

(3) For all trust instruments entered into, that become irrevocable or that are amended relative to any power that is described in part 12 of this chapter on or after July 1, 2013, part 12 of this chapter, along with any amendments made to this chapter in furtherance of the implementation and effectiveness of such part 12, shall be the exclusive method to create a directed trust or a provision regarding such and shall control such. Relative to trusts described in this subdivision and subdivision (f)(2), §§ 35-3-122 and 35-3-123 shall be of no further force and effect.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-808.

The provisions of this section diverge significantly from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

The 2013 amendments to the Tennessee Uniform Trust Code substantially rewrote this section, leaving the former version inoperative as provided in the enacting and transitional language of Section 55, Pub. Act. 2013, Pub. Ch. 390, 108th Gen. Assemb., Reg. Sess. (Tenn., 2013). Notwithstanding the above, Tennessee has had statutes fully providing for true directed trusts since the late 1980s, such provisions being contained in title 35, chapter 3. Part twelve (12) of the Tennessee Uniform Trust Code, added by such 2013 amendments, contains significantly more detailed provisions governing the operation of directed trusts than do Tennessee's original 1980s directed trust statutes. Finally, many modifications to various other provisions of the Tennessee Uniform Trust Code and certain other provisions of the Tennessee trust statutes have been made to coordinate those provisions with such part twelve (12). For all these reasons, in addition to the transitional language of Section 55

of such public chapter, T.C.A. § 35-15-808(f) contains transitional provisions specifically applicable to directed trusts as such are defined in T.C.A. § 35-15-103.

Subsection (a) is an application of T.C.A. § 35-15-603, which provides that a revocable trust is subject to the settlor's exclusive control as long as the settlor has capacity. Because of the settlor's degree of control, subsection (a) of this section authorizes a trustee to rely on a direction from the settlor even if it is contrary to the terms of the trust. The direction of the settlor might be regarded as an amendment of the trust. Subsection (a) has limited application upon a settlor's incapacity. An agent, conservator, or guardian has authority to give the trustee instructions contrary to the terms of the trust only if the agent, conservator, or guardian succeeds to the settlor's powers with respect to revocation, amendment, or distribution as provided in T.C.A. § 35-15-602.

Subsections (b)--(e) ratify the use of trust protectors and advisers and make such, except as otherwise provided in the transitional provisions of subsection (f), subject to part twelve (12) of this chapter. Neither T.C.A. § 35-15-103 nor such chapter makes a distinction between the powers and duties that can be held by a fiduciary due to such being referred to as "trust advisor" versus "trust protector." Traditionally, the former term has been used in the United States, while the latter term is often associated with non-U.S. trust practice. Both terms were included to assure anyone encountering the Tennessee Uniform Trust Code that, regardless of the term by which any such person was referred, such code provided for virtually any conceivable power and duty that could be held by a person referred to by either term. Both trust advisors and trust protectors are also included in the broader term, "fiduciary," both being such unless provided otherwise in the terms of the trust as allowed by T.C.A. § 35-15-105, or because one or more is an excluded fiduciary as such is defined in T.C.A. § 35-1-103.

Subsection (b) diverges from the Uniform Trust Code in that the various powers that can be held by either a trust advisor or a trust protector can be conferred in any of the following ways: by the terms of the trust, by an agreement of the qualified beneficiaries or by a court order. Moreover, subject only to a provision in a trust instrument to the contrary, a trustee or other fiduciary shall act in accordance with the exercise of a power held by any trust advisor or trust protector.

Subsection (c) makes it clear that, regardless of what the power holder is named, such holder can be granted the power to direct modification or termination of a trust.

Numerous powers can be granted to a trust advisor or trust protector under the Tennessee Uniform Trust Code, including powers to direct and powers to veto. While both affect a trustee's overall powers and duties, each affects such trustee in a different manner. A power to direct involves action initiated and within the control of a third party. A trustee usually has no responsibility other than to carry out the direction when made. But if a third party holds a veto power, a trustee is usually responsible for initiating the decision, subject to the third party's approval.

Subsection (d) pertains to powers held in reliance on T.C.A. §§ 35-3-122 and 35-3-123. These were the statutes fully providing for true directed trusts before the 2013 amendments to the Tennessee Uniform Trust Code. Under such sections, at times, the person holding the power is making directions relative to the holder's own beneficial interest. However at other times, the holder of the power is frequently making directions or other actions on behalf of others. In such latter case and as provided in subsection (d), unless provided otherwise in the terms of the trust, the holder is acting in a fiduciary capacity with respect to the powers granted and can be held liable if the holder's conduct constitutes a breach of trust, whether through action or inaction. Like a trustee, liability cannot be imposed if the holder has not accepted the grant of the power either expressly or informally through exercise of the power. See T.C.A. § 35-15-711, which applies the provisions of T.C.A. §§ 35-15-701 to trust advisors, trust protectors and other fiduciaries other than a trustee.

Subsection (e) pertains to powers held under part 12, which was created by the 2013 amendments to the Tennessee Uniform Trust Code. It simply directs one to such part 12 to determine the effect of holding such powers. Notwithstanding the preceding sentence and although such part 12 contains the majority of provisions

governing trust advisors, trust protectors and any other fiduciaries other than trustees after the 2013 amendments, such amendments necessitated changes to other parts of the Tennessee Uniform Trust Code to coordinate them with the part 12. Therefore, one is advised to review other parts of the Tennessee Uniform Trust Code for sections containing references to part 12 or to trust advisors, trust protectors, other fiduciaries and excluded fiduciaries. In particular, T.C.A. §§ 35-15-710-35-15-715 provide for persons holding powers under directed trusts the mechanisms to accept, reject, remove or resign from office that are similar to equivalent provisions applicable to a trustee. Such sections also provide for how to handle vacancies in such offices, as well as any fiduciary's bond regarding same.

Subsection (f) contains transitional provisions specifically applicable to directed trusts as such are defined in T.C.A. § 35-15-103 to account for the changes in such trusts made by the 2013 amendments to the Tennessee Uniform Trust Code.

As with the vast majority of other sections under the Tennessee Uniform Trust Code, the provisions of this section may be freely altered by the terms of the trust. See T.C.A. § 35-15-105. By way of example and not in limitation, a settlor can provide that the trustee must accept the decision of the power holder without question. Alternatively, a settlor could provide that the holder of the power is not to be held to the standards of a fiduciary. A common technique for assuring that a settlor continues to be taxed on all of the income of an irrevocable trust is for the settlor to retain a nonfiduciary power of administration. See I.R.C. § 675.

35-15-809. Control and protection of trust property

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

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-809.

This section codifies the substance of sections 175 and 176 of the Restatement (Second) of Trusts (1959). The duty to take control of and safeguard trust property is an aspect of the trustee's duty of prudent administration as provided in T.C.A. § 35-15-804. See also the various subdivisions of T.C.A. § 35-15-816 regarding the power to collect trust property), the power to insure trust property and the power to abandon trust property. The duty to take control normally means that the trustee must take physical possession of tangible personal property and securities belonging to the trust, and must secure payment of any choses in action. See Restatement (Second) of Trusts § 175 cmt. a, c & d (1959).

This section, like the other sections in this part 8, is subject to alteration by the terms of the trust. See T.C.A. § 35-15-105. By way of example and not in limitation, the settlor may provide that the spouse may occupy the settlor's former residence rent free, in which event the spouse's occupancy would prevent the trustee from taking possession.

35-15-810. Recordkeeping and identification of trust property

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

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

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

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

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-810.

The duty to keep adequate records stated in subsection (a) is implicit in the duty to provide prudent administration under T.C.A. § 35-15-804 and the duty to report to beneficiaries under T.C.A. § 35-15-813, subject to the exceptions to such duty to report as provided in T.C.A. § 35-15-813. For an application, see *Green v. Lombard*, 343 A. 2d 905, 911 (Md. Ct. Spec. App. 1975). See also Restatement (Second) of Trusts §§ 172, 174 (1959).

The duty to earmark trust assets and the duty of a trustee not to mingle the assets of the trust with the trustee's own are closely related. Subsection (b), which addresses the duty not to mingle, is derived from section 179 of the Restatement (Second) of Trusts (1959). Subsection (c) makes the requirement that assets be earmarked more precise than that articulated in Restatement (Second) § 179 by requiring that the interest of the trust must appear in the records of a third party, such as a bank, brokerage firm, or transfer agent. Because of the serious risk of mistake or misappropriation even if disclosure is made to the beneficiaries, showing the interest of the trust solely in the trustee's own internal records is insufficient. The provision of T.C.A. § 35-15-816(b), which allows a trustee to hold securities in nominee form, is not inconsistent with this requirement. While securities held in nominee form are not specifically registered in the name of the trustee, they are properly earmarked because the trustee's holdings are indicated in the records maintained by an independent party, such as in an account at a brokerage firm.

Earmarking is not practical for all types of assets. With respect to assets not subject to registration, such as tangible personal property and bearer securities, arranging for the trust's ownership interest to be reflected on the records of a third-party custodian would not be feasible. For this reason, subsection (c) waives separate recordkeeping for these types of assets. Under subsection (b), however, the duty of the trustee not to mingle these or any other trust assets with the trustee's own remains absolute.

Subsection (d) allows a trustee to use the property of two or more trusts to make joint investments, even though under traditional principles a joint investment would violate the duty to earmark. A joint investment frequently is more economical than attempting to invest the funds of each trust separately. Also, the risk of misappropriation or mistake is less when the trust property is invested jointly with the property of another trust than when pooled with the property of the trustee or other person.

Notwithstanding all of the above, the provisions of this sections are freely alterable by the terms of the trust, subject to T.C.A. § 35-15-105.

35-15-811. Enforcement and defense of claims

(a) A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.

(b) A trustee may abandon or assign any claim that it believes is unreasonable to enforce to one or more of the beneficiaries of the trust holding the claim.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-811.

Subsection (a) codifies the substance of Sections 177 and 178 of the Restatement (Second) of Trusts (1959). It may not be reasonable to enforce a claim depending upon the likelihood of recovery and the cost of suit and enforcement. It might also be reasonable to settle an action or suffer a default rather than to defend an action. See also the relevant provision of T.C.A. § 35-15-816(b) regarding the power to pay, contest, settle, or release

claims.

Subsection (b) does not have a corresponding provision in the Uniform Trust Code. Such subsection expressly grants a trustee the power to abandon, or to assign, any claim that the trustee believes unreasonable to enforce to one or more beneficiaries of a trust.

35-15-812. 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. No successor trustee appointed after the examination of the accounts of a trustee or the waiver of the examination by the beneficiaries shall be responsible for the acts and omissions of the prior trustee.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-812.

This section is a specific application of T.C.A. § 35-15-811 regarding the duty to enforce claims, which includes a claim for trust property held by a former trustee or others, and a claim against a predecessor trustee for breach of trust. The duty imposed by this section is not absolute. Pursuit of a claim is not required if the amount of the claim, costs of suit and enforcement, and likelihood of recovery, make such action uneconomic. Unlike Restatement (Second) of Trusts § 223 (1959), this section only requires a successor trustee to redress breaches of trust "known" to have been committed by the predecessor. For the definition of "know," see T.C.A. § 35-15-104. Limiting the successor's obligation to known breaches is a common feature of state trust statutes. See, e.g., Mo. Rev. Stat. § 456.187.2.

The last sentence in this section has no counterpart in the Uniform Trust Code and expressly relieves any successor trustee from liability for acts and omissions of prior trustees if such successor trustee was appointed after the accounts of the prior trustee were examined or such examination was waived by the beneficiaries required under the Tennessee Uniform Trust Code to so waive.

As authorized by T.C.A. § 35-15-1009, the beneficiaries may relieve the trustee from potential liability for failing to pursue a claim against a predecessor trustee or other person holding trust property. The obligation to pursue a predecessor trustee can also be addressed in and altered by the terms of the trust as provided by T.C.A. § 35-15-105.

35-15-813. Duty to inform and report

(a) (1) A trustee shall keep the beneficiaries of the trust who are current mandatory or permissible distributees of trust income or principal, or both, reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.

(2) Unless unreasonable under the circumstances, a trustee shall respond in a reasonable amount of time to a qualified beneficiary's request for information related to the administration of the trust. Additionally, a qualified beneficiary shall reimburse the trustee for any reasonable expenses incurred in responding to requests for information.

(3) The requirements of subdivisions (a)(1) and (a)(2) shall also apply to the benefit of anyone who, in a capacity other than that of a fiduciary, as defined by Section 35-15-103, holds a power of appointment.

(b) The trustee of an irrevocable or non-grantor trust within sixty (60) days after the acceptance and funding of a trust, excluding nominal funding for the trust to have corpus or the depositing of insurance policies on the life of a living person, shall notify each current income beneficiary, each vested ultimate beneficiary of a remainder

interest and anyone who, in a capacity other than that of a fiduciary, as defined by § 35–15–103, holds a power of appointment, that the trust has been established.

(1) The required notice shall:

(A) Be sent by first class mail or personal delivery; and

(B) Consist of either a complete copy of the document establishing the trust together with the trustee's name, address and telephone number or an abstract of the trust, whichever the trustee, in the trustee's absolute discretion, may choose.

(2) The abstract shall contain:

(A) The name, address and telephone number of each trustee; and

(B) If for a current income beneficiary:

(i) The number of other current income beneficiaries;

(ii) Whether distributions of income are required or discretionary;

(iii) Whether distributions of principal are permitted and, if so, for what purpose or purposes;

(iv) An estimate of the value of the trust at the date of the notice from which distributions may be

made; and

(v) An estimate of the income that may be distributable to the beneficiary; and

(C) If for a remainder beneficiary:

(i) The number of other remainder beneficiaries;

(ii) An estimate of the value of the trust at the date of the notice; and

(iii) The conditions which must be met before the beneficiary's share is distributable.

(D) If for anyone who, in a capacity other than that of a fiduciary, as defined by § 35–15–103, holds a power of appointment, all of the information required by subdivisions (b)(2)(A) through (C) necessary or beneficial for that person to effectively determine whether or not to exercise that power of appointment.

(c) Upon the termination of an interest of any one (1) or more of the current income beneficiaries:

(1) The trustee shall similarly notify the income beneficiaries who are takers of the terminated interest of their interest by sending or delivering them the notice required in subsection (b); and

(2) If at that time the period described in subsection (b) has lapsed, the trustee shall similarly notify anyone who, in a capacity other than that of a fiduciary, as defined by § 35–15–103, holds a power of appointment by sending or delivering to such person the notice required in subsection (b).

(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. Anyone who, in a capacity other than that of a fiduciary, as defined by § 35–15–103, holds a power of appointment has the same power as provided a beneficiary in this subsection to waive reports and other information and to withdraw a waiver previously given.

(e) Subsections (a) and (b) shall not apply to the extent that the terms of the trust provide otherwise or the settlor of the trust, or a trust protector or trust advisor under part 12 that holds the power to so direct, directs otherwise in a writing delivered to the trustee.

(f) Subdivision (a)(1) and subsection (b) do not apply to a trust created under a trust agreement that became irrevocable before July 1, 2004. Trust law in effect prior to July 1, 2004, regarding the subject matter of subdivision (a)(1) and subsection (b) shall continue to apply to those trusts.

(g) If the trustee of a trust is bound by any written confidentiality restrictions with respect to an asset of a trust, a trustee may require that any beneficiary who is eligible to receive information pursuant to this or any other section of this title about such asset shall agree in writing to be bound by the confidentiality restrictions that bind the trustee before receiving such information from the trustee.

(h) A trust advisor, trust protector, or other fiduciary designated by the terms of the trust shall keep each excluded fiduciary designated by the terms of the trust reasonably informed about:

(1) The administration of the trust with respect to any specific duty or function being performed by the trust advisor, trust protector, or other fiduciary to the extent that the duty or function would normally be

performed by the excluded fiduciary or to the extent that providing such information to the excluded fiduciary is reasonably necessary for the excluded fiduciary to perform its duties; and

(2) Any other material information that the excluded fiduciary would be required to disclose to the specified beneficiaries under subsection (a) regardless of whether the terms of the trust relieve the excluded fiduciary from providing such information to qualified beneficiaries. Neither the performance nor the failure to perform of a trust advisor, trust protector, or other fiduciary designated by the terms of the trust as provided in this subsection shall affect the limitation on the liability of any excluded fiduciary provided by part 12 of this chapter.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-813.

The provisions of this section in some ways diverge significantly from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

The duty to keep appropriate beneficiaries reasonably informed of the administration of the trust is a fundamental duty of a trustee. The term "reasonable" is used several times in this section. This term connotes a sensible and not excessive amount of information. For the common law duty to keep the beneficiaries informed, see Restatement (Second) of Trusts Section 173 (1959). The provisions of this section may diverge from such restatement's view of the common law, and to the extent such restatement is in conflict with this section, such restatement's view is rejected.

In the interest of certainty, subdivision (a)(1) diverges from the Uniform Trust Code and makes the duty to keep the beneficiaries informed more precise by limiting it to only those who are current mandatory or permissible distributees of trust income or principal, or both.

Subdivision (a)(2) provides that a trustee also has a duty to respond to a beneficiary's request for information, unless such is unreasonable under the circumstances. However, again in the interest of certainty, subdivision (a)(2) diverges from the Uniform Trust Code and makes such duty to respond to a beneficiary's request for information more precise by limiting such duty to only qualified beneficiaries as such are defined in T.C.A. 35-15-103. The result of this limitation is that the information need not be furnished to beneficiaries with remote remainder interests.

No limitation in subdivisions (a)(1) nor (a)(2) affects the rights of the any current beneficiary who is designated as one or more primary beneficiaries, explicitly or implicitly, by the trust instrument.

Nevertheless, unlike the Uniform Trust Code, subdivision (a)(2) requires that a qualified beneficiary reimburse the trustee for any reasonable expenses incurred in responding to requests for information.

In determining if a beneficiary's request for trust information is reasonable, the trustee may consider any of the following factors in determining whether a response is necessary and the extent of the information to be furnished:

- provisions of the trust document or other settlor written instructions concerning the providing of information;

- the relationship between the beneficiary requesting information and the other beneficiaries;

- the nature of the information requested;

- the frequency with which the beneficiary has or is requesting information;

- whether providing any of the requested information would violate any privacy rights of other

beneficiaries;

whether the requesting beneficiary is receiving statements on the trust account;

the likelihood that the requesting beneficiary will eventually receive an interest in the trust;

the cost of providing the requested information and whether the requesting beneficiary is willing to pay the cost. The trustee may require a prepayment of a fixed cost as a prerequisite to beginning to accumulate the information;

the availability of the information requested; and

any other factors the trustee deems appropriate.

