

MAINE STATE LEGISLATURE

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STATE OF MAINE
HOUSE OF REPRESENTATIVES
121ST LEGISLATURE
SECOND SPECIAL SESSION

COMMITTEE AMENDMENT "A" to H.P. 678, L.D. 921, Bill, "An Act To Enact the Uniform Trust Code"

Amend the bill by inserting after the enacting clause and before the concept draft summary the following:

PART A

UNIFORM GENERAL COMMENT

PREFATORY NOTE

The Uniform Trust Code (2000) is the first national codification of the law of trusts. The primary stimulus to the Commissioners' drafting of the Uniform Trust Code is the greater use of trusts in recent years, both in family estate planning and in commercial transactions, both in the United States and internationally. This greater use of the trust, and consequent rise in the number of day-to-day questions involving trusts, has led to a recognition that the trust law in many States is thin. It has also led to a recognition that the existing Uniform Acts relating to trusts, while numerous, are fragmentary. The Uniform Trust Code will provide States with precise, comprehensive, and easily accessible guidance on trust law questions. On issues on which States diverge or on which the law is unclear or unknown, the Code will for the first time provide a uniform rule. The Code also contains a number of innovative provisions.

2 Default Rule: Most of the Uniform Trust Code consists of default
rules that apply only if the terms of the trust fail to address
4 or insufficiently cover a particular issue. Pursuant to Section
105, a drafter is free to override a substantial majority of the
Code's provisions. The exceptions are scheduled in Section 105(b).

6 Innovative Provisions: Much of the Uniform Trust Code is a
8 codification of the common law of trusts. But the Code does
contain a number of innovative provisions. Among the more
10 significant are specification of the rules of trust law that are
not subject to override in the trust's terms (Section 105), the
12 inclusion of a comprehensive article on representation of
beneficiaries (Article 3), rules on trust modification and
14 termination that will enhance flexibility (Sections 410-417), and
the inclusion of an article collecting the special rules
16 pertaining to revocable trusts (Article 6).

18 Models for Drafting: While the Uniform Trust Code is the first
comprehensive Uniform Act on the subject of trusts, comprehensive
20 trust statutes are already in effect in several States. Notable
examples include the statutes in California, Georgia, Indiana,
22 Texas, and Washington, all of which were referred to in the
drafting process. Most influential was the 1986 California
24 statute, found at Division 9 of the California Probate Code
(Sections 15000 et seq.), which was used by the Drafting
26 Committee as its initial model.

28 Existing Uniform Laws on Trust Law Subjects: Certain older
Uniform Acts are incorporated into the Uniform Trust Code.
30 Others, addressing more specialized topics, will continue to be
available for enactment in free-standing form.

32 The following Uniform Acts are incorporated into or otherwise
34 superseded by the Uniform Trust Code:

36 Uniform Probate Code Article VII - Originally approved in
1969, Article VII has been enacted in about 15
38 jurisdictions. Article VII, although titled "Trust
Administration," is a modest statute, addressing only a
40 limited number of topics. Except for its provisions on trust
registration, Article VII is superseded by the Uniform Trust
42 Code. Its provisions on jurisdiction are incorporated into
Article 2 of the Code, and its provision on trustee
44 liability to persons other than beneficiaries are replaced
by Section 1010.

46 Uniform Prudent Investor Act (1994) - This Act has been
48 enacted in 35 jurisdictions. This Act, and variant forms
enacted in a number of other States, has displaced the older
50 "prudent man" standard, bringing trust law into line with

2 modern investment practice. States that have enacted the
Uniform Prudent Investor Act are encouraged to recodify it
4 as part of their enactment of the Uniform Trust Code. A
place for this is provided in Article 9.

6 Uniform Trustee Powers Act (1964) - This Act has been
enacted in 16 States. The Act contains a list of specific
8 trustee powers and deals with other selected issues,
particularly relations of a trustee with persons other than
10 beneficiaries. The Uniform Trustee Powers Act is outdated
and is entirely superseded by the Uniform Trust Code,
12 principally at Sections 815, 816, and 1012. States enacting
the Uniform Trust Code should repeal their existing trustee
14 powers legislation.

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

26 The following Uniform Acts are not affected by enactment of the
Uniform Trust Code and do not need to be amended or repealed:

28
30 Uniform Common Trust Fund Act - Originally approved in 1938,
this Act has been enacted in 34 jurisdictions. The Uniform
32 Trust Code does not address the subject of common trust
funds. In recent years, many banks have replaced their
34 common trust funds with mutual funds that may also be
available to non-trust customers. The Code addresses
investment in mutual funds at Section 802(f).

36
38 Uniform Custodial Trust Act (1987) - This Act has been
enacted in 14 jurisdictions. This Act allows standard trust
provisions to be automatically incorporated into the terms
40 of a trust simply by referring to the Act. This Act is not
displaced by the Uniform Trust Code but complements it.

42
44 Uniform Management of Institutional Funds Act (1972) - This
Act has been enacted in 47 jurisdictions. It governs the
administration of endowment funds held by charitable,
46 religious, and other eleemosynary institutions. The Uniform
Management of Institutional Funds Act establishes a standard
48 of prudence for use of appreciation on assets, provides
specific authority for the making of investments, authorizes
50 the delegation of this authority, and specifies a procedure,

2 through either donor consent or court approval, for removing
restrictions on the use of donated funds.

4 Uniform Principal and Income Act (1997) - The 1997 Uniform
Principal and Income Act is a major revision of the widely
6 enacted Uniform Act of the same name approved in 1962.
Because this Act addresses issues with respect both to
8 decedent's estates and trusts, a jurisdiction enacting the
revised Uniform Principal and Income Act may wish to include
10 it either as part of this Code or as part of its probate
laws.

12 Uniform Probate Code - Originally approved in 1969, and
14 enacted in close to complete form in about 20 States but
influential in virtually all, the UPC overlaps with trust
16 topics in several areas. One area of overlap, already
mentioned, is UPC Article VII. Another area of overlap
18 concerns representation of beneficiaries. UPC Section 1-403
provides principles of representation for achieving binding
20 judicial settlements of matters involving both estates and
trusts. The Uniform Trust Code refines these representation
22 principles, and extends them to nonjudicial settlement
agreements and to optional notices and consents. See Uniform
24 Trust Code, Section 111 and Article 3. A final area of
overlap between the UPC and trust law concerns rules of
26 construction. The UPC, in Article II, Part 7, extends
certain of the rules on the construction of wills to trusts
28 and other nonprobate instruments. The Uniform Trust Code
similarly extends to trusts the rules on the construction of
30 wills. Unlike the UPC, however, the Trust Code does not
prescribe the exact rules. Instead, Section 112 of the
32 Uniform Trust Code is an optional provision applying to
trusts whatever rules the enacting jurisdiction already has
34 in place on the construction of wills.

36 Uniform Statutory Rule Against Perpetuities - Originally
approved in 1986, this Act has been enacted in 27
38 jurisdictions. The Act reforms the durational limit on when
property interests, including interests created under
40 trusts, must vest or fail. The Uniform Trust Code does not
limit the duration of trusts or alter the time when
42 interests must otherwise vest, but leaves this issue to
other state law. The Code may be enacted without change
44 regardless of the status of the perpetuities law in the
enacting jurisdiction.