The trustee is under a duty to communicate to a qualified beneficiary information about the administration of the trust that is reasonably necessary to enable the beneficiary to enforce the beneficiary's rights and to prevent or redress a breach of trust. See Restatement (Second) of Trusts § 173 cmt. c (1959). Ordinarily, the trustee is not under a duty to furnish information to a beneficiary in the absence of a specific request for the information. See Restatement (Second) of Trusts § 173 cmt. d (1959). However, special circumstances may require that the trustee provide additional information. For example, if the trustee is dealing with the beneficiary on the trustee's own account, the trustee must communicate material facts relating to the transaction that the trustee knows or should know. See Restatement (Second) of Trusts § 173 cmt. d (1959). Furthermore, to enable the beneficiaries to take action to protect their interests, the trustee may be required to provide advance notice of transactions involving real estate, closely-held business interests, and other assets that are difficult to value or to replace. See *In re Green Charitable Trust*, 431 N.W. 2d 492 (Mich. Ct. App. 1988); *Allard v. Pacific National Bank*, 663 P.2d 104 (Wash. 1983). The trustee is justified in not providing such advance disclosure if disclosure is forbidden by other law, as under federal securities laws, or if disclosure would be seriously detrimental to the interests of the beneficiaries, for example, when disclosure would cause the loss of the only serious buyer. Notwithstanding the preceding portions of this paragraph to the extent any of it is in conflict with the Tennessee trust statutes, the latter are controlling.

Subdivision (a)(3) causes the requirements of subdivisions (a)(1) and (a)(2) to also apply to the benefit of anyone who, in a capacity other than that of a fiduciary holds a power of appointment; with all relevant terms having the meanings as defined in T.C.A. § 35-15-103. Holders of powers of appointment are not beneficiaries (and therefore, cannot be qualified beneficiaries) as such terms are defined in T.C.A. § 35-15-103. Nevertheless, in order to determine whether such power holder should not exercise or should exercise such power, as well as the manner in which any such exercise should be made, such power holder needs to be kept reasonably informed of the administration of a trust. Because other sections of the Tennessee Uniform Trust Code assure that all fiduciaries are kept appropriately informed of the administration of a trust, there is no need to impose the requirements of subdivisions (a)(1) and (a)(2) relative to a holder of a power of appointment who is also a fiduciary and subdivision (a)(3) does not do so.

Subsection (b) varies significantly from the Uniform Trust Code. Prior to the effective date of the Tennessee Uniform Trust Code on July 1, 2004, Tennessee already had in effect a procedure for providing notification of the creation of a trust and similar matters. That provision can be found at repealed T.C.A. § 35-50-119. The portions of the Tennessee Uniform Trust Code relative to notification of creation of a trust and similar matters is based on that prior language and not on the Uniform Trust Code. As with such procedure that existed prior to the effective date of the Tennessee Uniform Trust Code, the requirement of providing such notification under subsection (b) can in certain cases be waived, as can the requirements of subsection (a). Thus unlike the Uniform Trust Code, the restatements and other foreign law of many jurisdictions, the Tennessee Uniform Trust Code explicitly allows so-called "quiet" or "silent" trusts.

Absent such a waiver, subsection (b) requires that, in most cases, a trustee of an irrevocable trust that is not a grantor trust under subpart E, part 1, subchapter J, of Chapter 1 of the Internal Revenue Code (i.e., the "grantor

trust rules”) inform the current income and vested ultimate beneficiaries, as well as anyone who, in a capacity other than that of a fiduciary, holds a power of appointment (with all such terms having the meanings as defined in T.C.A. § 35-15-103) within sixty (60) days of the trust’s existence. Such notice must include the trustee’s name, address and telephone number and must contain, in the trustee’s discretion, either a complete copy of the document establishing the trust or an abstract containing the information provided in subdivision (b)(2).

Subsection (c) requires that the same information required in subsection (b) be provided to the income beneficiaries who are takers of a terminated interest upon the termination of such interest of any one or more current income beneficiaries. At such time certain holders of power of appointment are likewise required to be given the information required by subsection (b).

Notwithstanding the provisions of subsections (a)-(c), the Tennessee Uniform Trust Code does not statutorily take a position on the extent to which a trustee may claim attorney-client privilege against a beneficiary or holder of a power of appointment who has the right under such subsections (a)-(c) seeking discovery of attorney-client communications between the trustee and the trustee’s attorney. Nationally, courts are split on this issue and the drafters of the Tennessee Uniform Trust Code can find no Tennessee case on point.

Nevertheless, for the following reasons it is believed that overall Tennessee law gravitates toward the view that the fiduciary and not the beneficiary is the client:

Such is the traditional majority rule in the United States. See *Wells Fargo Bank v. Superior Court* (Boltwood), 990 P.2d 591 (Cal. 2000); *Huie v. De Shazo*, 922 S.W. 2d 920 (Tex. 1996); *Spinner v. Nutt*, 631 N.E.2d 542 (Mass. 1994); *Paskoski v. Johnson*, 626 So. 2d 338 (Fla. Ct. App. 4th 1993); *First Union Nat’l Bank v. Turney*, 824 So. 2d 172 (Fla. Dist. Ct. App. 2001); *Murphy v. Gorman*, 271 F.R.D. 296 (D.N.M. 2010). While a more recent Supreme Court case includes dicta that there is an exception regarding attorney-client privilege in fiduciary cases, see *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011); such dicta has been reviewed by the Illinois Court of Appeals, which rejected it and found no such exception.. *Garvy v. Seyfarth Shaw LLP*, 966 N.E.2d 523 (Ill. App. Ct. 1st Dist. 2012), *Petition for appeal denied*, *Garvy v. Seyfarth Shaw LLP*, 979 N.E.2d 876 (Ill. 2012).

The Tennessee Code contains multiple statutes providing for attorney-client privilege. See T.C.A. §§ 23-3-105, 23-3-106, and 67-1-1710. Moreover, an attorney who violates either of the first two such sections is severely penalized, being guilty of a Class C misdemeanor, and upon conviction stricken from the rolls as a practicing attorney. Finally, the attorney-client privilege is one of the privileges recognized under Tenn. R. Evid. 501 (2013). In response to the above indicated split in opinion, several states have recently explicitly provided by rule or statute that no exception to attorney-client privilege exists in fiduciary cases. See *New York Civil Practice: CPLR § 4503*; *Fl. Stat. 733.212 and 736.0813*.

The overriding emphasis of the Tennessee Uniform Trust Code is on settlor’s intent and of freedom of disposition. To hold that a beneficiary and not the fiduciary was the “real” client would conflict with the trustee’s fiduciary duty to implement the intentions of the settlor, which are sometimes in tension with the wishes of one or more beneficiaries. In order for a trustee to carry out this duty it is sometimes necessary or beneficial for the trustee to seek legal counsel and not being able to assert this privilege might inhibit the trustee from doing so.

After all as stated by the Supreme Court of the United States, “[The purpose of the attorney-client privilege] is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” and “The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 and 386 (1981).

Express donative trusts, such as those primarily provided for under the Tennessee Uniform Trust Code differ from ERISA trusts. Such ERISA trusts apply a theory that the beneficiary is the actual client. See, e.g., *United States v. Mett*, 178 F.3d 1058, 1062-64 (9th Cir. 1999). However, a pension trust differs from express private trusts because the beneficiaries are the settlors of their own trust, such trust being funded with the beneficiaries’

earnings. Accordingly, in ERISA attorney-client cases “[t]here are no competing interests such as other stockholders or the intentions of the Settlor.” Gibbs & Hanson, 21 ACTEC Notes at 238.

The Tennessee Uniform Trust Code employs the term “report” instead of “accounting” in order to negate any inference that the report must be prepared in any particular format or with a high degree of formality. The reporting requirement might even be satisfied by providing the beneficiaries with copies of the trust’s income tax returns and monthly brokerage account statements if the information on those returns and statements is complete and sufficiently clear. The key factor is not the format chosen but whether the report provides the beneficiaries with the information necessary to protect their interests. For model account forms, together with practical advice on how to prepare reports, see Robert Whitman, *Fiduciary Accounting Guide* (2d ed. 1998).

Subsection (d) allows trustee reports and other required information to be waived by a beneficiary as well as a holder of a power of appointment entitled to receive same. Such beneficiary or holder of a power of appointment may also withdraw a consent. However, a waiver of a trustee’s report or other information does not relieve the trustee from accountability and potential liability for matters that the report or other information would have disclosed.

Subsection (e) provides the mechanism for “quiet” or “silent” trusts. Subsection (a) and (b) do not apply to the extent that the terms of the trust provide otherwise, nor to the extent that the settlor or a trust protector or trust advisor holding the power to so direct, directs otherwise. Additionally under T.C.A. § 35-15-303 a settlor may designate in writing a representative to receive various notices and represent and bind such beneficiaries. The designation of a representative by a settlor may occur subsequent to the execution of the trust instrument, however, it must meet the notice requirements of this section. If the settlor designates a representative to receive notices, the designation should specify that the representative is to receive any reports from the trustee on behalf of the individual beneficiary. Although subsection (e) only explicitly states that it should apply to subsections (a) and (b), there is no logical reason it should not apply to subsection (c) as well. Subsection (c) only effectively provides such beneficiaries who were not either current income beneficiaries or vested remainder beneficiaries at the time the trust was established with any additional notice. It is only logical that if a settlor, trust advisor or trust protector can direct the withholding of notice to beneficiaries otherwise entitled thereto upon the creation of the trust under subsection (b), such persons should likewise be able to direct such withholding to those who only become current beneficiaries thereafter.

Subsection (f) provides the transition rules for the notice and information requirements upon the effective date of the Tennessee Uniform Trust Code.

Subsection (g) provides that if a trustee is required to keep certain information regarding trust assets confidential the trustee can be assured that he/she can carry out their duty to inform and report to beneficiaries without fear of indirectly breaching the trustee’s duty of confidentiality. This is often (but not exclusively) of special importance when a closely held asset is held by a trust.

In order to allow directed trusts to operate efficiently, subsection (h) requires that trust advisors, trust protectors and other fiduciaries keep each excluded fiduciary, all as such are defined in T.C.A. § 35-15-103, reasonably informed about the information reasonably necessary for such fiduciaries to carry out their respective duties.

35-15-814. Exercise of Powers Over Discretionary and Other Interests; Tax Savings

(a) Relative to exercise of powers over discretionary and other interests:

(1) “Improper motive” means to demonstrate action such as the following:

(A) A trustee refusing to make or limiting distributions to beneficiaries other than the trustee due to the trustee's self interest when the trustee also holds a beneficial interest subject to a discretionary interest; or

(B) A trustee making a distribution in excess of an ascertainable standard to himself or herself as beneficiary when the trustee is restricted by an ascertainable standard in the trust.

(2) Unless otherwise provided in the trust:

(A) If the settlor's spouse is named as a beneficiary, the settlor's spouse is still living and the trust is classified as a support trust, then the trustee shall consider the resources of the settlor's spouse, including the settlor's obligation of support, prior to making a distribution; and

(B) In all other cases, unless otherwise provided in the trust, the trustee need not consider the beneficiary's resources in determining whether a distribution should be made.

(b) The following provisions apply only to discretionary interests:

(1) A discretionary interest is neither a property interest nor an enforceable right; it is a mere expectancy;

(2) A court may review a trustee's distribution discretion only if the trustee acts dishonestly, acts with an improper motive, or fails to act if under a duty to do so;

(3) A reasonableness standard shall not be applied to the exercise of discretion by the trustee with regard to a discretionary interest;

(4) Other than for the three circumstances listed in subdivision (b)(2) or to enforce the limitations of subsection (d), a court has no jurisdiction to review the trustee's discretion or to force a distribution; and

(5) Absent express language in the trust instrument to the contrary, in the event that the distribution language in a discretionary interest permits unequal distributions between beneficiaries or distributions to the exclusion of other beneficiaries, the trustee may distribute all of the accumulated, accrued, or undistributed income and principal to one beneficiary in the trustee's discretion.

(c) The following provisions apply only to mandatory or support interests:

(1) A beneficiary of a mandatory or a support interest has an enforceable right to a distribution pursuant to a court's review;

(2) A trustee's distribution decision may be reviewed for unreasonableness, dishonesty, improper motivation, or failure to act if under a duty to do so; and

(3) In the case of a support interest, nothing in this section shall raise a beneficiary's support interest to the level of a property interest.

(d) Unless otherwise provided in subsection (f), 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.

(e) A power that is limited or prohibited by subsection (d) 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.

(f) Subsection (d) shall 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 was previously allowed;

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

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

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-814.

The provisions of this section diverge significantly from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

Relative to section 814 of the Uniform Trust Code, according to ULC--NCCUSL:

Despite the breadth of discretion purportedly granted by the wording of a trust, no grant of discretion to a trustee, whether with respect to management or distribution, is ever absolute. A grant of discretion establishes a range within which the trustee may act. Moreover, a trustee's exercise of discretion must always be in good faith.

Regarding the standards for exercising discretion, the Uniform Trust Code refers one to Restatement (Third) of Trusts § 50.

Restatement (Third) of Trusts § 50 and the comments thereto contain language that indicates that even if the terms of a trust specifically give a trustee "absolute, sole and unfettered" discretion, a "reasonableness" standard relative to the exercise (or non-exercise) of that discretion must be inferred.

As discussed elsewhere in these comments, regardless of how clear and obvious a drafter is regarding a settlor's intent to create a purely and absolutely discretionary trust, the above enumerated views of the Restatement (Third) of Trusts and the Uniform Trust Code result in nothing other than a vague "continuum" of rights and discretion.

In furtherance of its overriding emphasis on settlor's intent, freedom of disposition and certainty, as well as for numerous other reasons discussed elsewhere in the comments to the Tennessee Uniform Trust Code, such code categorically rejects the above enumerated views of the Restatement (Third) of Trusts and of the Uniform Trust Code.

Section (a) provides a definition of "improper motive" as such relates to a trustee who is considering whether or not to make a distribution from a trust, as well as when such trustee need consider a beneficiary's resources. Section (a) applies to all discretionary, support and mandatory interests.

Subsection (b) contains provisions of the Tennessee Uniform Trust Code that only apply to exercise of discretion related to, as well as distributions from, discretionary interests:

Subdivision (b)(1), in the clearest words possible, explicitly state that a discretionary interest is not a right or interest that rises to the level of "property." Instead such interest is nothing more than a "mere expectancy."

Subdivision(b)(2) states the sole and only bases on which a court has any jurisdiction to review a trustee's distribution discretion made relative to a distribution interest. There are three: (i) if a trustee acts dishonestly; (ii) if a trustee acts with an "improper motive," as such is defined in section (a); or (iii) if a trustee fails to act if under a duty to do so.

Subdivision (b)(3) is directly contra to the view of the Uniform Trust Code and the Restatement (Third) of Trusts regarding exercise of discretion under a distribution interest. It explicitly states that a reasonableness standard shall not be applied to such discretion.

Subdivision (b)(4) explicitly states that, other than for the three circumstances listed in subdivision (b)(2), a court has no jurisdiction to review a trustee's discretion made (or not made) or to force a distribution relative to a discretionary interest.

Subdivision (b)(5) further assures the statutory intent of subdivisions (b)(1)--(b)(4). It provides that, absent express language in a trust instrument to the contrary, when distribution language in a discretionary interest permits unequal distributions among beneficiaries, or distributions to the exclusion of other beneficiaries, the trustee truly has complete discretion to distribute all income and principal to one (or more) beneficiary and not to the other beneficiaries.

Subsection (c) contains provisions of the Tennessee Uniform Trust Code that only apply to exercise of discretion related to, as well as distributions from, support or mandatory interests:

Subdivision (c)(1) assures that a beneficiary under either such type of interest has an enforceable right to a distribution pursuant to a court's review of whether or not a trustee made such a distribution.

Subdivision (c)(2) states the sole and only bases on which a court has any jurisdiction to review a trustee's distribution discretion made relative to a support or mandatory interest. There are four: (i) if a trustee acts unreasonably; (ii) if a trustee acts dishonestly; (iii) if a trustee acts with an "improper motive," as such is defined in section (a); or (iv) if a trustee fails to act if under a duty to do so. Other than for such four enumerated circumstances, a court has no jurisdiction to review whether a trustee made (or did not make) a distribution relative to a support or mandatory interest.

Subdivision (c)(3) explicitly states that, although a beneficiary under a support interest has the right to a distribution subject to a court's review under the four bases contained in (c)(4), such support interest still does not rise to the level of a property right or interest.

Subsections (d)--(f) rewrite the terms of a trust that might otherwise result in adverse estate and gift tax consequences to a beneficiary who is serving as a trustee or other fiduciary. Subsections (d)-(f) vary from the fact that The Tennessee Uniform Trust Code does not generally address the subject of tax curative provisions. Tax curative provisions are provisions that automatically rewrite the terms of trusts that might otherwise fail to qualify for probable intended tax benefits. Tax curative provisions, because they apply to all trusts using or failing to use specified language, are often overbroad, applying not only to trusts intended to qualify for tax benefits but also to smaller trust situations where taxes are not a concern. Enacting tax curative provisions also requires special diligence by the state legislature to make certain that these provisions are periodically amended to account for the frequent changes in federal tax law. Furthermore, many failures to draft with sufficient care may be correctable by including a tax savings clause in the terms of the trust or by seeking modification of the trust using one or more of the methods authorized by sections T.C.A. §§ 35-15-411--35-15-417. Notwithstanding such reasons, the unintended inclusion in a beneficiary's gross estate of a trust when such beneficiary is also serving as a trustee or other fiduciary is a frequent enough occurrence that the Tennessee Uniform Trust Code addresses same herein.

A tax curative provision differs from a statute such T.C.A. § 35-15-416, which allows a court to modify a trust to achieve an intended tax benefit. Absent Congressional or regulatory authority authorizing the specific modification, a lower court decree in state court modifying a trust is controlling for federal estate tax purposes only if the decree was issued before the taxing event, which in the case of the estate tax would be the decedent's death. See Rev. Rul. 73-142, 1973-1 C.B. 405. There is specific federal authority authorizing modification of trusts for a number of reasons (see section comment to T.C.A. § 35-15-416) but not on the specific issues addressed in this section. Subsections (d)--(f), by interpreting the original language of the trust instrument in a way that qualifies for intended tax benefits, obviates the need to seek a later modification of the trust.

Subsection (d) is applicable unless otherwise provided in section (f) or unless the terms of the trust expressly indicate that a rule in subsection (d) is not to apply.

Subdivision (d)(1) states that, subject to such exceptions, the power to make discretionary distributions to a beneficiary who is also serving as a trustee or other fiduciary is automatically limited by the requisite ascertainable standard necessary to avoid inclusion of the trust in the beneficiary's gross estate or result in a taxable gift upon the beneficiary's release or exercise of the power. Subdivision (f)(2) provides that trusts of which the trustee-beneficiary is also a settlor are not subject to this subdivision. In such a case, limiting the discretion of a settlor-trustee to an ascertainable standard would not be sufficient to avoid inclusion of the trust in the settlor's gross estate. Furthermore, the inadvertent inclusion of a trust in the gross estate of a settlor who is also serving as a trustee or other fiduciary is a far less frequent and generally better understood occurrence than is the inadvertent inclusion of the trust in the estate of a nonsettlor beneficiary who is also serving as a trustee or other fiduciary.