46 Uniform Supervision of Trustees for Charitable Purposes Act
48 (1954) - This Act, which has been enacted in four States, is
limited to mechanisms for monitoring the actions of
50 charitable trustees. Unlike the Uniform Trust Code, the

2 Supervision of Trustees for Charitable Purposes Act does not
address the substantive law of charitable trusts.

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

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

24 **Overview of Uniform Trust Code**

26 The Uniform Trust Code consists of 11 articles. The substance of
the Code is focused in the first 10 articles; Article 11 is
28 primarily an effective date provision.

30 Article 1 - General Provisions and Definitions - In addition to
definitions, this article addresses miscellaneous but important
32 topics. The Uniform Trust Code is primarily default law. A
settlor, subject to certain limitations, is free to draft trust
34 terms departing from the provisions of this Code. The settlor, if
minimum contacts are present, may in addition designate the
36 trust's principal place of administration; the trustee, if
certain standards are met, may transfer the principal place of
38 administration to another State or country. To encourage
nonjudicial resolution of disputes, the Uniform Trust Code
40 provides more certainty for when such settlements are binding.
While the Code does not prescribe the exact rules to be applied
42 to the construction of trusts, it does extend to trusts whatever
rules the enacting jurisdiction has on the construction of wills.
44 The Uniform Trust Code, although comprehensive, does not
legislate on every issue. Its provisions are supplemented by the
46 common law of trusts and principles of equity.

48 Article 2 - Judicial Proceedings - This article addresses
selected issues involving judicial proceedings concerning trusts,
50 particularly trusts having contacts with more than one State or

2 country. The courts in the trust's principal place of
administration have jurisdiction over both the trustee and the
4 beneficiaries as to any matter relating to the trust. Optional
provisions on subject-matter jurisdiction and venue are provided.
6 The minimal coverage of this article was deliberate. The Drafting
Committee concluded that most issues related to jurisdiction and
8 procedure are not appropriate to a Trust Code, but are best left
to other bodies of law.

10 Article 3 - Representation - This article deals with the
representation of beneficiaries and other interested persons,
12 both by fiduciaries (personal representatives, guardians and
conservators), and through what is known as virtual
14 representation. The representation principles of the article
apply to settlement of disputes, whether by a court or
16 nonjudicially. They apply for the giving of required notices.
They apply for the giving of consents to certain actions. The
18 article also authorizes a court to appoint a representative if
the court concludes that representation of a person might
20 otherwise be inadequate. The court may appoint a representative
to represent and approve a settlement on behalf of a minor,
22 incapacitated, or unborn person or person whose identity or
location is unknown and not reasonably ascertainable.

24 Article 4 - Creation, Validity, Modification and Termination of
Trust - This article specifies the requirements for creating,
26 modifying and terminating trusts. Most of the requirements
relating to creation of trusts (Sections 401 through 409) track
28 traditional doctrine, including requirements of intent, capacity,
property, and valid trust purpose. The Uniform Trust Code
30 articulates a three-part classification system for trusts:
noncharitable, charitable, and honorary. Noncharitable trusts,
32 the most common type, require an ascertainable beneficiary and a
valid purpose. Charitable trusts, on the other hand, by their
34 very nature are created to benefit the public at large. The so
called honorary or purposes trust, although unenforceable at
36 common law, is valid and enforceable under this Code despite the
absence of an ascertainable beneficiary. The most common example
38 is a trust for the care of an animal.

40 Sections 410 through 417 provide a series of interrelated rules
42 on when a trust may be terminated or modified other than by its
express terms. The overall objective of these sections is to
44 enhance flexibility consistent with the principle that preserving
the settlor's intent is paramount. Termination or modification
46 may be allowed upon beneficiary consent if the court concludes
that the trust or a particular provision no longer serves a
48 material purpose or if the settlor concurs; by the court in
response to unanticipated circumstances or to remedy ineffective
50 administrative terms; or by the court or trustee if the trust is

2 of insufficient size to justify continued administration under
its existing terms. Trusts may be reformed to correct a mistake
4 of law or fact, or modified to achieve the settlor's tax
objectives. Trusts may be combined or divided. Charitable trusts
6 may be modified or terminated under cy pres to better achieve the
settlor's charitable purposes.

8 Article 5 - Creditor's Claims; Spendthrift and Discretionary
Trusts - This article addresses the validity of a spendthrift
10 provision and other issues relating to the rights of creditors to
reach the trust to collect a debt. To the extent a trust is
12 protected by a spendthrift provision, a beneficiary's creditor
may not reach the beneficiary's interest until distribution is
14 made by the trustee. To the extent not protected by a spendthrift
provision, a creditor can reach the beneficiary's interest,
16 subject to the court's power to limit the award. Certain
categories of claims are exempt from a spendthrift restriction,
18 including certain governmental claims and claims for child
support or alimony. Other issues addressed in this article
20 include creditor claims against discretionary trusts; creditor
claims against a settlor, whether the trust is revocable or
22 irrevocable; and the rights of creditors when a trustee fails to
make a required distribution within a reasonable time.

24 Article 6 - Revocable Trusts - This short article deals with
26 issues of significance not totally settled under current law. The
basic policy of this article and of the Uniform Trust Code in
28 general is to treat the revocable trust as the functional
equivalent of a will. The article specifies a standard of
30 capacity, provides that a trust is presumed revocable unless its
terms provide otherwise, prescribes the procedure for revocation
32 or amendment of a revocable trust, addresses the rights of
beneficiaries during the settlor's lifetime, and provides a
34 statute of limitations on contests.

36 Article 7 - Office of Trustee - This article contains a series of
default rules dealing with the office of trustee, all of which
38 may be modified in the terms of the trust. Rules are provided on
acceptance of office and bonding. The role of the cotrustee is
40 addressed, including the extent that one cotrustee may delegate
to another, and the extent to which one cotrustee can be held
42 liable for actions of another trustee. Also covered are changes
in trusteeship, including the circumstances when a vacancy must
44 be filled, the procedure for resignation, the grounds for
removal, and the process for appointing a successor trustee.
46 Finally, standards are provided for trustee compensation and
reimbursement for expenses.

48 Article 8 - Duties and Powers of Trustee - This article states
50 the fundamental duties of a trustee and enumerates the trustee's

2 powers. The duties listed are not new, although some of the
particulars have changed over the years. This article was drafted
where possible to conform to the Uniform Prudent Investor Act.

4 The Uniform Prudent Investor Act prescribes a trustee's
responsibilities with respect to the management and investment of
6 trust property. This article also addresses a trustee's duties
regarding distributions to beneficiaries.

8
10 Article 9 - Uniform Prudent Investor Act - This article provides
a place for a jurisdiction to enact, reenact or codify its
12 version of the Uniform Prudent Investor Act. States adopting the
Uniform Trust Code which have previously enacted the Uniform
14 Prudent Investor Act are encouraged to reenact their version of
the Prudent Investor Act in this article.

16 Article 10 - Liability of Trustees and Rights of Persons Dealing
With Trustees - Sections 1001 through 1009 list the remedies for
18 breach of trust, describe how money damages are to be determined,
provide a statute of limitations on claims against a trustee, and
20 specify other defenses, including consent of a beneficiary and
recognition of and limitations on the effect of an exculpatory
22 clause. Sections 1010 through 1013 address trustee relations with
persons other than beneficiaries. The objective is to encourage
24 third parties to engage in commercial transactions with trustees
to the same extent as if the property were not held in trust.

26
28 Article 11 - Miscellaneous Provisions - The Uniform Trust Code is
intended to have the widest possible application, consistent with
30 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.

32
34 The Drafting Committee was assisted by numerous officially
designated advisors and observers, representing an array of
36 organizations. In addition to the American Bar Association
advisors listed above, advisors and observers who attended a
38 majority of the Drafting Committee meetings include Edward C.
Halbach, Jr., Reporter, Restatement (Third) of Trust Law; Kent H.
McMahan, American College of Trust and Estate Counsel; Alex
40 Misheff, American Bankers Association; and Lawrence W. Waggoner,
Reporter, Restatement (Third) of Property: Wills and Other
42 Donative Transfers. Significant input was also received from the
Joint Editorial Board for Uniform Trusts and Estates Acts and the
44 Committee on State Laws of the American College of Trust and
Estate Counsel.

46
48 **MAINE GENERAL COMMENT**

2 The Uniform Trust Code is adopted in Maine as the Maine Uniform
Trust Code. Changes from the Uniform Trust Code are indicated in
the Maine Comments for the section in which the changes are made.

4
6 In addition, although section numbers are consistent between the
Uniform Trust Code and the Maine Uniform Trust Code, "articles"
8 in the Uniform Trust Code are "chapters" in the Maine Uniform
Trust Code. Statutory units within sections of the Maine Uniform
10 Trust Code are numbered and lettered differently from the Uniform
Trust Code to maintain consistency with Maine statutes. The
12 structure within the Maine Uniform Trust Code sections is as
follows:

14 Subsections (1, 2, 3, etc.)

Paragraphs (A, B, C, etc.)

16 Subparagraphs ((1), (2), (3), etc.)

Divisions ((a), (b), (c), etc.).

18
20 **Sec. A-1. 18-B MRSA** is enacted to read:

22 **TITLE 18-B**

24 **TRUSTS**

26 **PART 1**

28 **MAINE UNIFORM TRUST CODE**

30 **CHAPTER 1**

32 **GENERAL PROVISIONS AND DEFINITIONS**

34 **UNIFORM GENERAL COMMENT**

36 The Uniform Trust Code is primarily a default statute. Most of
the Code's provisions can be overridden in the terms of the
trust. The provisions not subject to override are scheduled in
38 Section 105(b). These include the duty of a trustee to act in
good faith and with regard to the purposes of the trust, public
40 policy exceptions to enforcement of spendthrift provisions, the
requirements for creating a trust, and the authority of the court
42 to modify or terminate a trust on specified grounds.

44 The remainder of the article specifies the scope of the Code
(Section 102), provides definitions (Section 103), and collects
46 provisions of importance not amenable to codification elsewhere
in the Uniform Trust Code. Sections 106 and 107 focus on the
48 sources of law that will govern a trust. Section 106 clarifies
that despite the Code's comprehensive scope, not all aspects of
50 the law of trusts have been codified. The Uniform Trust Code is

2 supplemented by the common law of trusts and principles of
equity. Section 107 addresses selection of the jurisdiction or
4 jurisdictions whose laws will govern the trust. A settlor, absent
overriding public policy concerns, is free to select the law that
will determine the meaning and effect of a trust's terms.

6
8 Changing a trust's principal place of administration is sometimes
desirable, particularly to lower a trust's state income tax. Such
transfers are authorized in Section 108. The trustee, following
10 notice to the "qualified beneficiaries," defined in Section
103(12), may without approval of court transfer the principal
12 place of administration to another State or country if a
qualified beneficiary does not object and if the transfer is
14 consistent with the trustee's duty to administer the trust at a
place appropriate to its purposes, its administration, and the
16 interests of the beneficiaries. The settlor, if minimum contacts
are present, may also designate the trust's principal place of
18 administration.

20 Sections 104 and 109 through 111 address procedural issues.
Section 104 specifies when persons, particularly persons who work
22 in organizations, are deemed to have acquired knowledge of a
fact. Section 109 specifies the methods for giving notice and
24 excludes from the Code's notice requirements persons whose
identity or location is unknown and not reasonably ascertainable.
26 Section 110 allows beneficiaries with remote interests to request
notice of actions, such as notice of a trustee resignation, which
28 are normally given only to the qualified beneficiaries.

30 Section 111 ratifies the use of nonjudicial settlement
agreements. While the judicial settlement procedures may be used
32 in all court proceedings relating to the trust, the nonjudicial
settlement procedures will not always be available. The terms of
34 the trust may direct that the procedures not be used, or settlors
may negate or modify them by specifying their own methods for
36 obtaining consents. Also, a nonjudicial settlement may include
only terms and conditions a court could properly approve.

38
40 The Uniform Trust Code does not prescribe the rules of
construction to be applied to trusts created under the Code. The
42 Code instead recognizes that enacting jurisdictions are likely to
take a diversity of approaches, just as they have with respect to
the rules of construction applicable to wills. Section 112
44 accommodates this variation by providing that the State's
specific rules on construction of wills, whatever they may be,
46 also apply to the construction of trusts.

48 **§101. Short title**

50

2 (i.e., trusts that have characteristics of both charitable and
noncharitable trusts, e.g., charitable remainder and charitable
4 lead trusts) are also within the scope of the Maine Uniform Trust
Code.

6 The term "noncharitable trust" is not a term currently used in
Maine trust law. "Trust," as defined in the Probate Code,
8 section 1-201, subsection (45) includes, among other things,
"private" trusts. The term "noncharitable," as used in the Maine
10 Uniform Trust Code, means "private" as currently used in Maine
trust law.

12
14 **§103. Definitions**

16 As used in this Code, unless the context otherwise
indicates, the following terms have the following meanings.

18 1. Action. "Action," with respect to an act of a trustee,
20 includes a failure to act.

22 2. Beneficiary. "Beneficiary" means a person that:

24 A. Has a present or future beneficial interest in a trust,
vested or contingent; or

26 B. In a capacity other than that of trustee, holds a power
28 of appointment over trust property.

30 3. Charitable trust. "Charitable trust" means a trust, or
portion of a trust, created for a charitable purpose described in
32 section 405, subsection 1.

34 3-A. Code. "Code" means the Maine Uniform Trust Code.

36 4. Conservator. "Conservator" means a person appointed by
the court to administer an estate of a minor or adult individual.

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

42 6. Guardian. "Guardian" means a person who has qualified
44 pursuant to court appointment to make decisions regarding the
support, care, education, health and welfare of a minor or adult
46 individual. The term does not include a guardian ad litem.

48 7. Interests of beneficiaries. "Interests of the
beneficiaries" means the beneficial interests provided in the
50 terms of the trust.

2 8. Jurisdiction. "Jurisdiction," with respect to a
geographic area, includes a state or country.

4
6 9. Person. "Person" means an individual, corporation,
business trust, estate, trust, partnership, limited liability
company, association, joint venture, government; governmental
8 subdivision, agency or instrumentality; public corporation; or
any other legal or commercial entity.

10
12 10. Power of withdrawal. "Power of withdrawal" means a
presently exercisable general power of appointment other than a
power exercisable only upon consent of the trustee or a person
14 holding an adverse interest.