Subdivision (d)(2) addresses a common trap that can occur when a trustee or other fiduciary is not a beneficiary, but such trustee or other fiduciary has the power to make discretionary distributions to those to whom such trustee or other fiduciary owes a legal obligation of support. Discretion to make distributions to those to whom the trustee or other fiduciary owes a legal obligation of support, including but not limited to a fiduciary's minor children, results in inclusion of the trust in the gross estate of the trustee or other fiduciary even if the power is limited by an ascertainable standard. That is because the language of both I.R.C. § 2041(b)(1)(A) and Treas. Reg. § 20.2041-1(c)(2) indicate that the ascertainable standard exception to the definition of a general power of appointment applies only to distributions for the benefit of a decedent (i.e., to a beneficiary who is also a trustee or other fiduciary). Such exception language says nothing regarding distributions to those to whom a decedent (i.e., a trustee or other fiduciary) owes a legal obligation of support.

Subsection (e) deals with cotrustees, trust advisors and trust protectors and adopts the common planning technique of granting the broader discretion only to the independent trustee(s), trust advisor(s) or trust protector(s). Cotrustees or other fiduciaries who are beneficiaries of the trust or who have a legal obligation to support a beneficiary may exercise the power only as limited by subsection (d). If all trustees are so limited, the court may appoint a special fiduciary to make a decision as to whether a broader exercise is appropriate.

Subsection (f) excludes certain trusts from the operation of this section. Trusts qualifying for the marital deduction will be includable in the surviving spouse's gross estate regardless of whether this section applies. Consequently, if the spouse is acting as a trustee or other fiduciary, there is no need to limit the power of such spouse to make discretionary distributions for the spouse's benefit. Similar reasoning applies to the revocable trust, which, because of the settlor's power to revoke, is automatically includable in the settlor's gross estate even if the settlor is not named as a beneficiary.

QTIP marital trusts are subject to this section, however. QTIP trusts qualify for the marital deduction only if so elected on the federal estate tax return. Excluding a QTIP for which an election has been made from the operation of this section would allow the terms of the trust to be modified after the settlor's death. By not making the QTIP election, an otherwise unascertainable standard would be limited. By making the QTIP election, the trustee's discretion would not be curtailed. This ability to modify a trust depending on elections made on the federal estate tax return could itself constitute a taxable power of appointment resulting in inclusion of the trust in the surviving spouse's gross estate.

The exclusion of an I.R.C. § 2503(c) [26 U.S.C. § 2503(c)] minors trust is necessary to avoid loss of gift tax benefits. While preventing a trustee from distributing trust funds in discharge of a legal obligation of support would keep the trust out of the trustee's gross estate, such a restriction might result in loss of the gift tax annual exclusion for contributions to the trust, even if the trustee were otherwise granted unlimited discretion. See Rev. Rul. 69-345, 1969-1 C.B. 226.

35-15-815. General powers of trustee

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

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

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

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

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

(C) Any other powers conferred by this chapter.

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

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-815.

This section is intended to grant trustees the broadest possible powers, but to be exercised always in accordance with the duties of the trustee and any limitations or expansion of such powers or duties as stated in the terms of the trust. This broad authority is denoted by granting the trustee the powers of an unmarried competent owner of individually owned property, unlimited by restrictions that might be placed on it by marriage, disability, or cotenancy.

The powers conferred elsewhere in this Code that are subsumed under this section include all of the specific powers listed in T.C.A. § 35-15-816 as well as other powers described elsewhere in the Tennessee trust statutes. For non-exclusive examples of other such subsumed powers see: the power to transfer principal place of administration as provided by T.C.A. § 35-15-108; the power to terminate and uneconomic trust with value less than one hundred thousand dollars (\$100,000) as provided by T.C.A. § 35-15-414; the power to combine and divide trusts as provided by T.C.A. § 35-15-417; the power to delegate to a cotrustee to the extent provided by T.C.A. § 35-15-703; the power to enter into transactions under the exceptions to the duty of loyalty as provided by T.C.A. § 35-15-802; the power to delegate to agents powers and duties as provided by T.C.A. § 35-15-807; as well as the power to invest trust assets jointly with another trust as provided by T.C.A. § 35-15-810(d) and the Tennessee Uniform Prudent Investor Act. The powers conferred by the Tennessee Uniform Trust Code may be exercised without court approval. If court approval of the exercise of a power is desired, a petition for court approval should be filed.

A power differs from a duty. A duty imposes an obligation or a mandatory prohibition. A power, on the other hand, is a discretion, the exercise of which is not obligatory. The existence of a power, however created or granted, does not speak to the question of whether it is prudent under the circumstances to exercise the power.

35-15-816. Specific powers of trustee

(a) Any references contained in a will or trust incorporating by reference the powers enumerated in § 35-50-110 as they relate to a trustee will incorporate by reference the powers contained in this section.

(b) Unless the terms of the instrument expressly provide otherwise and without limiting the authority conferred by § 35-15-815, 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 property, for cash or on credit, at public or private sale;

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

(4) Deposit trust money in an account in a regulated financial-service 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, 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, 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;

(C) Pay calls, assessments, and other sums chargeable or accruing against the securities, and sell or exercise stock subscription or conversion rights; and

(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;

(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;

(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;

(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 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 conservator or, if the beneficiary does not have a conservator, the beneficiary's guardian;

(B) Paying it to the beneficiary's custodian under the Uniform Transfers to Minors Act, compiled in title 35, chapter 7, part 2, and, for that purpose, creating a custodianship or custodial trust;

(C) If the trustee does not know of a conservator, guardian, custodian, or custodial trustee, 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

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

(22) On distribution of trust property or the division or termination of a trust, 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 and basis for income tax purposes;

(23) Resolve 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;

(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; and

(27) Unless the terms of the instrument expressly provide otherwise:

(A) A trustee who has authority, under the terms of a testamentary instrument or irrevocable inter vivos trust agreement, to invade the principal of a trust to make distributions to, or for the benefit of, one or more proper objects of the exercise of the power, may instead exercise such authority by appointing all or part of the principal of the trust in favor of a trustee of a trust under an instrument other than that under which the power to invade is created or under the same instrument; provided, however, that the exercise of such authority:

(i) Does not reduce any fixed income interest of any income beneficiary of the trust; and

(ii) Is in favor of the proper objects of the exercise of the power;

(B) The exercise of the power to invade the principal of the trust under subdivision (b)(27)(A) shall be by an instrument in writing, signed and acknowledged by the trustee and filed with the records of the trust;

(C) The exercise of the power to invade principal of the trust under subdivision (b)(27)(A) shall not extend the permissible period of the rule against perpetuities that applies to the trust; and

(D) The provisions of this section shall not be construed to abridge the right of any trustee who has a power of invasion to appoint property in further trust that arises under any other statute or under common law.

(E) The exercise of the power to appoint principal under subdivision (b)(27)(A) shall be considered an exercise of a power of appointment, other than a power to appoint to the trustee, the trustee's creditors, the trustee's estate, or the creditors of the trustee's estate;

(F) The second trust:

(i) May confer a power of appointment upon a beneficiary of the original trust to whom or for the benefit of whom the trustee has the power to distribute principal of the original trust;

(ii) The permissible appointees of the power of appointment conferred upon a beneficiary may include persons who are not beneficiaries of the original or second trust; and

(iii) The power of appointment conferred upon a beneficiary must preclude any exercise that would extend the permissible period of the rule against perpetuities that applies to the trust;

(G) If any contribution to the original trust qualified for the annual exclusion under § 2503(b) of the Internal Revenue Code, the marital deduction under §§ 2056(a) or 2523(a) of the Internal Revenue Code, or the charitable deduction under §§ 170(a), 642(c), 2055(a) or 2522(a) of the Internal Revenue Code, is a direct skip

qualifying for treatment under § 2642(c) of the Internal Revenue Code, or qualified for any other specific tax benefit that would be lost by the existence of the authorized trustee's authority under subdivision (b)(27)(A) for income, gift, estate, or generation-skipping transfer tax purposes under the Internal Revenue Code, then the authorized trustee shall not have the power to distribute the principal of a trust pursuant to subdivision (b)(27)(A) in a manner that would prevent the contribution to the original trust from qualifying for or would reduce the exclusion, deduction, or other tax benefit that was originally claimed with respect to that contribution;

(H) During any period when the original trust owns stock in a subchapter S corporation as defined in § 1361(a)(1) of the Internal Revenue Code, an authorized trustee shall not exercise a power authorized by subdivision (b)(27)(A) to distribute part or all of the stock of the S corporation to a second trust that is not a permitted shareholder under § 1361(c)(2) of the Internal Revenue Code;

(I) This section applies to any trust that is administered in this state; and

(J) For purposes of this section, the term "original trust" refers to the trust from which principal is being distributed and the phrase "second trust" refers to the trust to which assets are being distributed from the original trust.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-816.

This section enumerates specific powers commonly included in trust instruments and in trustee powers legislation. All the powers listed are freely subject to alteration, reduction or expansion in the terms of the trust, subject only to T.C.A. § 35-15-105. The powers listed are also subsumed under the general authority granted in T.C.A. § 35-15-815(a) to exercise all powers over the trust property which an unmarried competent owner has over individually owned property, and any other powers appropriate to achieve the proper management, investment, and distribution of the trust property. With the exception of a trustee's power of appointment under subdivision (b)(27), the powers listed add little of substance not already granted by T.C.A. § 35-15-815 and powers conferred elsewhere in the Tennessee Uniform Trust Code, including those listed in the Section Comment to section T.C.A. § 35-15-815.

As provided in subsection T.C.A. § 35-15-815, the exercise of a power is subject to fiduciary duties except as modified, limited or expanded in the terms of the trust. The fact that the trustee has a power does not imply a duty that the power must be exercised.

Many of the powers listed in this section are similar to the powers listed in Section 3 of the Uniform Trustees' Powers Act (1964). Several are new, however, and other powers drawn from such act have been updated. The powers enumerated in this section may be divided into categories. Certain powers, such as the powers to acquire or sell property, borrow money, and deal with real estate, securities, and business interests, are powers that any individual can exercise. Other powers, such as the power to collect trust property, are by their very nature only applicable to trustees. Other specific powers, particularly those listed in other sections of the Tennessee Uniform Trust Code, modify a trustee duty that would otherwise apply. See, e.g., the exceptions to the duty of loyalty provided in T.C.A. § 35-15-802 and the authorization of a trustee to make joint investments with another trust, which is an exception to earmarking requirement, provided for in T.C.A. § 35-15-810.

Subsection (a) has no counterpart in the Uniform Trust Code. It was included in this section to assure that instruments written before the original adoption of the Tennessee Uniform Trust Code in 2004 would obtain the benefits of the provisions of this section as well as those of T.C.A. § 35-50-110, such latter section being the primary section providing a list of powers that could be incorporated into an instrument by reference prior to adoption of the Tennessee Uniform Trust Code.

Subsection (b) acknowledges the ability of a settlor to freely modify, expand or reduce the powers included therein in its introductory phrase.

Subdivision (b)(1) authorizes a trustee to collect trust property and collect or decline additions to the trust property. The power to collect trust property is an incident of the trustee's duty to administer the trust as provided in T.C.A. § 35-15-801. The trustee has a duty to enforce claims as provided in T.C.A. § 35-15-811, the successful prosecution of which can result in collection of trust property. Pursuant to T.C.A. § 35-15-812, the trustee also has a duty to collect trust property from a former trustee or other person holding trust property. For a non-exclusive application of the power to reject additions to the trust property, see the provisions of this subsection that grant a fiduciary the power to decline property with possible environmental liability.

Subdivision (b)(2) authorizes a trustee to sell trust property, for cash or on credit, at public or private sale. Under the Restatement (Third) of Trusts: Prudent Investor Rule § 190 (1992), a power of sale is implied unless limited in the terms of the trust. In arranging a sale, a trustee must comply with the duty to act prudently as provided in T.C.A. § 35-15-801. This duty may dictate that the sale be made with security.

Subdivision (b)(4) authorizes a trustee to deposit funds in an account in a regulated financial service institution. This includes the right of a financial institution trustee to deposit funds in its own banking department as authorized by T.C.A. § 35-15-802.

Subdivision (b)(5) authorizes a trustee to borrow money. Under the Restatement (Third) of Trusts: Prudent Investor Rule § 191 (1992), the sole limitation on such borrowing is the general obligation to invest prudently. Language clarifying that the loan may extend beyond the duration of the trust was added to negate an older view that the trustee only had power to encumber the trust property for the period that the trust was in existence.

Subdivision (b)(6) authorizes the trustee to continue, contribute additional capital to, or change the form of a business. Any such decision by the trustee must be made in light of the standards of the Tennessee Uniform Prudent Investor Act, but such standards can be fully altered, expanded, reduced or eliminated pursuant to T.C.A. § 35-15-105.

Subdivision (b)(7), regarding powers with respect to securities, codifies and amplifies the principles of Restatement (Second) of Trusts § 193 (1959).

Subdivision (b)(9), authorizing the leasing of property, negates the older view, reflected in Restatement (Second) of Trusts § 189 cmt. c (1959), that a trustee could not lease property beyond the duration of the trust. Whether a longer term lease is appropriate is judged by the standards of prudence applicable to all investments.

Subdivision (b)(10), authorizing a trustee to grant options with respect to sales, leases or other dispositions of property, negates the older view, reflected in Restatement (Second) of Trusts § 190 cmt. k (1959), that a trustee could not grant another person an option to purchase trust property. Like any other investment decision, whether the granting of an option is appropriate is a question of prudence under the standards of the Tennessee Uniform Prudent Investor Act, but such standards can be fully altered, expanded, reduced or eliminated pursuant to T.C.A. § 35-15-105.

Subdivision (b)(11), authorizing a trustee to purchase insurance, empowers a trustee to implement the duty to protect trust property. See T.C.A. § 35-15-809. The trustee may also insure beneficiaries, agents, and the trustee against liability, including liability for breach of trust.

Subdivision (b)(13) is one of several provisions in the Tennessee Uniform Trust Code designed to address trustee concerns about possible liability for violations of environmental law. This subdivision collects all the powers relating to environmental concerns in one place even though some of the powers, such as the powers to pay expenses, compromise claims, and decline property, overlap with other subdivisions of this section (decline property, subdivision (b)(1); compromise claims, subdivision (b)(14); pay expenses, subdivision (b)(15)). See also T.C.A. § 35-15-701, which grants a designated trustee the power to inspect property to determine potential violation of environmental or other law or for any purpose, and the fact that under T.C.A. § 35-15-1010 (unlike under the corresponding section of the Uniform Trust Code) a trustee is not personally liable for violation of

environmental law arising from ownership or control of trust property.

Subdivision (b)(14) authorizes a trustee to pay, contest, settle, or release claims. T.C.A. § 35-15-811] requires that a trustee need take only “reasonable” steps to enforce claims, meaning that a trustee may release a claim not only when it is uncollectible, but also when collection would be uneconomic. See Restatement (Second) of Trusts § 192 (1959) (power to compromise, arbitrate and abandon claims). T.C.A. § 35-15-811 also allows a trustee to abandon or assign a claim such trustee believes unreasonable to enforce to one or more of the beneficiaries of a trust, giving such beneficiary(ies) the ability to attempt enforcement if such beneficiary(ies) so desire(s).

Subdivision (b)(15), among other things, authorizes a trustee to pay compensation to the trustee and agents without prior approval of court. Regarding the standard for setting trustee compensation and repayment of trustee expenditures, see T.C.A. §§ 35-15-708 and 35-15-709.

Subdivision (b)(16) authorizes a trustee to make elections with respect to taxes. It is intended to allow a trustee as well as any other fiduciary (as such term is defined in T.C.A. § 35-5-103) who holds the relevant powers, the broadest possible freedom consistent with overall objectives and provisions of the Tennessee trust statutes to exercise elections concerning taxes so that such fiduciary can provide for the overall efficient administration of a trust. Due to the intent of subdivision (b)(16), it would be illogical to limit its application to only matters that are only directly related to taxation and its application is not so limited. Accordingly, although not specifically enumerated in such subdivision, such subdivision (as well as other portions of the Tennessee trust statutes) grants a fiduciary the powers to make decisions regarding all things and matters that directly or indirectly affect taxation imposed on a trust, any of its property, any parties to the trust and any of its beneficiaries. For similar reasons, it would be illogical to limit the application of subdivision (b)(16) to only “federal, state and local taxes,” and its application is not so limited. Accordingly, although not specifically enumerated in such subdivision, such subdivision grants a fiduciary the power to exercise elections regarding all forms of taxation (regardless of name, as well as how and on what basis imposed) that is imposed on the trust, any of its property, any parties to the trust and any of its beneficiaries. Such power exists regardless of the nature or location (whether within this state, another state, the United States or within a foreign country, as well as within any subdivisions of any such locations) of the authority imposing or interpreting any form of taxation. Although not limited to taxes imposed on income, among other such elections, such subdivision specifically authorizes a trustee to make elections which relate to current, recent and future changes to the definition of “income” (as well as to the definition of any other term bearing on the taxability of any item or matter and the resulting rate or amount of tax, under any type or form of taxation). Several non-exclusive examples of such changes include: a definition of income such as an election to consider the net gains from the sale of capital assets to be part of “distributable net income” (often referred to by the acronym “DNI”) as such is defined in § 643 of the Internal Revenue Code; and any changes to matters affecting any definitions or other provisions contained in subpart D, part 1, subchapter J, of Chapter 1 of the Internal Revenue Code (i.e., the provisions of such code concerning treatment of excess distributions by trusts, including but not limited to accumulation distributions and undistributed net income, the latter often referred to by the acronym “UNI”). To the extent any provision of title 35, chapter 6, any other provision of the Tennessee trust statutes, any other Tennessee law or any foreign law are in conflict with this subdivision (b)(16), such subdivision (b)(16) controls.

Subdivision (b)(17) authorizes a trustee to take action with respect to employee benefit or retirement plans, or annuities or life insurance payable to the trustee. Typically, these will be beneficiary designations which the settlor has made payable to the trustee, but the Tennessee Uniform Trust Code also allows the trustee to acquire ownership of annuities or life insurance. Moreover, elections under this subdivision may be made in order to effect the other provisions of this section, including but not limited to subdivision (b)(16).

Subdivisions (b)(18) and (b)(19) allow a trustee to make loans to a beneficiary or to guarantee loans of a beneficiary upon such terms and conditions as the trustee considers fair and reasonable. The determination of what is fair and reasonable must be made in light of the fiduciary duties of the trustee and the purposes of the

trust. Frequently, a trustee will make loans to a beneficiary which might be considered less than prudent in an ordinary commercial sense although of great benefit to the beneficiary and which help carry out the trust purposes. If the trustee requires security for the loan to the beneficiary, adequate security under this subdivision may consist of a charge on the beneficiary's interest in the trust. See Restatement (Second) of Trusts § 255 (1959). It is important to note, that as with the vast majority of provisions of the Tennessee Uniform Trust Code, the provisions of subdivisions (b)(18) and (b)(19) may be modified, expanded, restricted or eliminated, subject only to T.C.A. § 35-15-105.