16 11. Property. "Property" means anything that may be the
subject of ownership, whether real or personal, legal or
18 equitable, or any interest therein.

20 12. Qualified beneficiary. "Qualified beneficiary" means a
beneficiary who on the date the beneficiary's qualification is
22 determined:

24 A. Is a distributee or permissible distributee of trust
income or principal;

26 B. Would be a distributee or permissible distributee of
trust income or principal if the interests of the
28 distributees described in paragraph A terminated on that
date; or

30 C. Would be a distributee or permissible distributee of
trust income or principal if the trust terminated on that
32 date.

34
36 "Qualified beneficiary" does not include a contingent distributee
or a contingent permissible distributee of trust income or
38 principal whose interest in the trust is not reasonably expected
to vest.

40
42 13. Revocable. "Revocable," as applied to a trust, means
revocable by the settlor without the consent of the trustee or a
person holding an adverse interest.

44
46 14. Settlor. "Settlor" means a person, including a
testator, who creates or contributes property to a trust. If more
than one person creates or contributes property to a trust, each
48 person is a settlor of the portion of the trust property
attributable to that person's contribution except to the extent
50 another person has the power to revoke or withdraw that portion.

2 While the holder of a power of appointment is not considered a
trust beneficiary under the common law of trusts, holders of
4 powers are classified as beneficiaries under the Uniform Trust
Code. Holders of powers are included on the assumption that their
6 interests are significant enough that they should be afforded the
rights of beneficiaries. A power of appointment as used in state
8 trust law and this Code is as defined in state property law and
not federal tax law although there is considerable overlap
10 between the two definitions.

12 A power of appointment is authority to designate the recipients
of beneficial interests in property. See Restatement (Second) of
14 Property: Donative Transfers Section 11.1 (1986). A power is
either general or nongeneral and either presently exercisable or
16 not presently exercisable. A general power of appointment is a
power exercisable in favor of the holder of the power, the power
18 holder's creditors, the power holder's estate, or the creditors
of the power holder's estate. See Restatement (Second) of
20 Property: Donative Transfers Section 11.4 (1986). All other
powers are nongeneral. A power is presently exercisable if the
22 power holder can currently create an interest, present or future,
in an object of the power. A power of appointment is not
24 presently exercisable if exercisable only by the power holder's
will or if its exercise is not effective for a specified period
26 of time or until occurrence of some event. See Restatement
(Second) of Property: Donative Transfers Section 11.5 (1986).
28 Powers of appointment may be held in either a fiduciary or
nonfiduciary capacity. The definition of "beneficiary" excludes
30 powers held by a trustee but not powers held by others in a
fiduciary capacity.

32
34 While all categories of powers of appointment are included within
the definition of "beneficiary," the Uniform Trust Code elsewhere
makes distinctions among types of powers. A "power of withdrawal"
36 (paragraph (10)) is defined as a presently exercisable general
power of appointment other than a power exercisable only upon
38 consent of the trustee or a person holding an adverse interest.
Under Section 302, the holder of a testamentary general power of
40 appointment may represent and bind persons whose interests are
subject to the power.

42
44 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
46 the community at large (see Section 405(a)), persons receiving
distributions from a charitable trust are not beneficiaries as
48 that term is defined in this Code. However, pursuant to Section
110(b), charitable organizations expressly designated to receive
50 distributions under the terms of a charitable trust, even though

2 not beneficiaries as defined, are granted the rights of qualified
beneficiaries under the Code.

4 The Uniform Trust Code leaves certain issues concerning
beneficiaries to the common law. Any person with capacity to take
6 and hold legal title to intended trust property has capacity to
be a beneficiary. See Restatement (Third) of Trusts Section 43
8 (Tentative Draft No. 2, approved 1999); Restatement (Second) of
Trusts Sections 116-119 (1959). Except as limited by public
10 policy, the extent of a beneficiary's interest is determined
solely by the settlor's intent. See Restatement (Third) of Trusts
12 Section 49 (Tentative Draft No. 2, approved 1999); Restatement
(Second) of Trusts Sections 127-128 (1959). While most beneficial
14 interests terminate upon a beneficiary's death, the interest of a
beneficiary may devolve by will or intestate succession the same
16 as a corresponding legal interest. See Restatement (Third) of
Trusts Section 55(1) (Tentative Draft No. 2, approved 1999);
18 Restatement (Second) of Trusts Sections 140, 142 (1959).

20 Under the Uniform Trust Code, when a trust has both charitable
and noncharitable beneficiaries only the charitable portion
22 qualifies as a "charitable trust" (paragraph (3)). The great
majority of the Code's provisions apply to both charitable and
24 noncharitable trusts without distinction. The distinctions
between the two types of trusts are found in the requirements
26 relating to trust creation and modification. Pursuant to Sections
405 and 413, a charitable trust must have a charitable purpose
28 and charitable trusts may be modified or terminated under the
doctrine of cy pres. Also, Section 411 allows a noncharitable
30 trust to in certain instances be terminated by its beneficiaries
while charitable trusts do not have beneficiaries in the usual
32 sense. To the extent of these distinctions, a split-interest
trust is subject to two sets of provisions, one applicable to the
34 charitable interests, the other the noncharitable.

36 For discussion of the definition of "conservator" (paragraph
(4)), see the definition of "guardian" (paragraph (6)).

38 To encourage trustees to accept and administer trusts containing
40 real property, the Uniform Trust Code contains several provisions
designed to limit exposure to possible liability for violation of
42 "environmental law" (paragraph (5)). Section 701(c)(2) authorizes
a nominated trustee to investigate trust property to determine
44 potential liability for violation of environmental law or other
law without accepting the trusteeship. Section 816(13) grants a
46 trustee comprehensive and detailed powers to deal with property
involving environmental risks. Section 1010(b) immunizes a
48 trustee from personal liability for violation of environmental
law arising from the ownership and control of trust property.

50

2 Under the Uniform Trust Code, a "guardian" (paragraph (6)) makes
3 decisions with respect to personal care; a "conservator"
4 (paragraph (4)) manages property. The terminology used is that
5 employed in Article V of the Uniform Probate Code, and in its
6 free-standing Uniform Guardianship and Protective Proceedings
7 Act. Enacting jurisdictions not using these terms in the defined
8 sense should substitute their own terminology. For this reason,
9 both terms have been placed in brackets. The definition of
10 "guardian" accommodates those jurisdictions which allow
11 appointment of a guardian by a parent or spouse in addition to
12 appointment by a court. Enacting jurisdictions which allow
13 appointment of a guardian solely by a court should delete the
14 bracketed language "a parent, or a spouse."

15 The phrase "interests of the beneficiaries" (paragraph (7)) is
16 used with some frequency in the Uniform Trust Code. The
17 definition clarifies that the interests are as provided in the
18 terms of the trust and not as determined by the beneficiaries.
19 Absent authority to do so in the terms of the trust, Section 108
20 prohibits a trustee from changing a trust's principal place of
21 administration if the transfer would violate the trustee's duty
22 to administer the trust at a place appropriate to the interests
23 of the beneficiaries. Section 706(b) conditions certain of the
24 grounds for removing a trustee on the court's finding that
25 removal of the trustee will best serve the interests of the
26 beneficiaries. Section 801 requires the trustee to administer the
27 trust in the interests of the beneficiaries, and Section 802
28 makes clear that a trustee may not place its own interests above
29 those of the beneficiaries. Section 808(d) requires the holder of
30 a power to direct who is subject to a fiduciary obligation to act
31 with regard to the interests of the beneficiaries. Section
32 1002(b) may impose greater liability on a cotrustee who commits a
33 breach of trust with reckless indifference to the interests of
34 the beneficiaries. Section 1008 invalidates an exculpatory term
35 to the extent it relieves a trustee of liability for breach of
36 trust committed with reckless indifference to the interests of
37 the beneficiaries.