Subdivision (b)(20) authorizes the appointment of ancillary trustees in jurisdictions in which the regularly appointed trustee is unable or unwilling to act. Often, but certainly not exclusively, an ancillary trustee will be appointed when there is a need to manage real estate located in another jurisdiction. This subdivision allows the regularly appointed trustee to select the ancillary trustee and to confer on the ancillary trustee such powers and duties as may be necessary. The appointment of ancillary trustees is a topic which a settlor may wish to address in the terms of the trust.

Subdivision (b)(21) authorizes a trustee to make payments to another person for the use or benefit of a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated. Although an adult relative or other person receiving funds is required to spend it on the beneficiary's behalf, it is preferable that the trustee make the distribution to a person having more formal fiduciary responsibilities. For this reason, payment may be made to an adult relative only if the trustee does not know of a conservator, guardian, custodian, or custodial trustee capable of acting for the beneficiary. Subdivision (b)(21) can also be used in furtherance of the provisions of T.C.A. §§ 35-15-506(a)(5) and 35-15-506(b)(2).

Subdivision (b)(22) authorizes a trustee to make non-pro-rata distributions and allocate particular assets in proportionate or disproportionate shares. This power provides needed flexibility and lessens the risk that a non-pro-rata distribution will be treated as a taxable sale. The power also provides needed flexibility to effect other provisions of this section, including but not limited to subdivision (b)(16).

Subdivision (b)(23) authorizes a trustee to resolve disputes through mediation or arbitration. The drafters of this the Tennessee Uniform Trust Code encourage the use of such alternate methods for resolving disputes. Arbitration is a form of nonjudicial settlement agreement authorized by T.C.A. § 35-15-111. In representing beneficiaries and others in connection with arbitration or mediation, the representation principles of title 35, chapter 15, part 3 may be applied. Settlers wishing to encourage use of alternate dispute resolution may draft to provide it. For sample language, see American Arbitration Association, Arbitration Rules for Wills and Trusts (1995).

Subdivision (b)(24) authorizes a trustee to prosecute or defend an action. As to the propriety of reimbursement for attorney's fees and other expenses of an action or judicial proceeding, see T.C.A. § 35-15-709 and its Section Comment. See also T.C.A. § 35-15-811 relative to a trustee's duty to defend actions.

Subdivision(b)(25) authorizes a fiduciary to execute and deliver all forms of instruments that facilitate exercise of that fiduciary's powers.

Subdivision (b)(26), which is similar to section 344 of the Restatement (Second) of Trusts (1959), clarifies that even though the trust has terminated, the trustee retains the powers needed to wind up the administration of the trust and distribute the remaining trust property.

Subdivision (b)(27) authorizes a trustee who possesses a discretionary power to distribute principal outright to trust beneficiaries to exercise that power in further trust. This power, which is commonly referred to as a "decanting" power, is considered a limited power of appointment.

The power may be exercised with respect to any trust that is administered in Tennessee.

In order to exercise the power, the Trustee is required to sign a written notarized instrument that is

maintained with the records of the original trust as well as the second trust. The Trustee does not have to obtain consent of the beneficiaries or a Court in order to exercise the power.

The power may only be exercised in favor of the proper objects of the exercise of the discretionary power. This means that new beneficiaries cannot be added to the second trust, though the second trust does not have to benefit all of the beneficiaries of the original trust. The second trust may grant a power of appointment to a beneficiary of the original trust, which power may be exercisable in favor of beneficiaries who were not beneficiaries of the original trust.

There are several limitations on the exercise of the power that prevent loss of tax benefits:

(1) the permissible rule of perpetuities applicable to the original trust may not be extended either by exercise of the decanting power or by the exercise of a power of appointment granted to a beneficiary in the second trust;

(2) if the original trust qualified for the federal gift tax annual exclusion under Code Section 2503(b), the federal gift or estate tax marital or charitable deduction, favorable generation-skipping transfer treatment under Code Section 2642(c), or any other specific tax benefit, the decanting power may not be exercised in a manner that causes the loss of the tax benefit; and

(3) if the original trust owns stock in a Subchapter S corporation, the power may not be exercised in favor of a second trust that is not a qualified shareholder in a Subchapter S corporation.

35-15-817. Distribution upon termination

(a) Upon termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. The right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within thirty (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. For the purpose of determining the date a proposed distribution was sent, where exact confirmation is unavailable, it can be assumed it was received five (5) days after the date of mailing.

(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.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-817.

This section contains several independent provisions governing distribution upon termination. Certain other provisions of the Tennessee Uniform Trust Code relevant to distribution upon termination include the power upon termination of a trust to windup administration and distribution subdivision as provided by T.C.A. § 35-15-816(b), and the limitation on actions against trustees as provided by T.C.A. § 35-15-1005.

Subsection (a) is based on section 3-906(b) of the Uniform Probate Code. It addresses the dilemma that sometimes arises when the trustee is reluctant to make distribution until the beneficiary approves but the beneficiary is reluctant to approve until the assets are in hand. The procedure made available under subsection (a) facilitates the making of non-pro-rata distributions. However, whenever practicable it is normally better practice to

obtain the advance written consent of the beneficiaries to a proposed plan of distribution. Similar to other notices under the Tennessee Uniform Trust Code, the right of a beneficiary to object may be barred by delivery of the proposal to another person if that other person may represent and bind the beneficiary as provided in title 35, chapter 3.

The last sentence of subsection (a) is not contained in the Uniform Trust Code and provides certainty as to the date on which a proposed distribution, having been sent, was received by the person or persons to whom its delivery was required.

The failure of a beneficiary to object to a plan of distribution pursuant to subsection (a) is not a release as provided in subsection (c) or in T.C.A. § 35-15-1009. A release requires an affirmative act by a beneficiary and is not accomplished upon a mere failure to object. Furthermore, a failure of a beneficiary to object does not preclude the beneficiary from bringing an action with respect to matters not disclosed in the proposal for distribution.

Subsection (b) recognizes that upon an event terminating or partially terminating a trust, expeditious distribution should be encouraged to the extent reasonable under the circumstances. However, a trustee is entitled to retain a reasonable reserve for payment of debts, expenses, and taxes. Sometimes these reserves must be quite large, for example, upon the death of the beneficiary of a QTIP trust that is subject to federal estate tax in the beneficiary's estate. Not infrequently, a substantial reserve must be retained until the estate tax audit is concluded several years after the beneficiary's death.

Subsection (c) is an application of T.C.A. § 35-15-1009, which addresses the validity of any type of release that a beneficiary might give. However, subsection (c) is more limited, dealing only with releases given upon termination of the trust. Factors affecting the validity of a release are provided in T.C.A. § 35-15-109, and such release may be obtained through represented under part 3. See Restatement (Second) of Trusts § 216 (1959).

“Uniform Principal and Income Act” and “Tennessee Uniform Prudent Investor Act of 2002” Incorporated

GENERAL COMMENT.

According to ULC--NCCUSL, this part provides a place for a jurisdiction to enact, reenact or codify its version of the Uniform Prudent Investor Act [ULC--NCCUSL does not mention the Uniform Principal and Income Act relative to its part 9]. States adopting the Uniform Trust Code which have previously enacted the Uniform Prudent Investor Act are encouraged to reenact their version of the Prudent Investor Act in this part.

Both the Tennessee Uniform Prudent Investor Act of 2002, title 35, part 14, T.C.A. § 35-14-101 et seq., and Tennessee’s version of the Uniform Principal and Income Act, title 35, part 6, T.C.A. § 35-6-101 et seq., were adopted prior to the Tennessee Uniform Trust Code. As with the Tennessee Uniform Trust Code, both have been amended since their respective enactments and in certain cases, both diverge, sometimes significantly, from their respective uniform codes, as well as from various restatements. Instead of “reenacting” the Tennessee Uniform Prudent Investor Act of 2002 in part 9, the Tennessee Uniform Trust Code incorporates therein by reference such act, codified at title 35, part 14, as well as Tennessee’s version of the Uniform Principal and Income Act, codified at title 35, part 6.

35-15-901. Uniform Principal and Income Act and Tennessee Uniform Prudent Investor Act of 2002 incorporated by reference.

Title 35, chapter 6 and chapter 14 are incorporated in this chapter by reference.

Liability of Trustees and Rights of Persons Dealing with Trustee

GENERAL COMMENT.

T.C.A. §§ 35-15-1001--35-15-1009 identify the remedies for breach of trust, describe how money damages for breach of trust, as well as in absence of breach of trust, are to be determined, and specify potential defenses. T.C.A. § 35-15-1001 lists the remedies for breach of trust and specifies when a breach of trust occurs. A breach of trust occurs when the trustee breaches one of the duties contained in part 8 [T.C.A. § 35-15-801--35-15-817] or elsewhere in the Tennessee Uniform Trust Code. The remedies for breach of trust in T.C.A. § 35-15-1001 are broad and flexible. T.C.A. § 35-15-1002 provides how money damages for breach of trust are to be determined. Subject to several exceptions, the standard for determining money damages rests on two principles: (1) the trust should be restored to the position it would have been in had the harm not occurred; and (2) the trustee should not be permitted to profit from the trustee's own wrong. T.C.A. § 35-15-1003 is in contravention to the similarly numbered section of the Uniform Trust Code and holds that a trustee is not liable to a beneficiary in absence of breach of trust for a loss or depreciation of value of trust property or for not making a profit; a trustee not being an insurer. T.C.A. § 35-15-1004 reaffirms the court's power in equity to award costs and attorney's fees as justice requires and unlike the Uniform Trust Code, recognizes the need to also allow such payments from trust assets in non-judicial proceedings, arbitrations and mediations.

T.C.A. §§ 35-15-1005--35-15-1009 deal with potential defenses. T.C.A. § 35-15-1005 provides a statute of limitations on actions against a trustee that diverges from that of the Uniform Trust Code. T.C.A. § 35-15-1005: (1) makes the benefit of such statute of limitations easier to obtain than under the Uniform Trust Code; and (2) unlike the Uniform Trust Code, contains similar statutes of limitation that apply to actions by a trustee against another or former trustee, as well as to actions by a trust advisor or trust protector against a trustee. T.C.A. § 35-15-1006 protects a trustee who acts in reasonable reliance on the terms of a written trust instrument. T.C.A. § 35-15-1007 protects a trustee who has exercised reasonable care to ascertain the happening of events that might affect distribution, such as a beneficiary's marriage or death. T.C.A. § 35-15-1008 describes the effect and limits on the use of an exculpatory clause. Unlike under the Uniform Trust Code and despite the provisions of T.C.A. § 35-15-1008, as discussed in the section comments to such section, the drafters of the Tennessee Uniform Trust Code believe that when taken as a whole, the Tennessee Uniform Trust Code allows enforceability of a provision in a trust instrument that relieves a trustee of liability for breach committed in bad faith. T.C.A. § 35-15-1009 deals with the standards for recognizing beneficiary approval of, or consent to, acts of the trustee that might otherwise constitute a breach of trust.

T.C.A. §§ 35-15-1010--1013 address trustee relations with persons other than beneficiaries. The emphasis is on encouraging third parties to engage in commercial transactions to the same extent as if the property were not held in trust. T.C.A. § 35-15-1010 negates personal liability on contracts entered into by the trustee if the fiduciary capacity was properly disclosed. The trustee is also relieved from personal liability for torts committed in the course of administration unless the trustee was personally at fault. Unlike the Uniform Trust Code, T.C.A. § 35-15-1010 requires that in order for such personal liability for tort to arise, the fault of the trustee must be due to the trustee's own willful misconduct proven by clear and convincing evidence. Also unlike the Uniform Trust Code, T.C.A. § 35-15-1010 does not contain an exception to protection from personal liability relative to environmental law. Therefore, T.C.A. § 35-15-1010 provides a trustee significantly better protection from personal liability than does the Uniform Trust Code. T.C.A. § 35-15-1011 negates personal liability for contracts entered into by partnerships in which the trustee is a general partner as long as the fiduciary capacity was disclosed in the contract or partnership certificate. Such section also provides a trustee protection from entity tort claims based on the same standard as in T.C.A. § 35-15-1010. By analogy, the drafters of the Tennessee Uniform Trust Code believe

such protection extends to a trustee of a trust that is the only member of a single member LLC should the LLC itself not protect the trustee. Such drafters also believe such protection is extended to a trustee of a trust that owns an interest in any entity that normally provides limitation of liability, but which is attacked by any alter ego or veil piercing theory. Overall T.C.A. § 35-15-1011 provides a trustee better protection than does the Uniform Trust Code. T.C.A. § 35-15-1012 protects persons other than beneficiaries who deal with a trustee in good faith and without knowledge that the trustee is exceeding or improperly exercising a power. T.C.A. § 35-15-1013 permits a third party to rely on a certification of trust, thereby reducing the need for a third party to request a copy of the complete trust instrument. However, T.C.A. § 35-15-1013 provides more privacy and more flexibility than does the Uniform Trust Code.

T.C.A. § 35-15-1014 provides for enforceability of no-contest provisions and does not have a counterpart in the Uniform Trust Code. Such section provides in the absence of a specific list of grounds for bringing an action, a no-contest provision is valid and enforceable. Moreover, the good or bad faith of the person contesting is not relevant.

Though much of this part is not subject to override in the terms of the trust, in the interest of enforcing a settlor's intent and the freedom of disposition of property, more is subject to override than under the Uniform Trust Code. The settlor may not limit the rights of persons other than beneficiaries as provided in T.C.A. §§ 35-15-1010--35-15-1013, modify the provisions regarding statutes of limitation contained in T.C.A. § 35-15-1005 nor interfere with the court's ability to take such action to remedy a breach of trust as may be necessary in the interests of justice. See T.C.A. § 35-15-105.

35-15-1001. Remedies for breach of trust

- (a) A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.
- (b) To remedy a breach of trust that has occurred or may occur, the court may:
 - (1) Compel the trustee to perform the trustee's duties;
 - (2) Enjoin the trustee from committing a breach of trust;
 - (3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means;
 - (4) Order a trustee to account;
 - (5) Appoint a special fiduciary to take possession of the trust property and administer the trust;
 - (6) Suspend the trustee;
 - (7) Remove the trustee as provided in § 35-15-706;
 - (8) Reduce or deny compensation to the trustee;
 - (9) Subject to § 35-15-1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or
 - (10) Order any other appropriate relief whether provided elsewhere in this chapter, available at common law or under equity principles.

COMMENT.

This section codifies the remedies available to rectify or to prevent a breach of trust for violation of a duty owed to a beneficiary. The duties that a trustee might breach include those contained in part 8 [T.C.A. §§ 35-15-801--35-15-817] in addition to those specified elsewhere in the Tennessee Uniform Trust Code. In consulting part 8 or other provisions of the Tennessee Uniform Trust Code, note that certain provisions in part 8 and elsewhere in some ways diverge significantly from the Uniform Trust Code and the restatements. Such divergence may reduce or enlarge a trustee's duties relative to the duties as defined by the Uniform Trust Code or the restatements. To the extent such divergence is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

While this section identifies the available remedies, it does not attempt to cover the refinements and

exceptions developed in case law. The availability of a remedy in a particular circumstance will be determined not only by the Tennessee Uniform Trust Code, but also by the common law of trusts and principles of equity to the extent provided in T.C.A. § 35-15-106.

Beneficiaries, cotrustees and to the extent they are so authorized, trust advisors and trust protectors, have standing to bring a petition against a trustee or cotrustee to remedy a breach of trust. Similarly such persons have standing to bring a petition to remedy a breach of trust against a relevant trust advisor or trust protector to the extent such trust advisor or trust protector owed a duty giving rise to such petition. Following acceptance of office by a successor trustee or other fiduciary, such successor fiduciary has standing to sue a predecessor for breach of trust. See Restatement (Second) of Trusts § 200 (1959). A person who may represent a beneficiary's interest under part 3 [T.C.A. §§ 35-15-301--35-15-305] would have standing to bring a petition on behalf of the person represented. In the case of a charitable trust, those with standing include the state attorney general and a charitable organization expressly designated to receive distributions under the terms of the trust. See T.C.A. § 35-15-110 & Restatement (Second) of Trusts § 391 (1959). A person appointed to enforce a trust for an animal or a trust for a noncharitable purpose would have standing to sue for a breach of trust. See T.C.A. §§ 35-15-408, and 35-15-409.

Notwithstanding the preceding paragraph, during the period in which a beneficiary is an ultimate, or potential ultimate, beneficiary as such is defined in the definition of "qualified beneficiary" at T.C.A. § 35-15-103 and the section comments thereto, such beneficiary shall not have the standing to petition to remedy a breach of trust or to enforce a trust; such beneficiary's interest being too remote. If and when the interests of any ultimate, or potential ultimate, beneficiary have ripened to the point that such beneficiary is eligible to receive, or have paid for their benefit, current distributions of income or principal, at such time they will no longer be an "ultimate beneficiary" or "potential ultimate beneficiary." At such time such beneficiary has all the rights of any other current beneficiary of the same type, charitable or non-charitable. Similarly if a trust for animals or a trust for a noncharitable purpose (individually and collectively, "purpose trust") is an ultimate, or potential ultimate, beneficiary, the rights of any person provided in T.C.A. §§ 35-15-408 or 35-15-409 to enforce the trust under which such purpose trust is an ultimate, or potential ultimate beneficiary will not ripen until such purpose trust is eligible to receive from the trust under which it was previously an ultimate, or potential ultimate, beneficiary, current distributions of income or principal.

Traditionally, remedies for breach of trust at law were limited to suits to enforce unconditional obligations to pay money or deliver chattels. See Restatement (Second) of Trusts § 198 (1959). Otherwise, remedies for breach of trust were exclusively equitable, and as such, punitive damages were not available and findings of fact were made by the judge and not a jury. See Restatement (Second) of Trusts § 197 (1959).

The remedies identified in this section are derived from Restatement (Second) of Trusts § 199 (1959). The reference to payment of money in subdivision (b)(3) includes liability that might be characterized as damages, restitution, or surcharge. For the measure of liability, see T.C.A. § 35-15-1002. Subdivision (b)(5) makes explicit the court's authority to appoint a special fiduciary, also sometimes referred to as a receiver. See Restatement (Second) of Trusts § 199(d) (1959). The authority of the court to appoint a special fiduciary is not limited to actions alleging breach of trust but is available whenever the court, exercising its equitable jurisdiction, concludes that an appointment would promote administration of the trust. See T.C.A. § 35-15-704 (special fiduciary may be appointed whenever court considers such appointment necessary for administration).

Subdivision (b)(8), which allows the court to reduce or deny compensation, is in accord with Restatement (Second) of Trusts § 243 (1959). For the factors to consider in setting the compensation of a trustee or other fiduciary absent breach of trust, see T.C.A. § 35-15-708. In deciding whether to reduce or deny a trustee compensation, the court may wish to consider: (1) whether the trustee acted in good faith; (2) whether the breach of trust was intentional; (3) the nature of the breach and the extent of the loss; (4) whether the trustee has restored the loss; and (5) the value of the trustee's services to the trust. See Restatement (Second) of Trusts § 243

cmt. c (1959).