38 "Jurisdiction" (paragraph (8)), when used with reference to a
39 geographic area, includes a state or country but is not
40 necessarily so limited. Its precise scope will depend on the
41 context in which it is used. "Jurisdiction" is used in Sections
42 107 and 403 to refer to the place whose law will govern the
43 trust. The term is used in Section 108 to refer to the trust's
44 principal place of administration. The term is used in Section
45 816 to refer to the place where the trustee may appoint an
46 ancillary trustee and to the place in whose courts the trustee
47 can bring and defend legal proceedings.
48

2 The definition of "property" (paragraph (11)) is intended to be
3 as expansive as possible and to encompass anything that may be
4 the subject of ownership. Included are choses in action, claims,
5 and interests created by beneficiary designations under policies
6 of insurance, financial instruments, and deferred compensation
7 and other retirement arrangements, whether revocable or
8 irrevocable. Any such property interest is sufficient to support
9 creation of a trust. See Section 401 comment.

10 Due to the difficulty of identifying beneficiaries whose
11 interests are remote and contingent, and because such
12 beneficiaries are not likely to have much interest in the
13 day-to-day affairs of the trust, the Uniform Trust Code uses the
14 concept of "qualified beneficiary" (paragraph (12)) to limit the
15 class of beneficiaries to whom certain notices must be given or
16 consents received. The definition of qualified beneficiaries is
17 used in Section 705 to define the class to whom notice must be
18 given of a trustee resignation. The term is used in Section 813
19 to define the class to be kept informed of the trust's
20 administration. Section 417 requires that notice be given to the
21 qualified beneficiaries before a trust may be combined or
22 divided. Actions which may be accomplished by the consent of the
23 qualified beneficiaries include the appointment of a successor
24 trustee as provided in Section 704. Prior to transferring a
25 trust's principal place of administration, Section 108(d)
26 requires that the trustee give at least 60 days notice to the
27 qualified beneficiaries.

28 The qualified beneficiaries consist of the beneficiaries
29 currently eligible to receive a distribution from the trust
30 together with those who might be termed the first-line
31 remaindermen. These are the beneficiaries who would become
32 eligible to receive distributions were the event triggering the
33 termination of a beneficiary's interest or of the trust itself to
34 occur on the date in question. Such a terminating event will
35 typically be the death or deaths of the beneficiaries currently
36 eligible to receive the income. Should a qualified beneficiary be
37 a minor, incapacitated, or unknown, or a beneficiary whose
38 identity or location is not reasonably ascertainable, the
39 representation and virtual representation principles of Article 3
40 may be employed, including the possible appointment by the court
41 of a representative to represent the beneficiary's interest.

44 The qualified beneficiaries who take upon termination of the
45 beneficiary's interest or of the trust can include takers in
46 default of the exercise of a power of appointment. The term can
47 also include the persons entitled to receive the trust property
48 pursuant to the exercise of a power of appointment. Because the
49 exercise of a testamentary power of appointment is not effective
50 until the testator's death and probate of the will, the qualified

2 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.

4
6 Charitable trusts and trusts for a valid noncharitable purpose do
not have beneficiaries in the usual sense. However, certain
8 persons, while not technically beneficiaries, do have an interest
in seeing that the trust is enforced. Section 110 expands the
10 definition of qualified beneficiaries to encompass this wider
group. It grants the rights of qualified beneficiaries to the
attorney general of the state and charitable organizations
12 expressly designated to receive distributions under the terms of
a charitable trust. It also grants the rights of qualified
14 beneficiaries to persons appointed by the terms of the trust or
by the court to enforce a trust created for an animal or other
16 noncharitable purpose.

18 The definition of "revocable" (paragraph (13)) clarifies that
revocable trusts include only trusts whose revocation is
20 substantially within the settlor's control. The consequences of
classifying a trust as revocable are many. The Uniform Trust Code
22 contains provisions relating to liability of a revocable trust
for payment of the settlor's debts (Section 505), the standard of
24 capacity for creating a revocable trust (Section 601), the
procedure for revocation (Section 602), the subjecting of the
beneficiaries' rights to the settlor's control (Section 603), the
26 period for contesting a revocable trust (Section 604), the power
of the settlor of a revocable trust to direct the actions of a
trustee (Section 808(a)), notice to the qualified beneficiaries
30 upon the settlor's death (Section 813(b)), and the liability of a
trustee of a revocable trust for the obligations of a partnership
32 of which the trustee is a general partner (Section 1011(d)).

34 Because under Section 603(c) the holder of a power of withdrawal
has the rights of a settlor of a revocable trust, the definition
36 of "power of withdrawal" (paragraph (10)), and "revocable"
(paragraph (13)) are similar. Both exclude individuals who can
38 exercise their power only with the consent of the trustee or
person having an adverse interest.

40
42 The definition of "settlor" (paragraph (14)) refers to the person
who creates, or contributes property to, a trust, whether by
will, self-declaration, transfer of property to another person as
44 trustee, or exercise of a power of appointment. For the
requirements for creating a trust, see Section 401. Determining
46 the identity of the "settlor" is usually not an issue. The same
person will both sign the trust instrument and fund the trust.
48 Ascertaining the identity of the settlor becomes more difficult
when more than one person signs the trust instrument or funds the
50 trust. The fact that a person is designated as the "settlor" by

2 the terms of the trust is not necessarily determinative. For
example, the person who executes the trust instrument may be
4 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
6 signing the trust instrument, will be the settlor. Should more
than one person contribute to a trust, all of the contributors
8 will ordinarily be treated as settlors in proportion to their
respective contributions, regardless of which one signed the
trust instrument. See Section 602(b).

10
12 In the case of a revocable trust employed as a will substitute,
gifts to the trust's creator are sometimes made by placing the
14 gifted property directly into the trust. To recognize that such a
donor is not intended to be treated as a settlor, the definition
16 of "settlor" excludes a contributor to a trust that is revocable
by another person or over which another person has a power of
18 withdrawal. Thus, a parent who contributes to a child's revocable
trust would not be treated as one of the trust's settlors. The
20 definition of settlor would treat the child as the sole settlor
of the trust to the extent of the child's proportionate
22 contribution. Pursuant to Section 603(c), the child's power of
withdrawal over the trust would also result in the child being
24 treated as the settlor with respect to the portion of the trust
attributable to the parent's contribution.