The authority under subdivision (b)(9) to set aside wrongful acts of the trustee is a corollary of the power to enjoin a threatened breach as provided in subdivision (b)(2). However, in setting aside the wrongful acts of the trustee the court may not impair the rights of bona fide purchasers protected under T.C.A. § 35-15-1012. See Restatement (Second) of Trusts § 284 (1959).

35-15-1002. Damages for breach of trust

(a) Except as otherwise provided in § 35-3-117(h)-(k) with regard to investment of trust funds or elsewhere in this chapter, a trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of:

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

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

(b) Except as otherwise provided in this subsection (b), if more than one (1) trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-1002.

The exception language in the clause at the beginning of subsection (a) may result in a divergence from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

Subsection (a) is based on Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992). Such subsection states the general rule that if a trustee commits a breach of trust, the beneficiaries may either affirm the transaction or, if a loss has occurred, hold the trustee liable for the amount necessary to compensate fully for the consequences of the breach. This may include recovery of lost income, capital gain, or appreciation that would have resulted from proper administration. Even if a loss has not occurred, the trustee may not benefit from the improper action and is accountable for any profit the trustee made by reason of the breach.

Notwithstanding the above, subsection (a) has two sources of exceptions to the general rule:

Exception number one is the provisions of T.C.A. § 35-3-117(a)-(d), which since 1951 have been part of the Tennessee trust statutes. Such subdivisions provide:

(a) Expressly that a bank or trust company can invest fiduciary assets in any open or closed end, investment company (i.e., a mutual fund), as well as in a collective trust. It is immaterial that such investment company or collective trust is being provided services by an affiliate of the trustee (a similar but broader authorization is provided in T.C.A. § 35-15-802);

(b) In the absence of express provisions to the contrary in a trust instrument, a fiduciary is not liable for with respect to decisions made regarding allocation or nature of investments of fiduciary assets unless the court determines that any such decision was an abuse of the fiduciary's discretion. Such abuse is not to be found merely because the court would not have exercised the investment discretion in the same manner;

(c) In the case where a fiduciary is found to have abused investment discretion, provides a methodology to

determine how a fiduciary is to restore the income and remainder beneficiaries to the same positions such would have occupied had the fiduciary not abused investment discretion.

(d) Provides a mechanism by which a fiduciary can obtain prior court approval for a plan of investment. If the plan provides sufficient information to the beneficiaries such that the beneficiaries are informed about the plan, any beneficiary who wishes to challenge the plan has the burden of establishing the plan will result in an abuse of discretion.

Exception number two is except as provided otherwise in this chapter 15, which by way of incorporation by reference includes chapters 6 and 14, the Tennessee Uniform Principal and Income Act and the Tennessee Uniform Prudent Investor Act, respectfully. Because of the flexibility contained in such Tennessee trust statutes (freedom of settlor's intent, freedom of settlor's variance from the terms of such Tennessee trust statutes, directed trusts, etc.) it is quite possible that a given trust contains exceptions that apply to the general rule. Such is far more likely under the Tennessee Uniform Trust Code than under the Uniform Trust Code or the restatements.

Relative to the default rule:

For extensive commentary on the determination of damages, traditionally known as trustee surcharge, with numerous specific applications, see Restatement (Third) of Trusts: Prudent Investor Rule §§ 205-213 (1992).

For the use of benchmark portfolios to determine damages, see Restatement (Third) of Trusts: Prudent Investor Rule Reporter's Notes to §§ 205 and 208--211 (1992).

On the authority of a court of equity to reduce or excuse damages for breach of trust, see Restatement (Second) of Trusts § 205 cmt. g (1959).

For purposes of this section and T.C.A. § 35-15-1003, "profit" does not include the trustee's compensation. A trustee who has committed a breach of trust is entitled to reasonable compensation for administering the trust unless the court reduces or denies the trustee compensation pursuant to T.C.A. § 35-15-1001(b)(8).

Subsection (b) is based on Restatement (Second) of Trusts § 258 (1959). Cotrustees are jointly and severally liable for a breach of trust if there was joint participation in the breach. Joint and several liability also is imposed on a nonparticipating cotrustee who, as provided in T.C.A. § 35-15-703, failed to exercise reasonable care: (1) to prevent a cotrustee from committing a serious breach of trust, or (2) to compel a cotrustee to redress a serious breach of trust. Joint and several liability normally carries with it a right in any trustee to seek contribution from a cotrustee to the extent the trustee has paid more than the trustee's proportionate share of the liability. Subsection (b), consistent with Restatement (Second) of Trusts § 258 (1959), creates an exception. A trustee who was substantially more at fault or committed the breach of trust in bad faith (absent being exculpated from same under T.C.A. § 35-15-105(a), see section comment to T.C.A. § 35-15-1008) or with reckless indifference to the purposes of the trust or the interests of the beneficiaries is not entitled to contribution from the other trustees.

Determining degrees of comparative fault is a question of fact. The fact that one trustee was more culpable or more active than another does not necessarily establish that this trustee was substantially more at fault. Nor is a trustee substantially less at fault because the trustee did not actively participate in the breach. See Restatement (Second) of Trusts § 258 cmt. e(195). Among the factors to consider: (1) Did the trustee fraudulently induce the other trustee to join in the breach? (2) Did the trustee commit the breach intentionally while the other trustee was at most negligent? (3) Did the trustee, because of greater experience or expertise, control the actions of the other trustee? (4) Did the trustee alone commit the breach with liability imposed on the other trustee only because of an improper delegation or failure to properly monitor the actions of the cotrustee? See Restatement (Second) of Trusts § 258 cmt. d (1959).

35-15-1003. Damages in absence of breach

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.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-1003.

The provisions of this section are in contravention to portions of the equivalent provision contained in the Uniform Trust Code and is controlling over it, the restatements and any foreign law.

A trustee is not an insurer. Similar to Restatement (Second) of Trusts § 204 (1959), this section provides that absent a breach of trust a trustee is not liable for a loss or depreciation in the value of the trust property or for failure to make a profit.

By way of example of such contravention, the Uniform Trust Code (but not the Tennessee Uniform Trust Code) contains two subsections, one of which is in accord with this section, while the other subsection in the Uniform Trust Code (but not in the Tennessee Uniform Trust Code) states, "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."

35-15-1004. Attorney's fees and costs

(a) In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

(b) In a nonjudicial proceeding involving the administration of a trust, the trustee may pay fees, other reasonable costs and expenses from the trust assets where all of the parties to the proceeding agree in writing.

(c) In a mediation or arbitration proceeding involving the administration of a trust, the mediator or arbitrator may award fees, other reasonable costs and expenses against the assets of the trust.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-1004.

Subsection (a) codifies the court's historic authority to award costs and fees, including reasonable attorney's fees, in judicial proceedings grounded in equity. The court may award a party its own fees and costs from the trust. The court may also charge a party's costs and fees against another party to the litigation. Generally, litigation expenses were at common law chargeable against another party only in the case of egregious conduct such as bad faith or fraud. With respect to a party's own fees, T.C.A. § 35-15-709 authorizes a trustee to recover expenditures properly incurred in the administration of the trust. The court may award a beneficiary litigation costs if the litigation is deemed beneficial to the trust. Sometimes, litigation brought by a beneficiary involves an allegation that the trustee has committed a breach of trust. On other occasions, the suit by the beneficiary is brought because of the trustee's failure to take action against a third party, such as to recover property properly belonging to the trust. For the authority of a beneficiary to bring an action when the trustee fails to take action against a third party, see Restatement (Second) of Trusts §§ 281-282 (1959). For the case law on the award of attorney's fees and other litigation costs, see 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* §§ 188.4 (4th ed. 1988).

Subsections (b) and (c), for which the Uniform Trust Code has no equivalent, recognizes that there is also a

need to allow the payment of fees, expenses and costs from trust assets in non-judicial proceedings, arbitrations and mediations, such being encouraged under the Tennessee Uniform Trust Code.

35-15-1005. Limitation of action against trustee by a beneficiary; Limitation of action against trustee by a trustee, trust advisor or trust protector.

(a) A beneficiary may not commence a proceeding against a trustee for breach of trust more than one (1) year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed facts indicating the existence of a potential claim for breach of trust.

(b) A report adequately discloses facts indicating the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or the beneficiary's representative knows of the potential claim or has sufficient information to be presumed to know of it, or to be put on notice to inquire into its existence.

(c) If subsection (a) does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within three (3) 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.

(d) A trustee may not commence a proceeding against a cotrustee or a former trustee for breach of trust more than one (1) year after the date the trustee or a representative of the trustee was sent a report that adequately disclosed facts indicating the existence of a potential claim for breach of trust.

(e) A report adequately discloses facts indicating the existence of a potential claim for breach of trust if it provides sufficient information so that the trustee or the trustee's representative knows of the potential claim or has sufficient information to be presumed to know of it, or to be put on notice to inquire into its existence.

(f) If subsection (d) does not apply, a judicial proceeding by a trustee against a cotrustee or former trustee for breach of trust must be commenced within three (3) years after the first to occur of:

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

(g) A trust advisor or trust protector may not commence a proceeding against a trustee or a former trustee for breach of trust more than one (1) year after the date the trust advisor or trust protector or the respective representative of each was sent a report that adequately disclosed facts indicating the existence of a potential claim for breach of trust.

(h) A report adequately discloses facts indicating the existence of a potential claim for breach of trust if it provides sufficient information so that the trust advisor or trust protector or the respective representative of each knows of the potential claim or has sufficient information to be presumed to know of it, or to be put on notice to inquire into its existence.

(i) If subsection (g) does not apply, a judicial proceeding by a trust advisor or trust protector against a trustee or former trustee for breach of trust must be commenced within three (3) years after the first to occur of:

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

(j) Notwithstanding subsections (d)—(i), no trustee, trust advisor or trust protector, may commence a proceeding against a trustee or a former trustee if, under § 35-15-1005(a)—(c), none of the beneficiaries may commence a proceeding against the cotrustee or former trustee for such breach of trust.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or

such portion of, T.C.A. § 35-15-1005.

The provisions of this section in some ways diverge significantly from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

The one-year and three year limitations periods under this section are not the only means for barring an action by a beneficiary. A beneficiary may be foreclosed by consent, release, or ratification as provided in T.C.A. § 35-15-1009. Claims may also be barred by principles such as estoppel and laches arising in equity under the common law of trusts. See T.C.A. § 35-15-106.

The representative referred to in subsection (a) is the person who may represent and bind a beneficiary as provided in part 3 [T.C.A. §§ 35-15-301--35-15-305]. During the time that a trust is revocable and the settlor has capacity, the person holding the power to revoke is the one who must receive the report. See T.C.A. § 35-15-603 (rights of settlor of revocable trust).

This section addresses only the issue of when the clock will start to run for purposes of the statute of limitations. If the trustee wishes to foreclose possible claims immediately, a consent to the report or other information may be obtained pursuant to T.C.A. § 35-15-1009. For the provisions relating to the duty to report to beneficiaries, see T.C.A. § 35-15-803.

Subsection (a) applies only if the trustee has furnished a report. The one-year statute of limitations does not begin to run against a beneficiary who has waived the furnishing of a report as provided in T.C.A. § 35-15-813. Moreover, unlike in the similar provision in the Uniform Trust Code, subsection (a) does not require that the trustee's report disclose the existence of a potential claim for breach of trust, but only that such report disclose "facts indicating" such existence, nor does subsection (a) require a trustee's report apprise a beneficiary of the time allowed to commence a proceeding.

Subsection (b) defines what information must be contained in a trustee's report for such to be adequate disclosure. Such subsection requires less than does the similar provision of the Uniform Trust Code. First, such report need only disclose "facts indicating" the existence of a potential claim for breach of trust (as opposed to the existence). Second, such report need only contain such information that a beneficiary or the beneficiary's representative will be presumed to know of, or that puts a beneficiary or the beneficiary's representative on notice to inquire into, the existence of a potential claim. Under the Uniform Trust Code, there is no "presumption" or "notice to inquire" language.

Subsection (c) is intended to provide some ultimate repose for actions against a trustee. It applies to cases in which the trustee has failed to report to the beneficiaries or the report did not meet the disclosure requirements of subsection (b). It also applies to beneficiaries who did not receive notice of the report, whether personally or through representation. While the three (3) year limitations period will normally begin to run on termination of the trust, it can also begin earlier. If a trustee leaves office prior to the termination of the trust, the limitations period for actions against that particular trustee begins to run on the date the trustee leaves office. If a beneficiary receives a final distribution prior to the date the trust terminates, the limitations period for actions by that particular beneficiary begins to run on the date of final distribution.

If a trusteeship terminates by reason of death, a claim against the trustee's estate for breach of fiduciary duty would, like other claims against the trustee's estate, be barred by a probate creditor's claim statute even though the statutory period prescribed by this section has not yet expired.

Subsections (d)--(j) have no corresponding provisions in the Uniform Trust Code.

Subsections (d)--(f) provide similar statutes of limitations for actions by a trustee against another trustee or former trustee.

Subsections (g)--(i) provide similar statutes of limitations for actions by a trust advisor or trust protector against a trustee or former trustee.

Subsection (j) provides that if the statute of limitations has run against all beneficiaries, then regardless of the existence of a breach or potential breach, no trustee, trust advisor or trust protector may bring an action for such against any trustee or former trustee.

This section does not specifically provide that the statutes of limitations under this section are tolled for fraud or other misdeeds, the drafters preferring to leave the resolution of this question to other law of this state.

35-15-1006. 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.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-1006.

It sometimes happens that the intended terms of the trust differ from the apparent meaning of the trust instrument. This can occur because the court, in determining the terms of the trust, is allowed to consider evidence extrinsic to the trust instrument. See definition of "terms of a trust" in T.C.A. § 35-15-103. Furthermore, if a trust is reformed on account of mistake of fact or law, as authorized by T.C.A. § 35-15-415, provisions of a trust instrument can be deleted or contradicted and provisions not in the trust instrument may be added. The concept of the "terms of a trust," both as defined in the Tennessee Uniform Trust Code and as used in the doctrine of reformation, is intended to effectuate the principle that a trust should be administered and distributed in accordance with the settlor's intent. However, a trustee should also be able to administer a trust with some dispatch and without concern that a reasonable reliance on the terms of the trust instrument is misplaced. This section protects a trustee who so relies on a trust instrument but only to the extent the breach of trust resulted from such reliance. This section is similar to T.C.A. § 35-14-103(b), in the Tennessee Uniform Prudent Investor Act, which protects a trustee from liability to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

This section protects a trustee only if the trustee's reliance is reasonable. For example, a trustee's reliance on the trust instrument would not be justified if the trustee is aware of a prior court decree or binding nonjudicial settlement agreement clarifying or changing the terms of the trust.

35-15-1007. 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.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-1007

This section is designed to encourage trustees to administer trusts expeditiously and without undue concern about liability for failure to ascertain external facts, often of a personal nature, that might affect administration or distribution of the trust. The common law, contrary to this section, imposed absolute liability against a trustee for

misdelivery regardless of the trustee's level of care. See Restatement (Second) of Trusts § 226 (1959). The events listed in this section are not exclusive. A trustee who has exercised reasonable care to ascertain the occurrence of other events, such as the attainment by a beneficiary of a certain age, is also protected from liability.

35-15-1008. Exculpation of trustee

(a) A provision of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:

(1) Relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or

(2) Was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

(b) An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-1008

To the extent subsection (a) forbids exculpation of a trustee in the case of bad faith, such subsection is in conflict with T.C.A. § 35-15-105(a). Under T.C.A. § 35-15-105(a), a settlor can in the terms of a trust override the duty of good faith, such not being a mandatory rule under T.C.A. § 35-15-105(b). Such duty was not included in T.C.A. § 35-15-105(b) when the Tennessee Uniform Trust Code was originally adopted and such duty has not been added to T.C.A. § 35-15-105(b) in any subsequent amendment thereto.

Moreover, it is a primary objective of the Tennessee trust statutes that a settlor's intent be the lodestar by which a trust is interpreted, that such intent be carried out and that settlors have the freedom to dispose of their assets to whom and in the manner they wish, all to the greatest extent constitutionally allowable.

Also, unlike with the Uniform Trust Code, there is no duty of good faith imposed by default in T.C.A. § 35-15-814, which relates to exercise of discretion. Under such section, the only bases on which a court can review exercise of such discretion relative to a discretionary trust are dishonesty, failure to act if under a duty to do so and "improper motive," which is defined at T.C.A. § 35-15-814(a)(1) to only include two specified acts and does not include "bad faith." Relative to exercise of distribution discretion under a support and mandatory interests, T.C.A. § 35-15-804(c)(2) stipulates four grounds for judicial review. The three listed above for discretionary interests plus "unreasonableness," and does not add a general prohibition against exculpating a trustee for acting in bad faith or requiring such trustee to act in "good faith."

For all the reasons stated above, the drafters of the Tennessee Uniform Trust Code are of the opinion that a provision of a trust relieving a trustee of liability for breach is enforceable to the extent such provision relieves the trustee of liability for breach committed in bad faith. Such drafters believe subdivision (a)(1) of this section should read, "Relieves the trustee of liability for breach of trust committed with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or", omitting the words "bad faith".

Absent such override of the duty of good faith in the terms of a trust pursuant to T.C.A. § 35-15-105(a), such duty is imposed as a default rule in T.C.A. §§ 35-15-801, 35-15-808(d) and 35-15-1002. Such default rule is likely to be the appropriate one in most circumstances, however, the Tennessee Uniform Trust Code honors a settlor's desire to override such default rule.

Subsection (b) responds to the danger that the insertion of such a clause by the fiduciary or its agent may have been undisclosed or inadequately understood by the settlor. To overcome the presumption of abuse in

subsection (b), the trustee must establish that the clause was fair and that its existence and contents were adequately communicated to the settlor. In determining whether the clause was fair, the court may wish to examine: (1) the extent of the prior relationship between the settlor and trustee; (2) whether the settlor received independent advice; (3) the sophistication of the settlor with respect to business and fiduciary matters; (4) the trustee's reasons for inserting the clause; and (5) the scope of the particular provision inserted. See Restatement (Second) of Trusts § 222 cmt. d (1959).

The requirements of subsection (b) are satisfied if the settlor was represented by independent counsel. If the settlor was represented by independent counsel, the settlor's attorney is considered the drafter of the instrument even if the attorney used the trustee's form. Because the settlor's attorney is an agent of the settlor, disclosure of an exculpatory term to the settlor's attorney is disclosure to the settlor.

35-15-1009. Beneficiary's consent, release, or ratification

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

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

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-1009.

This section is based on, but also varies from, sections 216 through 218 of the Restatement (Second) of Trusts (1959). It also varies from the similar provision in the Uniform Trust Code.

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) & cmt. n (1959).