26 Ascertaining the identity of the settlor is important for a
variety of reasons. It is important for determining rights in
28 revocable trusts. See Sections 505(a)(1), (3) (creditor claims
against settlor of revocable trust), 602 (revocation or
30 modification of revocable trust), and 604 (limitation on contest
of revocable trust). It is also important for determining rights
32 of creditors in irrevocable trusts. See Section 505(a)(2)
(creditors of settlor can reach maximum amount trustee can
34 distribute to settlor). While the settlor of an irrevocable trust
traditionally has no continuing rights over the trust except for
36 the right under Section 411 to terminate the trust with the
beneficiaries' consent, the Uniform Trust Code also authorizes
38 the settlor of an irrevocable trust to petition for removal of
the trustee and to enforce or modify a charitable trust. See
40 Sections 405(c) (standing to enforce charitable trust), 413
(doctrine of cy pres), and 706 (removal of trustee).

42
44 "Spendthrift provision" (paragraph (15)) means a term of a trust
which restrains the transfer of a beneficiary's interest, whether
46 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
48 beneficiary is concerned, would be involuntary. A spendthrift
provision is valid under the Uniform Trust Code only if it
restrains both voluntary and involuntary transfer. For a
50 discussion of this requirement and the effect of a spendthrift

2 provision in general, see Section 502. The insertion of a
3 spendthrift provision in the terms of the trust may also
4 constitute a material purpose sufficient to prevent termination
5 of the trust by agreement of the beneficiaries under Section 411,
6 although the Code does not presume this result.

7 "Terms of a trust" (paragraph (17)) is a defined term used
8 frequently in the Uniform Trust Code. While the wording of a
9 written trust instrument is almost always the most important
10 determinant of a trust's terms, the definition is not so limited.
11 Oral statements, the situation of the beneficiaries, the purposes
12 of the trust, the circumstances under which the trust is to be
13 administered, and, to the extent the settlor was otherwise
14 silent, rules of construction, all may have a bearing on
15 determining a trust's meaning. See Restatement (Third) of Trusts
16 Section 4 cmt. a (Tentative Draft No. 1, approved 1996);
17 Restatement (Second) of Trusts Section 4 cmt. a (1959). If a
18 trust established by order of court is to be administered as an
19 express trust, the terms of the trust are determined from the
20 court order as interpreted in light of the general rules
21 governing interpretation of judgments. See Restatement (Third) of
22 Trusts Section 4 cmt. f (Tentative Draft No. 1, approved 1996).

23 A manifestation of a settlor's intention does not constitute
24 evidence of a trust's terms if it would be inadmissible in a
25 judicial proceeding in which the trust's terms are in question.
26 See Restatement (Third) of Trusts Section 4 cmt. b (Tentative
27 Draft No. 1, approved 1996); Restatement (Second) of Trusts
28 Section 4 cmt. b (1959). See also Restatement (Third) Property:
29 Donative Transfers Sections 10.2, 11.1-11.3 (Tentative Draft No.
30 1, approved 1995). For example, in many states a trust of real
31 property is unenforceable unless evidenced by a writing, although
32 Section 407 of this Code does not so require, leaving this issue
33 to be covered by separate statute if the enacting jurisdiction so
34 elects. Evidence otherwise relevant to determining the terms of a
35 trust may also be excluded under other principles of law, such as
36 the parol evidence rule.

37 "Trust instrument" (paragraph (18)) is a subset of the definition
38 of "terms of a trust" (paragraph (17)), referring to only such
39 terms as are found in an instrument executed by the settlor.
40 Section 403 provides that a trust is validly created if created
41 in compliance with the law of the place where the trust
42 instrument was executed. Pursuant to Section 604(a)(2), the
43 contest period for a revocable trust can be shortened by
44 providing the potential contestant with a copy of the trust
45 instrument plus other information. Section 813(b)(1) requires
46 that the trustee upon request furnish a beneficiary with a copy
47 of the trust instrument. To allow a trustee to administer a trust
48 with some dispatch without concern about liability if the terms
49
50

2 of a trust instrument are contradicted by evidence outside of the
instrument, Section 1006 protects a trustee from liability to the
4 extent a breach of trust resulted from reasonable reliance on
those terms. Section 1013 allows a trustee to substitute a
6 certification of trust in lieu of providing a third person with a
copy of the trust instrument. Section 1106(a)(4) provides that
8 unless there is a clear indication of a contrary intent, rules of
construction and presumptions provided in the Uniform Trust Code
apply to trust instruments executed before the effective date of
10 the Code.

12 The definition of "trustee" (paragraph (19)) includes not only
the original trustee but also an additional and successor trustee
14 as well as a cotrustee. Because the definition of trustee
includes trustees of all types, any trustee, whether original or
16 succeeding, single or cotrustee, has the powers of a trustee and
is subject to the duties imposed on trustees under the Uniform
18 Trust Code. Any natural person, including a settlor or
beneficiary, has capacity to act as trustee if the person has
20 capacity to hold title to property free of trust. See Restatement
(Third) of Trusts Section 32 (Tentative Draft No. 2, approved
22 1999); Restatement (Second) of Trusts Section 89 (1959). State
banking statutes normally impose additional requirements before a
24 corporation can act as trustee.

26
28 **MAINE COMMENT**

30 Subsection 4. The uniform code's reference to "the court" has
been changed to "a court" in the Maine Uniform Trust Code. The
32 term "court" is intentionally used in the lowercase to clarify
and acknowledge that the definition of "conservator" includes a
34 conservator appointed in any number of courts, including a court
in another state, which will permit a conservator appointed by a
court in a foreign state to receive notice on behalf of, and to
36 bind, a trust beneficiary. See, for example, the provisions of
Chapter 3, Representation.

38 It is acknowledged that the term "conservator" is also defined in
40 the Probate Code, section 1-201, subsection (6). The definition
of section 1-201, subsection (6) is intentionally left unchanged
42 with the use of uppercase "Court."

44 "Court" is defined in the Probate Code, section 1-201, subsection
(5) as "any one of the several courts of probate of this State
46"

48 Subsection 6. The term "court" is intentionally used in the
lowercase to clarify and acknowledge that the definition of
50 "guardian" includes a guardian appointed in another state, which

2 will permit a guardian appointed by a court in a foreign state to
receive notice on behalf of, and to bind, a trust beneficiary.
See, for example, the provisions of chapter 3, Representation.

4
6 "Court" is defined in the Probate Code, section 1-201, subsection
(5) as "any one of the several courts of probate of this
State... ."

8
10 A person who has qualified "pursuant to court appointment"
includes a person who has been appointed by will for an
incapacitated person and who has filed acceptance of appointment
12 in the court in which the will is formally or informally
probated, pursuant to the Probate Code, section 5-301.

14
16 Subsection 12. Maine has added the sentence at the end of the
definition to limit the class of beneficiaries to whom certain
notices must be given or from whom consents must be received.

18
20 The Uniform Comments to section 103, subsection 12 state, "the
Uniform Trust Code uses the concept of 'qualified beneficiary'
(paragraph (12)) to limit the class of beneficiaries to whom
22 certain notices must be given or consents received. . . . The
qualified beneficiaries consist of the beneficiaries currently
24 eligible to receive a distribution from the trust together with
those who might be termed the first-line remaindermen."

26
28 Despite the intention of the Uniform Trust Code drafters that the
concept of "qualified beneficiary" be a limiting definition,
under certain circumstances remote contingent distributees will
30 fall within the scope of the definition as it appears in the
Uniform Trust Code. For example, a "dynasty" trust that gives
32 the trustee discretion to distribute income and/or principal
among settlor's descendants, from generation to generation, or a
34 credit shelter/bypass trust that gives the trustee discretion to
distribute income and principal among "my spouse and my
36 descendants" in equal or unequal shares, is likely to have an
ultimate distribution clause leaving the trust assets to one or
38 more charities in the unexpected event that at some time none of
settlor's descendants is living. Under paragraph B, the
40 charitable beneficiaries would be distributees of trust principal
if the interests of the descendants, or spouse and descendants in
42 the case of the credit shelter/bypass trust, all of whom are
permissible distributees described in paragraph A, terminated.
44 The addition of the last sentence makes clear that the charities,
as contingent distributees, do not come within the definition of
46 "qualified beneficiary."

48 Subsection 16. The definition of "state" was modified by
deleting the portion of the definition that stated, "The term

2 includes an Indian tribe or band recognized by federal law or
formally acknowledged by a State."

4 Subsection 19. The phrase "whether or not appointed or confirmed
by a court" has been added to the Uniform Trust Code definition
6 to make it clear that no action by a court is required for a
trustee to assume the trusteeship, unless the terms of the trust
8 require court action.

10 **§104. Knowledge**

12 **1. Person.** Subject to subsection 2, a person has knowledge
14 of a fact if the person:

16 **A. Has actual knowledge of it;**

18 **B. Has received a notice or notification of it; or**

20 **C. From all the facts and circumstances known to the person
at the time in question, has reason to know it.**

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

38 **UNIFORM COMMENT**

40 This section specifies when a person is deemed to know a fact.
42 Subsection (a) states the general rule. Subsection (b) provides a
special rule dealing with notice to organizations. Pursuant to
44 subsection (a), a fact is known to a person if the person had
actual knowledge of the fact, received notification of it, or had
46 reason to know of the fact's existence based on all of the
circumstances and other facts known to the person at the time.
48 Under subsection (b), notice to an organization is not
necessarily achieved by giving notice to a branch office. Nor
50 does the organization necessarily acquire knowledge at the moment

2 the notice arrives in the organization's mailroom. Rather, the
3 organization has notice or knowledge of a fact only when the
4 information is received by an employee having responsibility to
5 act for the trust, or would have been brought to the employee's
6 attention had the organization exercised reasonable diligence.

7 "Know" is used in its defined sense in Sections 109 (methods and
8 waiver of notice), 305 (appointment of representative), 604(b)
9 (limitation on contest of revocable trust), 812 (collecting trust
10 property), 1009 (nonliability of trustee upon beneficiary's
11 consent, release, or ratification), and 1012 (protection of
12 person dealing with trustee). But as to certain actions, a person
13 is charged with knowledge of facts the person would have
14 discovered upon reasonable inquiry. See Section 1005 (limitation
15 of action against trustee following report of trustee).

16 This section is based on Uniform Commercial Code Section 1-202
17 (2000 Annual Meeting Draft).

18
19
20 **§105. Default and mandatory rules**

21
22 1. Code governs. Except as otherwise provided in the terms
23 of the trust, this Code governs the duties and powers of a
24 trustee, relations among trustees and the rights and interests of
25 a beneficiary.

26
27 2. Terms prevail; exceptions. The terms of a trust prevail
28 over any provision of this Code except:

29
30 A. The requirements for creating a trust;

31
32 B. The duty of a trustee to act in good faith and in
33 accordance with the purposes of the trust;

34
35 C. The requirement that a trust and its terms be for the
36 benefit of its beneficiaries and that the trust have a
37 purpose that is lawful, not contrary to public policy and
38 possible to achieve;

39
40 D. The power of the court to modify or terminate a trust
41 under sections 410 to 416;

42
43 E. The effect of a spendthrift provision and the rights of
44 certain creditors and assignees to reach a trust as provided
45 in chapter 5;

46
47 F. The power of the court under section 702 to require,
48 dispense with, modify or terminate a bond;

49
50

2 G. The power of the court under section 708, subsection 2
3 to adjust a trustee's compensation specified in the terms of
4 the trust that is unreasonably low or high;

6 H. The duty under section 813, subsection 2, paragraphs B
7 and C to notify qualified beneficiaries of an irrevocable
8 trust who have attained 25 years of age of the existence of
9 the trust, of the identity of the trustee and of their right
10 to request trustee's reports;

12 I. The duty under section 813, subsection 1 to respond to
13 the request of a qualified beneficiary of an irrevocable
14 trust for trustee's reports and other information reasonably
15 related to the administration of a trust;

16 J. The effect of an exculpatory term under section 1008;

18 K. The rights under sections 1010 to 1013 of a person other
19 than a trustee or beneficiary;

20 L. Periods of limitation for commencing a judicial
21 proceeding;

24 M. The power of the court to take such action and exercise
25 such jurisdiction as may be necessary in the interests of
26 justice; and

28 N. The subject matter jurisdiction of the court and venue
29 for commencing a proceeding as provided in sections 203 and
30 204.

32 **UNIFORM COMMENT**

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

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

48 Subsection (b)(1) confirms that the requirements for a trust's
49 creation, such as the necessary level of capacity and the
50 requirement that a trust have a legal purpose, are controlled by

2 statute and common law, not by the settlor. For the requirements
3 for creating a trust, see Sections 401-409. Subsection (b)(12)
4 makes clear that the settlor may not reduce any otherwise
5 applicable period of limitations for commencing a judicial
6 proceeding. See Sections 604 (period of limitations for
7 contesting validity of revocable trust), and 1005 (period of
8 limitation on action for breach of trust). Similarly, a settlor
9 may not so negate the responsibilities of a trustee that the
10 trustee would no longer be acting in a fiduciary capacity.
11 Subsection (b)(2) provides that the terms may not eliminate a
12 trustee's duty to act in good faith and in accordance with the
13 purposes of the trust. Subsection (b)(3) provides that the terms
14 may not eliminate the requirement that a trust and its terms must
15 be for the benefit of the beneficiaries. Subsection (b)(3) also
16 provides that the terms may not eliminate the requirement that
17 the trust have a purpose that is lawful, not contrary to public
18 policy, and possible to achieve. Subsections (b)(2)-(3) are
19 echoed in Sections 404 (trust and its terms must be for benefit
20 of beneficiaries; trust must have a purpose that is lawful, not
21 contrary to public policy, and possible to achieve), 801 (trustee
22 must administer trust in good faith, in accordance with its terms
23 and purposes and the interests of the beneficiaries), 802(a)
24 (trustee must administer trust solely in interests of the
25 beneficiaries), 814 (trustee must exercise discretionary power in
26 good faith and in accordance with its terms and purposes and the
27 interests of the beneficiaries), and 1008 (exculpatory term
28 unenforceable to extent it relieves trustee of liability for
29 breach of trust committed in bad faith or with reckless
30 indifference to the purposes of the trust and the interests of
the beneficiaries).