An approval by the settlor of a revocable trust or by the holder of a presently exercisable power of withdrawal binds all the beneficiaries. See T.C.A. § 35-15-603. A beneficiary is also bound to the extent an approval is given by a person authorized to represent the beneficiary as provided in part 3 [T.C.A. §§ 35-15-301--35-15-305].

35-15-1010. Limitation on personal liability of trustee

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

(b) Except as otherwise provided in subsection (a) or (c), the debts, obligations and liabilities incurred by a trustee by reason of the ownership, management or control of trust property in the trustee's fiduciary capacity, shall be enforceable solely against the trust and its property, without any obligation or liability personally being borne by any trustee of such trust.

(c) A trustee is personally liable for torts committed in the course of administering a trust only if the trustee is personally at fault on account of the trustee's own willful misconduct proven by clear and convincing evidence.

(d) 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.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-1010.

The provisions of this section in some ways diverge significantly from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

This section generally provides more protection against personal liability of a trustee than does the Uniform Trust Code.

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

While this section does not excuse any liability the trustee may have for breach of trust, subsection (b) provides that, except in rare circumstances, a trustee is not otherwise personally liable by reason of the trustee acting in a fiduciary capacity of a trust and that any obligations undertaken by the trustee in such fiduciary capacity are enforceable solely against the trust and its property.

Subsections (c) addresses when a trustee will be personally liable (other than for breach of trust) relative to the trustee's acting in administering a trust.

A trustee will be personally liable for torts committed in the course of administering a trust only if the trustee was personally at fault on account of the trustee's willful misconduct. Such must be proven by clear and convincing evidence. This is contrary to Restatement (Second) of Trusts § 264 (1959), which imposes liability on a trustee regardless of fault, including liability for acts of agents under respondeat superior. It is also contrary to the relevant provision contained in the Uniform Trust Code.

Unlike under the Uniform Trust Code, subsection (c) immunizes a trustee from personal liability for violation of environmental law, such as CERCLA (42 U.S.C. § 9607) or its state law counterparts, arising from the ownership and control of trust property. For further protection of a fiduciary relative to environmental claims, see T.C.A. § 35-15-701 (nominated trustee may investigate trust property to determine potential violation of environmental law without having accepted trusteeship) and T.C.A. § 35-15-816 (trustee powers with respect to possible liability for violation of environmental law). The protections afforded trustees in T.C.A. § 35-15-701 are afforded to trust advisors and trust protectors in T.C.A. § 35-15-711.

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

35-15-1011. Interest as general partner

(a) Except as otherwise provided in subsection (c) or unless personal liability is imposed in the contract, a trustee who holds an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership after the trust's acquisition of the interest if the fiduciary capacity was disclosed in the contract or in a statement previously filed pursuant to the Uniform Partnership Act, compiled in title 61, chapter 1, or the Uniform Limited Partnership Act, compiled in title 61, chapter 2.

(b) Except as otherwise provided in subsection (c), a trustee who holds an interest as a general partner is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault on account of the trustee's own willful misconduct proven by clear and convincing evidence.

(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.

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

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-1011.

The provisions of this section in some ways diverge significantly from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

This section generally provides more protection against personal liability of a trustee than does the Uniform Trust Code.

This section adds protection in addition to that provided by T.C.A. § 35-15-1010, which generally protects a trustee from personal liability on contracts that the trustee enters into on behalf of the trust. This section also protects a trustee from personal liability for contracts entered into or torts committed by a general or limited partnership of which the trustee was a general partner.

Subsection (a) protects the trustee from personal liability for such partnership obligations whether the trustee signed the contract or it was signed by another general partner. Subsection (b) protects a trustee from personal liability for torts committed by the partnership unless the trustee was personally at fault. Unlike with the Uniform Trust Code, such fault must be on account of the trustee's own willful misconduct and such must be proven by clear and convincing evidence.

Protection from the partnership's contractual obligations is available under subsection (a) only if the other party is on notice of the fiduciary relationship, either in the contract itself or in the partnership certificate on file.

By analogy, the above protection is also provided to a trustee serving a trust that is the sole member of an LLC, should the LLC itself not be found to so protect the trustee. By such analogy, and subject to the provisions of this section, it should also protect a trustee relative to any alter ego or veil piercing theory applied to any form of entity that generally provides limitation on liability.

Generally speaking, special protection is not otherwise needed for other business interests that the trustee may own, such as an interest as a limited partner, generally with a membership interest in an LLC, or an interest as a corporate shareholder. In these cases the nature of the entity or the interest owned by the trustee generally carries with it its own limitation on liability. Should such not be the case, then the above analogy should apply to the trustee and the trustee's position relative to the entity.

Certain exceptions apply. The section is not intended to be used as a device for individuals or their families to shield assets from creditor claims. Consequently, subsection (c) excludes from the protections provided by this section trustees who own an interest in a partnership (or subject to the analogy above, in another type of entity) in a capacity other than as trustee. This exception is narrower than that provided by the Uniform Trust Code, which unlike the Tennessee Uniform Trust Code, attributes ownership by certain other persons to the trustee.

Notwithstanding the above, a revocable trust cannot be used as a device for avoiding claims protected by this section. Subsection (d) imposes personal liability on the settlor of a revocable trust for such claims.

35-15-1012. Protection of person dealing with trustee

(a) A person other than a beneficiary who in "good faith", as defined in § 47-1-201(19), assists a trustee, or who in "good faith" and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers is protected from liability as if the trustee properly exercised the power.

(b) A person other than a beneficiary who in "good faith" deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise.

(c) A person who in "good faith" delivers assets to a trustee need not ensure their proper application.

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

(e) Comparable protective provisions of other laws, see §§ 47-8-101 -- 47-8-408, relating to commercial transactions or transfer of securities by fiduciaries prevail over the protection provided by this section.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-1012.

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

Subsection (a) protects two different classes; persons other than beneficiaries who assist a trustee with a transaction, and persons other than beneficiaries who deal with the trustee for value. As long as the assistance was provided or the transaction was entered into in good faith and without knowledge, third persons in either category are protected in the transaction even if the trustee was exceeding or improperly exercising the power. For the definition of "know," see T.C.A. § 35-15-104. The Tennessee Uniform Trust Code does not define "good faith" for purposes of this and the next section. That term is defined at T.C.A. § 47-1-201. The definition provided there is consistent with the purpose of this section, which is to treat commercial transactions with trustees similar to other commercial transactions.

Subsection (b) confirms that a third party who is acting in good faith is not charged with a duty to inquire into the extent of a trustee's powers or the propriety of their exercise. The third party may assume that the trustee has the necessary power. Consequently, there is no need to request or examine a copy of the trust instrument. A third party who wishes assurance that the trustee has the necessary authority instead should request a certification of trust as provided in T.C.A. § 35-15-1013. Subsection (b) is intended to negate the rule, followed by some courts, that a third party is charged with constructive notice of the trust instrument and its contents. The cases are collected in George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 897 (Rev. 2d ed. 1995); and 4 Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 297 (4th ed. 1989).

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

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

Subsection (e) clarifies that a statute relating to commercial transactions controls whenever both it and this section could apply to a transaction. Consequently, the protections provided by this section are superseded by T.C.A. §§ 47-8-101 through 47-8-407. The principal statutes in question are the various chapters of the Uniform Commercial Code, including Chapter 8 on the transfer of securities.

35-15-1013. Certification of trust

(a) Instead of furnishing a copy of the trust instrument to any person to evidence the existence and validity of the trust, the trustee may furnish to such person a certification of trust, signed by the trustee or trustees having signatory authority as identified in subdivision (a)(5) and attested by a notary public and shall contain the following:

(1) An affirmation of the current existence of the trust and the date on which the trust came into existence;

(2) The identity of the settlor or settlors, the currently acting trustee or trustees, and the named successor trustee or trustees of the trust or a statement that no successor is named;

(3) The administrative or managerial powers of the trustee, or both;

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

(5) When there are multiple trustees or multiple successor trustees, the signature authority of the trustees indicating whether all or less than all of the currently acting trustees are required to sign in order to exercise various powers of the trustee;

(6) Where there are successor trustees designated, a statement detailing the conditions for their succession or a statement that a third party may rely on the authority of one (1) or more successors without proof of their succession;

(7) The trust's identification number, whether a social security or an employer identification number, but only if the trust's identification number is essential to the transaction for which the request for the trust document was made;

(8) The manner in which trust assets should properly be titled; and

(9) A statement that, to the best of the trustee's knowledge, 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.

(b) The certification of trust shall not be required to contain the dispositive provisions of the trust that set forth the distribution of the trust estate.

(c) The trustee offering the certification of trust may provide copies of all or any part of the trust document and amendments, if any. Nothing in this section is intended to require or imply an obligation to provide dispositive provisions of the trust or a copy of the entire trust document and amendments.

(d) A person who acts in reliance on a certification of trust without actual knowledge that the representations contained therein are incorrect is not liable to any person for so acting. A person who does not have actual knowledge that the facts contained in the certification of trust are incorrect may assume without inquiry the existence of the facts contained in the certification of trust. Actual knowledge shall not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying on the trust certification. Nothing contained in this section shall limit the rights of the beneficiaries of the trust against the trustee. Any person relying on the certification of trust shall be indemnified from the assets of the trust to the extent of the share of the trust attributable to the beneficiary or beneficiaries bringing any action against the person for any costs, damage, attorney fees or other expenses incurred in defending any action against the person arising for the transaction to which a certification of trust related.

(e) A person's failure to request a certification of trust does not affect the protections provided that person in this section. No inference that the person has not acted in good faith or that the person was negligent may be drawn from the failure of the person to request a certification of trust. Nothing in this section is intended to create an implication that a person is liable for acting in reliance on a certification of trust under circumstances where the requirements of this section are not satisfied.

(f) Nothing in this section shall be construed to require a third party, when presented with a trust certificate, to enter into a contract with a trustee relating to trust assets or obligations, or to preclude a third party from demanding as a precondition to any contract that the trustee provide additional information in order to clarify any ambiguities or inconsistencies in the trust certificate.

(g) 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.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-1013.

The provisions of this section in some ways diverge significantly from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

In general, T.C.A. § 35-15-1013 provides for more privacy and more flexibility than does the similar provision of the Uniform Trust Code.

In this section, as well as in this section comment, whenever the word "trustee" is used, such word includes any trust advisor or trust protector who holds the power to furnish a certification of trust.

This section is an incorporation of T.C.A. § 35-50-126 [repealed] with the addition of subsection (g) and is designed to protect the privacy of a trust instrument by discouraging requests from persons other than beneficiaries for complete copies of the instrument in order to verify a trustee's authority. Contrary to section 1013 of the Uniform Trust Code, there is no penalty imposed on the third party for requesting a copy of the full trust instrument in bad faith. Even absent this section, such requests are usually unnecessary. Pursuant to T.C.A. § 35-15-1012, a third person proceeding in good faith (as such is defined in T.C.A. § 35-15-1012 and the section comment thereto) is not required to inquire into the extent of the trustee's powers or the propriety of their exercise. This section adds another layer of protection.

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

Subsection (a) specifies the required contents of a certification. Subsection (b) clarifies that the certification shall not be required to include the trust's dispositive provisions. A certification, however, normally will contain the administrative terms of the trust relevant to the transaction. Subsections (d), (e) and (f) protect a third party who relies on the certification. The third party may assume that the certification is true, and is not charged with constructive knowledge of the terms of the trust instrument even if the third party has a copy.

35-15-1014. Enforcement of No-contest, In Terrorem or Forfeiture Provisions.

(a) For the purposes of this section, "no-contest provision" includes a "no-contest provision," "in terrorem provision" or "forfeiture provision" of a trust instrument. A "no-contest provision" means a provision that, if given effect, would reduce or eliminate the interest of any beneficiary of such trust who, directly or indirectly, initiates or otherwise pursues:

- (1) Any action to contest the validity of the trust or the terms of the trust;
- (2) Any action to set aside or vary the terms of the trust;
- (3) Any action to challenge the acts of the trustee or other fiduciary of the trust in the performance of the trustee's or other fiduciary's duties as described in the terms of the trust; or
- (4) Any other act or proceedings to frustrate or defeat the settlor's intent as expressed in the terms of the trust.

(b) Regardless of whether or not the beneficiary sought, received or relied upon legal counsel, a no-contest provision shall be enforceable according to the express terms of the no-contest provision without regard to the beneficiary's good or bad faith in taking the action that would justify the complete or partial forfeiture of the beneficiary's interest in the trust under the terms of the no-contest provision unless probable cause exists for the beneficiary taking such action on the grounds of:

- (1) Fraud;
- (2) Duress;
- (3) Revocation;
- (4) Lack of testamentary capacity;
- (5) Undue influence;
- (6) Mistake;
- (7) Forgery; or
- (8) Irregularity in the execution of the trust instrument.

(c) Subsection (b) shall not apply to:

- (1) Any action brought solely to challenge the acts of the trustee or other fiduciary of the trust to the extent that the trustee or other fiduciary has committed a breach of fiduciary duties or breach of trust;
- (2) Any action brought by the trustee or any other fiduciary serving under the terms of the trust, unless the trustee or other fiduciary is a beneficiary against whom the no-contest provision is otherwise enforceable;
- (3) Any agreement among the beneficiaries and any other interested persons in settlement of a dispute or resolution of any other matter relating to the trust, including without limitation any nonjudicial settlement agreement;
- (4) Any action to determine whether a proposed or pending motion, petition, or other proceeding constitutes a contest within the meaning of a no-contest provision;
- (5) Any action brought by a beneficiary or on behalf of any such beneficiary for a construction or interpretation of the terms of the trust; or
- (6) Any action brought by the attorney general for a construction or interpretation of a charitable trust or a trust containing a charitable interest if a provision exists in a trust purporting to penalize a charity or charitable interest for contesting the trust if probable cause exists for instituting proceedings.

(d) Pursuant to this section, courts shall enforce the settlor's intent as reflected in a no-contest provision to the greatest extent possible.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-1014.

There is no similar section in the Uniform Trust Code. Moreover, the provisions of this section diverge from

the restatements. To the extent this section is in conflict with any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

This section was included in the Tennessee Uniform Trust Code in furtherance of its overriding policy and goal of carrying out a settlor's intent, as well as providing settlors with the freedom to dispose of their assets to whom and in the manner they wish, all to the greatest extent constitutionally allowable

Subsection (a) defines "no-contest provision" and states that such term is synonymous with the terms "in terrorem provision" and "forfeiture provision".

Subsection (b) states that a no-contest provision is enforceable according to its express terms, without regard to whether a beneficiary is acting in good or bad faith in taking the action triggering the provisions of the no-contest provision unless probable cause exists for such beneficiary taking such action on eight specific grounds. These grounds are basically the same grounds that, if proven true, would cause the trust to be void in general and not just as to the provisions applicable to the beneficiary taking such action.

Subsection (c) contains a explicit list of actions that if taken will not trigger enforceability of the no contest provision. Those actions are:

An action brought solely to redress a breach of duty or of trust;

Any action brought by a fiduciary unless that fiduciary is a beneficiary against whom the no-contest is otherwise enforceable;

Any agreement among the beneficiaries and any other interested persons in settlement of a dispute or in resolution of another matter (other than the no-contest provision), including any nonjudicial settlement agreement; see T.C.A. § 35-15-111 for the matters that can be resolved by, as well as the validity of, a nonjudicial settlement agreement;

Any action taken for the purpose of determining whether a proposed or pending motion, petition or other proceeding qualifies as a contest that will trigger enforcement of the no-contest provision;

Any action by or on behalf of a beneficiary for construction or interpretation of the terms of the trust; and

Any action by the attorney general for construction or interpretation of the terms of a trust containing a charitable interest if a provision exists in the trust that would penalize such charitable interest holder for contesting the trust, but only if probable cause exists for instituting such proceedings.

Miscellaneous Provisions

GENERAL COMMENT.

With the exception of the provision for electronic records and signatures and the provision covering application of the Tennessee Uniform Trust Code existing relationships (i.e., effective date provisions), T.C.A. §§ 35-15-1101--35-15-1105 diverge entirely from article 11 of the Uniform Trust Code.

T.C.A. § 35-15-1101 is directly contrary to the provisions of section 1101 of the Uniform Trust Code, holding that in applying and construing the Tennessee Uniform Trust Code, no consideration shall be given to any need for the promotion of uniformity of law with respect to its subject matter among states.

T.C.A. § 35-15-1102, providing for electronic records and signatures is equivalent to such provisions contained in the Uniform Trust Code.

Part 11 of the Tennessee Uniform Trust Code, unlike the Uniform Trust Code, does not contain a severability clause. However, T.C.A. §§ 35-15-1103 does contain provisions covering application of the Tennessee Uniform Trust Code to existing relationships that is in the spirit of the effective date provision of section 1104 of the Uniform Trust Code.

T.C.A. §§ 35-15-1004 and 35-15-1005 contain provisions in furtherance of the Tennessee trust statutes' overriding goal of enforcing settlor's intent and providing freedom of disposition of property. Such sections respectively limit when a settlor may be deemed to be the alter ego of a trust and limit claims that a settlor's or beneficiary's influence over a trust rises to the level of dominion and control over such trust.

35-15-1101. Uniformity of application and construction

(a) Numerous provisions of each of the following have been modified extensively relative to their respective uniform acts as such uniform acts were drafted and have been amended by the Uniform Law Commission, also known as the National Conference of Commissioners of Uniform State Laws:

- (1) Chapter 6, the Uniform Principal and Income Act;
- (2) Chapter 14, the Tennessee Uniform Prudent Investor Act of 2002; and
- (3) Chapter 15, the Tennessee Uniform Trust Code.

(b) These modifications were undertaken deliberately and after significant consideration:

(1) Therefore, in applying and construing title 35, no consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states, including any other state that has enacted laws covering the same general subject matter as chapters 9, 14 or 15, either by enacting such respective uniform acts as such uniform acts were originally drafted or as such were originally drafted and subsequently have been amended, or by enacting laws based on or similar to such uniform acts as originally drafted or as such have been amended; and

(2) Unless specifically provided otherwise in this chapter, chapter 6 or chapter 14, courts shall not consult, rely on or give any persuasive value to such uniform acts or any respective other state's acts based on or similar to such uniform acts, or any comments accompanying any such uniform acts or any respective other state's acts based on or similar to such uniform acts; none of which have any force or effect relative to trusts governed by the laws of this state.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-1101.

The provisions of this section are directly in contravention to the equivalently numbered provision contained in the Uniform Trust Code and is controlling over it, the restatements and any foreign law.

As originally adopted, numerous provisions of title 35, chapters 6, 14 and 15 were modified and diverge, in some cases significantly, from their respective uniform codes as well as related restatements. Moreover, there are no uniform code provisions addressing the subjects covered by title 35, chapters 16 and 17, as well of various provisions of chapter 15. Finally, since their initial adoption, various amendments to the Tennessee trust statutes have also been enacted. For example since its initial adoption in 2004, the Tennessee Uniform Trust Code underwent amendment in 2005, substantial amendment in 2007, further amendment in 2010 and substantial amendment in 2013. This has resulted in further divergence from uniform law and related restatements, such divergence sometimes being significant. This divergence was undertaken deliberately and after significant consideration. Taken as a whole, the Tennessee trust statutes are a distinct and integrated set of trust laws.

It is for this reason that the provisions of T.C.A. § 35-15-1101 reverse those of section 1101 of the Uniform Trust Code and expressly state that in applying and construing title 35 no consideration shall be given to any need to promote uniformity with respect to its subject matter among states, including relative to the laws of any foreign jurisdiction (as such is defined in T.C.A. § 35-15-103) that has enacted versions of the various uniform codes, laws or acts. Moreover, T.C.A. § 35-15-1101 provides that unless specifically provided otherwise in title 35, chapters 6, 14, 15, 16 and 17, courts shall not consult or give any persuasive value to any such uniform acts or any foreign jurisdiction's acts based on or similar to them; or to the comments of any of them; none of which have any force or effect relative to trusts governed by the laws of Tennessee.

35-15-1102. Electronic records and signatures

The provisions of this chapter 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.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-1102.

This section preempts the federal Electronic Signatures in Global and National Commerce Act. Subdivision 102(a)(2)(B) of such act provides that the federal law can be preempted by a later statute of a state that specifically refers to the federal law. The effect of this section, when enacted as part of the Tennessee Uniform Trust Code, is to leave to the law of this state the procedures for obtaining and validating an electronic signature. The Tennessee Uniform Trust Code does not require that any document be in paper form, allowing all documents under such code to be transmitted in electronic form. A properly directed electronic message is a valid method of notice under the Tennessee Uniform Trust Code as long as it is reasonably suitable under the circumstances and likely to result in receipt of the notice or document. See T.C.A. § 35-15-109.

35-15-1103. Application to existing relationships

(a) Except as otherwise provided in this chapter, on July 1, 2004:

- (1) This chapter applies to all trusts created before, on, or after July 1, 2004;
- (2) This chapter applies to all judicial proceedings concerning trusts commenced on or after July 1, 2004;
- (3) This chapter applies to judicial proceedings concerning trusts commenced before July 1, 2004, unless the court finds that application of a particular provision of this chapter would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this chapter does not apply and the superseded law applies;

(4) Any rule of construction or presumption provided in this chapter applies to trust instruments executed before July 1, 2004, unless there is a clear indication of a contrary intent in the terms of the trust; and

(5) An act done before July 1, 2004, is not affected by this chapter.

(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 July 1, 2004, that statute continues to apply to the right even if it has been repealed or superseded.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-1103.

The Tennessee Uniform Trust Code is intended to have the widest possible effect within constitutional limitations. Specifically, the Tennessee Uniform Trust Code applies to all trusts whenever created, to judicial proceedings concerning trusts commenced on or after its effective date, and unless the court otherwise orders, to judicial proceedings in progress on the effective date. In addition, any rules of construction or presumption provided in the Tennessee Uniform Trust Code apply to preexisting trusts unless there is a clear indication of a contrary intent in the trust's terms. By applying the Tennessee Uniform Trust Code to preexisting trusts, the need to know two (2) bodies of law will quickly lessen.

The Tennessee Uniform Trust Code cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under the Tennessee Uniform Trust Code. Nor is an act done before the effective date of the Tennessee Uniform Trust Code affected by the Tennessee Uniform Trust Code's enactment.

The Tennessee Uniform Trust Code contains an additional effective date provision. Pursuant to T.C.A. § 35-15-602(a), prior law will determine whether a trust executed prior to the effective date of the Tennessee Uniform Trust Code is presumed to be revocable or irrevocable.

Due to the various amendments to the Tennessee Uniform Trust Code, as well as to the Tennessee trust statutes in general that have occurred since July 1, 2004, the introductory phrase contained in subsection (a), "Except as otherwise provided in this chapter, on July 1, 2004:" should be read to mean, "Except as otherwise provided in this chapter or in amendments thereto, regardless of whether such provision was adopted before, on or after July 1, 2004, on July 1, 2004:".

35-15-1104. Alter Ego

(a) Absent clear and convincing evidence, no settlor of an irrevocable trust may be deemed to be the alter ego of a trustee of such trust.

(b) None of the following factors, by themselves or in combination, may be considered sufficient evidence for a court to conclude that the settlor controls a trustee, or is the alter ego of a trustee of such trust:

(1) Any combination of the factors listed in § 35-15-1105 regarding dominion and control over a trust;

(2) Isolated occurrences where the settlor has signed checks, made disbursements, or executed other documents related to such trust as a trustee, a trust advisor or a trust protector, when in fact the settlor was not such a trustee, trust advisor or trust protector;

(3) Making any requests for distributions on behalf of beneficiaries; or

(4) Making any requests to the trustee to hold, purchase, or sell any trust property.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-1104.

The Uniform Trust Code has no similar provision to this section.

Deeming that a settlor of a trust is the alter ego of the trustee of such trust can cause multiple significant issues, including but not limited to taxation, as well as a trust's level of spendthrift and discretionary trust protection and the effect of exercising discretion in general. Therefore, in keeping with the Tennessee trust statutes' emphasis on freedom of disposition and settlor's intent, this section makes it exceedingly difficult for a settlor of a trust to be deemed an alter ego of the trustee of such trust.

35-15-1105. Dominion and Control over a Trust.

In the event a person challenges a settlor's or a beneficiary's influence over a trust, none of the following factors, alone or in combination, shall enter into a determination that dominion and control over a trust exists:

(1) The settlor or a beneficiary is serving as a trustee, a trust advisor, a trust protector or other fiduciary as described in § 35-15-508;

(2) The settlor or a beneficiary holds an unrestricted power to remove or replace a trustee, a trust advisor, a trust protector or other fiduciary;

(3) The settlor or a beneficiary is a trust administrator, a general partner of a partnership, a manager of a limited liability company, an officer of a corporation, or holds any other managerial function relative to any type of entity specified in this subdivision, or relative to any other type of entity not so specified, and part or all of the trust property consists of an interest in such entity;

(4) A person related by blood or adoption to the settlor or a beneficiary is appointed as a trustee, a trust advisor, a trust protector or other fiduciary;

(5) The settlor's or a beneficiary's agent, accountant, attorney, financial advisor, or friend is appointed as a trustee, a trust advisor, a trust protector or other fiduciary;

(6) A business associate is appointed as a trustee, a trust advisor, a trust protector or other fiduciary; (7) A beneficiary holds any power of appointment over any or all of the trust property;

(8) The settlor holds a power to substitute property of equivalent value for property held by the trust, regardless of whether such power is:

(A) Held in a fiduciary or nonfiduciary capacity;

(B) Exercisable with or without the approval of any person in a fiduciary capacity; or

(C) Exercisable with or without the approval of any person having an interest adverse to such settlor;

(9) A trustee, a trust advisor, a trust protector or other fiduciary has the power to loan trust property to the settlor for less than a full and adequate rate of interest or without adequate security;

(10) Any language relative to the power to make any distribution provides for any discretion relative to such distribution;

(11) The trust has only one beneficiary eligible for current distributions; or

(12) The beneficiary is serving as a cotrustee, or as a trust advisor or trust protector under part 12, or as any other fiduciary.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-1105.

The Uniform Trust Code has no similar provision to this section.

A finding that the influence of a settlor or a beneficiary of a trust rises to the level of dominion and control over such trust can cause multiple significant issues, including but not limited to taxation, as well as a trust's level of spendthrift and discretionary trust protection and the effect of exercising discretion in general. Therefore, in keeping with the Tennessee trust statutes' emphasis on freedom of disposition and settlor's intent, this section makes it exceedingly difficult to sustain that the a settlor's or beneficiary's influence over a trust gives either such person dominion and control over such trust.

TRUST PROTECTORS AND TRUST ADVISORS

GENERAL COMMENT.

Section 808 of the Uniform Trust Code nominally provides irrevocable trusts with what ULC--NCCUSL calls "powers to direct," as follows:

"(b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

(c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

(d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty."

Section 808 of the Uniform Trust Code is a significant step toward providing for "powers to direct." However, it does not contain many of the provisions necessary for:

certainty regarding the rights and responsibilities of those granting or serving under such "powers to direct;"

certainly regarding the rights and responsibilities of those from whom certain traditional powers and duties of a trustee were removed through such direction; as well as

a default set of rules that assure the smooth interaction of the various parties involved in the administration of such trusts.

This part 12 (along with various other provisions of the Tennessee Uniform Trust Code) is designed to comprehensively cover directed trusts. Because the Uniform Trust Code does not contain provisions similar to those provided by this part 12, the effects of the provisions of this part 12 may result in significant divergence from the Uniform Trust Code and the restatements. To the extent this part 12, as well as other portions of the Tennessee Uniform Trust Code designed to facilitate or implement this part 12, are in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

A true directed trust is a trust in which the trustee is directed by a number of other trust participants in implementing the trust's execution. That trustee is referred to as a directed trustee. Examples of other trust participants (those directing the trustee) include an investment committee, a distribution committee, trust advisors, trust protectors and investment advisors. Relative to any duty traditionally held by a party, but directed to another under the terms of a directed trust, that person no longer holding the duty is called an excluded fiduciary. A directed trustee's role is often limited to: following distribution and investment instructions, holding legal title to the trust assets, providing fiduciary and tax accounting, coordinating trust participants and offering dispute resolution among those participants. That directed trustee is otherwise an excluded fiduciary. Typically, these duties and those of the other participants in the trust are defined and governed by the trust document itself (however, under part 12 of the Tennessee Uniform Trust Code, such respective powers and duties can be added after the fact by agreement of the qualified beneficiaries or by a court order).

Directed trusts are also referred to by several other names:

"Reserved powers trusts"--Reserved, because someone, typically a settlor reserves to himself or to others, certain powers normally held by a trustee. Although this term is used in the United States, one is more likely to encounter it relative to trusts under the laws of Commonwealth jurisdictions, or that were written by Commonwealth attorneys.

"Multi-participant trusts"--Perhaps this name best functionally describes a true directed trust. As stated above, such types of trusts operate in a system under which multiple parties hold the diverse powers and duties traditionally vested in a unitary trustee.

Such latter term is used in several articles to which a reader is directed:

John P.C. Duncan and Anita M. Sarafa, Multi-Participant Trusts Need a Coordinator, *Trusts & Estates*, November 2008 at 32, (hereinafter "Duncan and Sarafa--Multi-Participant Trusts"); and

John P.C. Duncan and Anita M. Sarafa, Achieve the Promise--and Limit the Risk--of Multi-Participant Trusts, 36 *ACTEC Law Journal* 769 (2011), (hereinafter "Duncan and Sarafa--Achieve the Promise"). This latter article contains an especially thorough and detailed discussion of the trend toward "creating 'multi-participant trusts' and review[s] the challenges to achieving the promise of this powerful arrangement while limiting its risks." Duncan and Sarafa--Achieve the Promise at 769.

Why would someone want to use a directed (multi-participant) trust? Such trusts are beneficial in a number of situations, including but not limited to the following:

High net-worth families' diverse and complex needs often make a directed (multi-participant) trust the optimum structure with which to effect multi-generational wealth planning.

Directed trusts are also often the optimum (and in many cases, mandatory) multi-generational wealth planning structure for international and cross-border families.

Perhaps one of the most succinct explanations of the factors contributing to an increase in the use of directed (multi-participant) trusts is as follows:

"There has been a proliferation of trusts with new participants that are required to act under a trust in addition to or in place of the traditional, plenipotent trustee. These can include co-trustees, directed trustees, trust advisors for investment and other functions, trust protectors, distribution advisors and committees, removers and appointers.

The primary developments contributing to this trend are dramatic recent changes in trust law, distrust of traditional trustees, a desire to relieve trustees of liability, growing sophistication and complexity in the investment world, growing assertiveness among settlors and families seeking to exercise greater control over certain trust functions, growth in dynasty trusts, special purpose trusts requiring special expertise to administer, federal tax law limits on family involvement in distribution decisions and vigorous competition between several states for trust business. Multi-participant trusts are being fashioned to address each of the foregoing opportunities and challenges." Duncan and Sarafa--Achieve the Promise at 774.

Part 12 and related changes to other parts of the Tennessee Uniform Trust Code included in the 2013 amendments thereto significantly expand the detail and clarity with which the subject of directed trusts is covered in the Tennessee trust statutes. However, such types of trusts are not new to Tennessee law or to the Tennessee trust statutes. As mentioned in the section comment to T.C.A. § 35-15-808, Tennessee has one of the longest histories of having statutes that expressly and fully provide for true directed trusts. Since the late 1980s, they have been specifically provided for in title 35, chapter 3. The applicable sections in such chapter read as follows:

35-3-122. Liability of fiduciaries for losses.

Whenever an instrument under which a fiduciary is acting reserves to the settlor or vests an advisory or investment committee or in any other person or persons including one (1) or more other fiduciaries, to the exclusion of the fiduciary or to the exclusion of one (1) or more of several fiduciaries, authority to direct the making or retention of any investment, or to perform any other act in the management or administration of the fiduciary account, the excluded fiduciary or fiduciaries shall not be liable, either individually or as a fiduciary, for any loss resulting from the making or retention of any investment or other act pursuant to that direction.

HISTORY: Acts 1987, ch. 89, § 2, effective date unknown, but likely July 1, 1987.

35-3-123. Trustee liability--Action upon written directions.

(a) A trustee of a revocable, irrevocable or testamentary trust is not liable to any beneficiary for any act performed or omitted pursuant to written directions from the person holding the power to revoke, terminate or amend the trust.

(b) A trustee of a revocable, irrevocable or testamentary trust is not liable for any investment action performed or omitted pursuant to written directions from the person to whom the power to direct the investment or management of the account is delegated by the trustor.

HISTORY: Acts 1989, ch. 288, § 3, effective July 1, 1989.

In fact, Tennessee has one of the longest histories of statutorily providing for directed trusts. To give one an idea of how long, compare those original Tennessee directed trust statute what is believed to be one of the longest (if not the longest) existing directed trust statutes. It is Del. Code. Ann. Tit 12, § 3313. The original version of such Delaware legislation was enacted in Section 9 of 65 Del. Laws and was signed by its governor on July 3, 1986. Therefore, Tennessee's original statute at T.C.A. § 35-3-122 trails Delaware's statute by roughly one year, making it one of the oldest directed trust statutes in the United States (and perhaps the second oldest).

Part 12 generally supersedes T.C.A. §§ 35-3-123 and 35-3-124. Nevertheless, the drafters of the Tennessee Uniform Trust Code recognize there are likely a number of trusts in existence that rely on such sections. This is especially true in light the fact that, by the time part 12 was adopted, such sections had been part of the Tennessee trust statutes for 24--26 years. Therefore, T.C.A. § 35-15-811 contains appropriate transition provisions.

The 2013 amendments related to directed (multi-participant) trusts seek to provide those settlors who choose that their trusts be governed by Tennessee trust law, a comprehensive framework designed to achieve the promise of this powerful tool. Moreover, because such directed (multi-participant) trust provisions can be added by the agreement of the qualified beneficiaries or by a court order, such settlor's families, beneficiaries, charities and purposes can also enjoy the benefits of such tool, even if not originally provided for in the trust instrument.

Although part 12 contains the core provisions of the Tennessee trust statutes that apply to directed (multi-participant) trusts, other parts of the Tennessee Uniform Trust Code contain provisions to integrate such trusts into such code and provide for their smooth operation. Some of these other provisions include, but are not limited to:

A duty among trust advisors, trust protectors and trustees to communicate with each other and keep each other informed. Under T.C.A. § 35-15-813, a trust advisor or trust protector generally has a duty to keep each excluded fiduciary, all as such are defined in T.C.A. § 35-15-103, reasonably informed about the information reasonably necessary for such fiduciaries to carry out their respective duties. Moreover, A trust advisor or trust protector must inform the excluded fiduciary about any material facts that the excluded fiduciary must disclose to the beneficiaries as required by other portions of T.C.A. § 35-15-813. Notwithstanding the above, a trust advisor's or trust protector's failure to keep the excluded fiduciary informed does not affect an excluded fiduciary's limitation of liability. Perhaps more significantly, a trust advisor's or trust protector's performance of its duty to keep the excluded fiduciary informed also does not affect an excluded fiduciary's limitation of liability. This provides certainty relative to the respective potential liabilities held by a given trustee, or by a trust advisor or

trust protector.

The general right of a trust advisor or trust protector to receive reasonable compensation. T.C.A. § 35-15-708 provides that trust advisors and trust protectors are subject to the same rules as are trustees regarding compensation. Therefore, as is the case with a trustee, a trust advisor or trust protector generally is entitled to receive reasonable compensation. The terms of the trust may specify the amount of the trust advisor's or trust protector's compensation. If the terms of the trust specify the trust advisor or trust protector's compensation, then a court may adjust the amount of compensation. A court may also adjust the compensation if the trust advisor's or trust protector's duties are substantially different from those contemplated when the trust was created. Finally, a court may adjust the compensation if the compensation is unreasonably low or unreasonably high.

Similarly, a trust advisor or trust protector is entitled to the same degree as is a trustee to be reimbursed for expenses advanced for the benefit of the trust. A trust advisor or trust protector is similarly entitled to a lien against a trust for any amounts expended to protect the trust. See T.C.A. § 35-15-709.

T.C.A. § 35-15-710, in concordance with T.C.A. § 35-15-103 provides that any trustee, as well as any trust advisor or trust protector is an "excluded beneficiary" to the extent any of them is required to follow the direction of another and such trustee, trust advisor or trust protector acts in accordance with such direction.

T.C.A. §§ 35-15-711-35-15-715 provide that trust advisors and trust protectors are to be treated in a manner similar to trustees relative to accepting or declining appointment, fiduciary's bonds, vacancies, resignation and removal.

35-15-1201. Powers of Trust Advisors and Trust Protectors.

(a) A trust protector or trust advisor is any person, and may be a committee of more than one person, other than a trustee, who under the terms of the trust, an agreement of the qualified beneficiaries, or a court order has a power or duty with respect to a trust, including but not limited to, one or more of the following powers:

(1) The power to modify or amend the trust instrument to achieve favorable tax status or respond to changes in any applicable federal, state, or other tax law affecting the trust, including but not limited to, any rulings, regulations, or other guidance implementing or interpreting such laws;

(2) The power to amend or modify the trust instrument to take advantage of changes in the rule against perpetuities, laws governing restraints on alienation, or other state laws restricting the terms of the trust, the distribution of trust property, or the administration of the trust;

(3) The power to appoint a successor trust protector or trust advisor;

(4) The power to review and approve a trustee's trust reports or accountings;

(5) The power to change the governing law or principal place of administration of the trust;

(6) The power to remove and replace any trust advisor or trust protector for the reasons stated in the trust instrument;

(7) The power to remove a trustee, cotrustee, or successor trustee, for the reasons stated in the trust instrument, and appoint a successor;

(8) The power to consent to a trustee's or cotrustee's action or inaction in making distributions to beneficiaries;

(9) The power to increase or decrease any interest of the beneficiaries in the trust, to grant a power of appointment to one (1) or more trust beneficiaries, or to terminate or amend any power of appointment granted in the trust;

(10) The power to perform a specific duty or function that would normally be required of a trustee or cotrustee;

(11) The power to advise the trustee or cotrustee concerning any beneficiary;

(12) The power to consent to a trustee's or cotrustee's action or inaction relating to investments of trust assets;

(13) The power to direct the acquisition, disposition, or retention of any trust investment;

(14) The power to appoint under § 35-15-816(b)(27);

(15) The power to terminate all or part of a trust;

(16) The power to veto or direct all or part of any trust distribution;

(17) The power to borrow money with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;

(18) The power to make loans out of trust property, including but not limited to, loans to a beneficiary on terms and conditions, including without interest, considered to be fair and reasonable under the circumstances;

(19) The power to vote proxies and exercise all other rights of ownership relative to securities and business entities held by the trust;

(20) The power to select one (1) or more investment advisors, managers or counselors, including but not limited to, a trustee and delegate to them any of its powers; and

(21) The power to direct the trustee with respect to any additional powers and discretions over investment and management of trust assets provided in the trust instrument.

(b) The exercise of a power by a trust advisor or a trust protector shall be exercised in the sole and absolute discretion of the trust advisor or trust protector and shall be binding on all other persons.

(c) Any power of a trust advisor or trust protector to directly or indirectly modify a trust may be granted notwithstanding the provisions of §§ 35-15-410 through 35-15-412 and 35-15-414.

(d) An excluded fiduciary may continue to follow the direction of a trust protector or trust advisor upon the incapacity or death of the grantor of a trust to the extent provided in the trust instrument.

(e) Notwithstanding anything in this section to the contrary, no modification, amendment or grant of a power of appointment with respect to a trust all of whose beneficiaries are charitable organizations may authorize a trust protector or trust advisor to grant a beneficial interest in such trust to any non-charitable interest or purpose.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-1201.

The Uniform Trust Code has no similar provision to this section. The effects of the provisions of this section may result in significant divergence from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

While contained in the definition section of T.C.A. § 35-15-103, this section flushes out the definitions of the terms "trust advisor" and "trust protector." Historically (and in the statutes of foreign jurisdictions), there has sometimes been a division in the powers that could be held by an "advisor" versus a "protector." However under the Tennessee Uniform Trust Code these terms are synonymous. Therefore, regardless of the term used, either a trust advisor or trust protector can hold any power provided in this section.

Subsection (a) states that any person can be either a trust advisor or trust protector. In section 35-15-103, "person" is defined to mean "an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity." Therefore it is completely permissible for a trust advisor or trust protector to be an entity, and in some cases using a limited liability entity as such could be beneficial. Also other than in special cases (such as with a Tennessee Investment Services Trust) there is no requirement that a trustee of a Tennessee trust be a resident of or have a place of business in Tennessee. The same is true relative to a trust advisor or trust protector under Tennessee Uniform Trust Code. Notwithstanding the preceding portions of

this paragraph, a reader should be mindful that:

adverse federal income and transfer tax consequences can be triggered by certain persons (including trust advisors or trust protectors) holding certain types of powers over a trust; and

although the Tennessee Uniform Trust Code goes to great length to bring certainty to what state's laws control validity and construction of, as well the principal place of administration of, a trust; the location of trust advisors or trust protectors may in some circumstances cause another jurisdiction to bring a competing claim regarding such issues; or give another jurisdiction a possible claim that it has "interests" in the trust, particularly regarding rights of creditors and the assertion that such other jurisdiction has the ability to assess its income tax on the trust. For a discussion of some of these issues, see Sections I.E and II in Duncan and Sarafa--Achieve the Promise.

Also, note that the Tennessee Uniform Trust Code does not take a position on whether naming an entity as a trust advisor or trust protector (particularly if serving in a fiduciary capacity) submits such entity to regulation by the Tennessee Department of Financial Institutions or similar regulator in another jurisdiction.

Subsection (a) also clearly states that a trust advisor or trust protector can be comprised of a committee. Indeed, committees are often used for this purpose by larger and more complex trusts, particularly by long lived, or "dynasty" trusts (e.g., investment committee, distribution committee, etc.).

Subsection (a) then goes on to provide an extensive list of 21 powers that a trust advisor or trust protector may hold. While to the knowledge of the drafters of the Tennessee Uniform Trust Code, such is the most extensive list of powers contained in any U.S. directed trust statute, it is exceedingly important to understand that such list is in no way exclusive. Virtually any power related to a trust can be removed from a trustee and placed in the control of one or more trust advisors or trust protectors.

It is also important to note that, unless the effect of the nature of granting a trust advisor or trust protector a power is such that it violates T.C.A. § 35-15-105(b) (the "mandatory rules" of the Tennessee Uniform Trust Code), the provisions of part 12 are otherwise default rules. A settlor, the qualified beneficiaries or a court has the freedom to paint on a virtually blank canvas.

Subsection (b) states that, absent a trust instrument, the agreement of the qualified beneficiaries or a court order providing otherwise:

"The exercise of a power by a trust advisor or a trust protector shall be exercised in the sole and absolute discretion of the trust advisor or trust protector and shall be binding on all other persons." [emphasis added] Note that there is no "reasonableness" standard contained in the discretionary language of subsection (b).

This is in keeping with the overriding goals of the Tennessee trust statutes; the furtherance of the principles that a settlor's intent is paramount and that one should have the broadest freedom to dispose of assets as that person sees fit. Therefore, there is no "reasonableness" standard implied under T.C.A. § 35-15-814 relative to the exercise of discretion over a discretionary interest (which is contra to the provisions of the Uniform Trust Code and the Restatement (Third) of Trusts) and there is no "reasonableness" standard contained in the discretionary language of subsection (b).

Subsection (c) grants the freedom to give the power to a trust advisor or trust protector to modify a trust without being subject to the provisions of T.C.A. §§ 35-15-410-35-15-412 and 35-15-414. Notwithstanding such freedom, it would seem that in many (if not most) cases, such trust advisor or trust protector should be mindful of not causing unintended consequences such as those listed in T.C.A. § 35-15-410(d).

Subsection (d) makes it clear that the power of a trust advisor or trust protector need not die with death of a grantor who vested such trust advisor or trust protector with such power.

Subsection (e) is a savings provision to assure that the charitable nature of a trust cannot be vitiated by the

act of a trust advisor or trust protector.

35-15-1202. Trust Advisors and Trust Protectors as Fiduciaries.

(a) A trust advisor or trust protector, other than a beneficiary, is a fiduciary with respect to each power granted to such trust advisor or trust protector. In exercising any power or refraining from exercising any power, a trust advisor or trust protector shall act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

(b) A trust advisor or trust protector is an excluded fiduciary with respect to each power granted or reserved exclusively to any one or more other trustees, trust advisors, or trust protectors.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-1202.

The Uniform Trust Code has no similar provision to this section. The effects of the provisions of this section may result in significant divergence from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

Subsection (a) contains two default rules:

The first is that any trust advisor or trust protector other than a beneficiary is a fiduciary with respect to each power held by such trust advisor or trust protector.

The second is that in exercising a power, or refraining therefrom, a trust advisor or trust protector must not only act in accordance with the terms and purposes of the trust and the interests of the beneficiaries (as such are defined in the terms of the trust per T.C.A. § 35-15-105(b)(3)), such trust advisor or trust protector must also act in good faith.

Such default rules are likely to be the appropriate ones in most circumstances (as are the similar default rules regarding good faith found in T.C.A. §§ 35-15-801, 35-15-808(d) and 35-15-1002).

Nevertheless, the default rules of subsection (a) relating to the requirement that a trust advisor or trust protector must act in a fiduciary capacity and the duty of a trust advisor or trust protector to act in good faith can be overridden by the terms of a trust, an agreement of the qualified beneficiaries or a court order.

Moreover relative to a trust in general as well as the powers and duties of a trust advisor or trust protector, the default rules in T.C.A. §§ 35-15-801, 35-15-808(d) and 35-15-1002) can be overridden by the terms of a trust.

The reasons the above specified default rules can be overridden is that they are not required by the mandatory provisions of T.C.A. § 35-15-105(b).

Therefore, a trust advisor or trust protector can serve as such in either a fiduciary or non-fiduciary capacity and may or may be subject to a duty of good faith.

On a related note, it is the opinion of the drafters of the Tennessee Uniform Trust Code that, while a trust advisor or trust protector cannot be exculpated from breach of trust committed with reckless indifference to the purposes of the trust or the interests of the beneficiaries (as such interests of the beneficiaries are defined in the terms of the trust), so long as such exculpation provision was not inserted in a manner that violates T.C.A. § 35-15-1008(a)(2) or (b), a trust advisor or trust protector can be exculpated from having to act in good faith. See the section comment to T.C.A. § 35-15-1008 for a discussion of why this is so.

Subsection (b) describes the extent to which a trust advisor or trust protector will be an excluded fiduciary. It

follows the definition of "excluded fiduciary" in T.C.A. § 35-15-103 and the concept that those persons who do not have a power or duty over a trust should not be liable for the actions of the other persons who do have such power or duty.

35-15-1203. Trust Advisor and Trust Protector Subject to Court Jurisdiction.

By accepting appointment to serve as a trust advisor or trust protector, the trust advisor or the trust protector submits personally to the jurisdiction of the courts of this state even if investment advisory agreements or other related agreements provide otherwise, and the trust advisor or trust protector may be made a party to any action or proceeding relating to a decision, action, or inaction of the trust advisor or trust protector.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-1203.

The Uniform Trust Code has no similar provision to this section. The effects of the provisions of this section may result in significant divergence from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

This section states several things regarding court jurisdiction over a trust advisor or trust protector:

By accepting such appointment, a trust advisor or trust protector submits to the jurisdiction of the courts of this state. (Note that under T.C.A. § 35-15-711, a trust advisor or trust protector has the same rights as does a trustee relative to accepting or rejecting appointment, as well as certain powers before accepting appointment; such powers being spelled out in detail in T.C.A. § 35-15-701, to which T.C.A. § 35-15-711 refers).

Such trust advisor or trust protector can be made a party to any action or proceeding relating to any decision, action or inaction of such trust advisor or trust protector.

35-15-1204. No Duty to Review Actions of Trustee, Trust Advisor, or Trust Protector.

(a) Whenever, pursuant to the terms of a trust, an agreement of the qualified beneficiaries, or a court order, an excluded fiduciary is to follow the direction of a trustee, trust advisor, or trust protector with respect to investment decisions, distribution decisions, or other decisions of the non-excluded fiduciary, then, except to the extent that the terms of the trust, the agreement of the qualified beneficiaries, or the court order provide otherwise, the excluded fiduciary shall have no duty to:

(1) Review, evaluate, perform investment reviews, suitability reviews, inquiries, or investigations, or in any other way monitor the conduct of the trustee, trust advisor, or trust protector;

(2) Make recommendations or evaluations or in any way provide advice to the trustee, trust advisor, or trust protector or consult with the trustee, trust advisor, or trust protector; or

(3) Communicate with or warn or apprise any beneficiary or third party concerning instances in which the excluded fiduciary would or might have exercised the excluded fiduciary's own discretion in a manner different from the manner directed by the trustee, trust advisor, or trust protector.

(b) Absent provisions in the trust instrument to the contrary, the actions of the excluded fiduciary pertaining to matters within the scope of the trustee, trust advisor, or trust protector's authority, including but not limited to, confirming that the trustee, trust advisor, or trust protector's directions have been carried out and recording and reporting actions taken at the trustee, trust advisor, or trust protector's direction or other information pursuant to § 35-15-813, shall be deemed to be administrative actions taken by the excluded fiduciary solely to allow the excluded fiduciary to perform those duties assigned to the excluded fiduciary under the terms of the trust, the

agreement of the qualified beneficiaries, or the court order; such administrative actions, as well as any communications made by the excluded fiduciary to the trust advisor, trust protector or any of their agents or persons they have selected to provide services to the trust, shall not be deemed to constitute an undertaking by the excluded fiduciary to monitor the trustee, trust advisor, or trust protector or otherwise participate in actions within the scope of the trustee, trust advisor, or trust protector's authority.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-1204.

The Uniform Trust Code has no similar provision to this section. The effects of the provisions of this section may result in significant divergence from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

This section follows the definition of "excluded fiduciary" in T.C.A. § 35-15-103 and the concept that those persons who do not have a power or duty over a trust should not be liable for the actions of the other persons who do have such power or duty. Therefore, this section states an overriding rule that excluded fiduciaries have no duty to review the actions of a trustee, a trust advisor or trust protector to which any power or duty was granted or reserved, such power or duty having been removed from such excluded fiduciary.

Subsection (a) states that unless the terms of a trust, the agreement of the qualified beneficiaries or a court order provides otherwise, the general rule above applies and an excluded fiduciary has no duty to:

Perform any kind of review, evaluation, inquiry or investigation of, or in any other way monitor, the conduct of the non-excluded trustee, trust advisor or trust protector.

Make evaluations of, recommendations to, or in any way provide advice to, the non-excluded trustee, trust advisor or trust protector.

Communicate with, warn or apprise any beneficiary or third-party concerning instances in which the excluded fiduciary would or might have exercised such excluded fiduciary's discretion differently than as exercised by the non-excluded trustee, trust advisor or trust protector.

Subsection (b) states that any action of an excluded beneficiary relative to any actions of any non-excluded fiduciary shall be deemed to be nothing more than administrative actions taken by the excluded fiduciary to allow such excluded beneficiary to perform those duties assigned to the excluded fiduciary under the terms of the trust, the agreement of the qualified beneficiaries or a court order. Moreover, any such administrative actions; as well as any communications made by the excluded fiduciary to a non-excluded fiduciary, or to any agent or person selected by any non-excluded fiduciary to provide services (through delegation or otherwise) to the trust; does not rise to an undertaking by the excluded fiduciary to monitor or otherwise participate in actions within the scope of the authority of any non-excluded fiduciary. Unlike under subsection (a), subsection (b) can only be overridden by provisions contained in the trust instrument to the contrary.

35-15-1205. Fiduciary's Liability for Action or Inaction of Trustee, Trust Advisor, and Trust Protector.

An excluded fiduciary is not liable, either individually or as a fiduciary, for:

(1) Any loss resulting from compliance with a direction of a trustee, trust advisor or trust protector, including but not limited to, any loss from the trustee, trust advisor or trust protector breaching fiduciary responsibilities or acting beyond the trustee's, trust advisor's or trust protector's scope of authority;

(2) Any loss resulting from any action or inaction of a trustee, trust advisor, or trust protector; or

(3) Any loss that results from the failure of a trustee, trust advisor, or trust protector to take any action proposed by the excluded fiduciary where such action requires the authorization of the trustee, trust advisor, or trust protector, provided that an excluded fiduciary who had a duty to propose such action timely sought but failed to obtain the authorization.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-1205.

The Uniform Trust Code has no similar provision to this section. The effects of the provisions of this section may result in significant divergence from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

This section follows the definition of "excluded fiduciary" in T.C.A. § 35-15-103 and the concept that those persons who do not have a power or duty over a trust should not be liable for the actions of the other persons who do have such power or duty.

Therefore, this section states the rule that excluded fiduciaries are not liable, either individually or as a fiduciary for any loss:

resulting from the excluded fiduciary complying with a direction of a non-excluded fiduciary regardless of whether such loss results from a non-excluded fiduciary breaching their respective fiduciary responsibilities, a non-excluded fiduciary acting beyond their respective scope of authority, or otherwise;

resulting from any action or action of a non-excluded fiduciary; or

resulting from the failure of a non-excluded fiduciary to take any action proposed by an excluded fiduciary where such action requires authorization of a non-excluded fiduciary; provided that, if the excluded fiduciary had a duty to propose such action, such excluded fiduciary timely sought but failed to obtain such authorization.

35-15-1206. Limitation of Action Against a Trust Advisor or Trust Protector.

(a) A beneficiary may not commence a proceeding against a trust advisor or trust protector for breach of trust more than one (1) year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed facts indicating the existence of a potential claim for breach of trust.

(b) A report adequately discloses facts indicating the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or the beneficiary's representative knows of the potential claim or has sufficient information to be presumed to know of it, or to be put on notice to inquire into its existence.

(c) If subsection (a) does not apply, a judicial proceeding by a beneficiary against a trust advisor or trust protector for breach of trust must be commenced within three (3) years after the first to occur of:

(1) The removal, resignation, or death of the trust advisor or trust protector;

(2) The termination of the beneficiary's interest in the trust; or

(3) The termination of the trust.

(d) A trustee may not commence a proceeding against a trust advisor or trust protector for breach of trust more than one (1) year after the date the trustee or a representative of the trustee was sent a report that adequately disclosed facts indicating the existence of a potential claim for breach of trust.

(e) A report adequately discloses facts indicating the existence of a potential claim for breach of trust if it provides sufficient information so that the trustee or the trustee's representative knows of the potential claim or has sufficient information to be presumed to know of it, or to be put on notice to inquire into its existence.

(f) If subsection (d) does not apply, a judicial proceeding by a trustee against a trust advisor or trust protector for breach of trust must be commenced within three (3) years after the first to occur of:

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

(g) A trust advisor or trust protector may not commence a proceeding against another trust advisor or another trust protector for breach of trust more than one (1) year after the date the trust advisor or trust protector or the respective representative of each was sent a report that adequately disclosed facts indicating the existence of a potential claim for breach of trust.

(h) A report adequately discloses facts indicating the existence of a potential claim for breach of trust if it provides sufficient information so that the trust advisor or trust protector or the respective representative of each knows of the potential claim or has sufficient information to be presumed to know of it, or to be put on notice to inquire into its existence.

(i) If subsection (g) does not apply, a judicial proceeding by a trust advisor or trust protector against another trust advisor or another trust protector for breach of trust must be commenced within three (3) years after the first to occur of:

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

(j) Notwithstanding subsections (d)–(i), no trustee, trust advisor or trust protector, may commence a proceeding against a trust advisor or trust protector or another trust advisor or another trust protector if, under either subsections (a)–(c) or § 35-15-1005(a)–(c), none of the beneficiaries may commence a proceeding against the trust advisor or trust protector for such breach of trust.

COMMENT.

Unless provided otherwise hereinafter, any reference to "section," "subsection" or "subdivision" means all, or such portion of, T.C.A. § 35-15-1202.

The Uniform Trust Code has no similar provision to this section. The effects of the provisions of this section may result in significant divergence from the Uniform Trust Code and the restatements. To the extent this section is in conflict with the Uniform Trust Code, any restatement or any other foreign law, such foreign law is not precedential or controlling and is rejected by the Tennessee Uniform Trust Code.

This section applies to trust advisors and trust protectors statutes of limitation consistent with that provided to trustees by T.C.A. § 35-15-1005. The requirements under this section for obtaining the benefit of this section's statutes of limitation, as well as the length of such statutes of limitation, are substantially the same as those provided relative to trustees in T.C.A. § 35-15-1005. Therefore, one is referred to the section comment under T.C.A. § 35-15-1005.