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

48 Section 813 imposes a general obligation to keep the
49 beneficiaries informed as well as several specific notice
50 requirements. Subsections (b)(8) and (b)(9) specify limits on the

2 settlor's ability to waive these information requirements. With
3 respect to beneficiaries age 25 or older, a settlor may dispense
4 with all of the requirements of Section 813 except for the duties
5 to inform the beneficiaries of the existence of the trust, of the
6 identity of the trustee, and to provide a beneficiary upon
7 request with such reports as the trustee may have prepared. Among
8 the specific requirements that a settlor may waive include the
9 duty to provide a beneficiary upon request with a copy of the
10 trust instrument (Section 813(b)(1)), and the requirement that
11 the trustee provide annual reports to the qualified beneficiaries
12 (Section 813(c)). The furnishing of a copy of the entire trust
13 instrument and preparation of annual reports may be required in a
14 particular case, however, if such information is requested by a
15 beneficiary and is reasonably related to the trust's
16 administration.

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

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

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

45 Neither subsection (b)(8) nor (b)(9) apply to revocable trusts.
46 The settlor of a revocable trust may waive all reporting to the
47 beneficiaries, even in the event the settlor loses capacity. If
48

2 the settlor is silent about the subject, reporting to the
beneficiaries will be required upon the settlor's loss of
capacity. See Section 603.

4
6 In conformity with traditional doctrine, the Uniform Trust Code
limits the ability of a settlor to exculpate a trustee from
liability for breach of trust. The limits are specified in
8 Section 1008. Subsection (b)(10) of this section provides a
cross-reference. Similarly, subsection (b)(7) provides a
10 cross-reference to Section 708(b), which limits the binding
effect of a provision specifying the trustee's compensation.

12
14 Finally, subsection (b)(11) clarifies that a settlor is not free
to limit the rights of third persons, such as purchasers of trust
property. Subsection (b)(5) clarifies that a settlor may not
16 restrict the rights of a beneficiary's creditors except to the
extent a spendthrift restriction is allowed as provided in
18 Article 5.

20 2001 Amendment. By amendment in 2001, subsections (b) (3), (8)
and (9) were revised to read as above. The language in subsection
22 (b)(3) "that the trust have a purpose that is lawful, not
contrary to public policy, and possible to achieve" is new. This
24 addition clarifies that the settlor may not waive this common law
requirement, which is codified in the Code at Section 404.

26 Subsections (b)(8) and (9) formerly provided:

28 (8) the duty to notify the qualified beneficiaries of an
irrevocable trust who have attained 25 years of age of the
30 existence of the trust, and of their right to request trustee's
reports and other information reasonably related to the
32 administration of the trust;

34 (9) the duty to respond to the request of a beneficiary of an
irrevocable trust for trustee's reports and other information
reasonably related to the administration of a trust.

36
38 The amendment clarifies that the information requirements not
subject to waiver are requirements specified in Section 813 of
the Code.

40
42 **MAINE COMMENT**

44 Section 105, subsection 2, paragraph I has been changed by adding
the word "qualified" before "beneficiary." The change is
46 consistent with section 813, subsection 1, which, as adopted in
Maine, requires that a trustee respond to a "qualified
48 beneficiary's" request for trustee's reports and other
information reasonably related to the administration of a trust.

2 Notwithstanding the trustee's duty under section 813, subsection
3 2, paragraphs B and C to provide qualified beneficiaries with
4 notice of certain information about the trust, under section 105,
5 subsection 2, paragraph H a settlor may, by the terms of the
6 trust, prohibit the trustee from notifying a qualified
7 beneficiary who has not yet attained 25 years of age, of the
8 existence of the trust, of the identity of the trustee and of the
9 qualified beneficiary's right to request trustee reports.
10 However, the settlor may not prohibit a trustee from providing
11 such notice to a qualified beneficiary who has attained 25 years
12 of age. In other words, once a qualified beneficiary has
13 attained 25 years of age, that beneficiary may no longer be kept
14 in the dark about the existence of the trust, despite the
15 settlor's desire to the contrary.

16 The Uniform Trust Code has a hierarchy of rights built into its
17 provisions relating to notifying various beneficiaries of
18 information about a trust:

- 20 i. Some classes of beneficiaries have a right to
21 information whether they request it or not; e.g., under
22 section 813, subsection 3 distributees or permissible
23 distributees of trust income or principal have a right
24 to receive annual reports without request.
- 26 ii. Other beneficiaries have a right to be affirmatively
27 told of their right to request information; e.g., under
28 section 813, subsection 2, paragraph C qualified
29 beneficiaries have to be informed of their right to
30 request a copy of the trust instrument and of trustee's
31 reports.
- 32 iii. Nonqualified beneficiaries have a right to obtain a
33 copy of the trust instrument only if they request a
34 copy, but a trustee is under no affirmative obligation
35 to inform them of the existence of the trust or of
36 their right to request a copy; the nonqualified
37 beneficiaries are on their own to learn of the
38 existence of the trust. See section 813, subsection 2,
39 paragraph A.

42 Section 105 permits the settlor, by the terms of the trust, to
43 alter the beneficiaries' rights and trustee's duties under
44 section 813, except as specified in section 105, subsection 2,
45 paragraphs H and I.

48 §106. Common law of trusts; principles of equity

2 The common law of trusts and principles of equity supplement
3 this Code, except to the extent modified by this Code or another
4 statute of this State.

6 **UNIFORM COMMENT**

8 The Uniform Trust Code codifies those portions of the law of
9 express trusts that are most amenable to codification. The Code
10 is supplemented by the common law of trusts, including principles
11 of equity, particularly as articulated in the Restatement of
12 Trusts, Restatement (Third) of Property: Wills and Other Donative
13 Transfers, and the Restatement of Restitution. The common law of
14 trusts is not static but includes the contemporary and evolving
15 rules of decision developed by the courts in exercise of their
16 power to adapt the law to new situations and changing conditions.
17 It also includes the traditional and broad equitable jurisdiction
18 of the court, which the Code in no way restricts.

19 The statutory text of the Uniform Trust Code is also supplemented
20 by these comments, which, like the comments to any Uniform Act,
21 may be relied on as a guide for interpretation. See *Acierno v.*
22 *Worthy Bros. Pipeline Corp.*, 656 A.2d 1085, 1090 (Del. 1995)
23 (interpreting Uniform Commercial Code); *Yale University v.*
24 *Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting
25 Uniform Management of Institutional Funds Act); 2 *Norman Singer*,
26 *Statutory Construction Section 52.05* (6th ed. 2000); *Jack Davies*,
27 *Legislative Law and Process in a Nutshell Section 55-4* (2d ed.
28 1986).

30 **§107. Governing law**

32 The meaning and effect of the terms of a trust are
34 determined by:

36 1. Law of jurisdiction designated; exception. The law of
37 the jurisdiction designated in the terms unless the designation
38 of that jurisdiction's law is contrary to a strong public policy
39 of the jurisdiction having the most significant relationship to
40 the matter at issue; or

42 2. Law of jurisdiction with most significant relationship.
43 In the absence of a controlling designation in the terms of the
44 trust, the law of the jurisdiction having the most significant
45 relationship to the matter at issue.

46 **UNIFORM COMMENT**

48 This section provides rules for determining the law that will
50 govern the meaning and effect of particular trust terms. The law

2 to apply to determine whether a trust has been validly created is
determined under Section 403.

4 Paragraph (1) allows a settlor to select the law that will govern
the meaning and effect of the terms of the trust. The
6 jurisdiction selected need not have any other connection to the
trust. The settlor is free to select the governing law regardless
8 of where the trust property may be physically located, whether it
consists of real or personal property, and whether the trust was
10 created by will or during the settlor's lifetime. This section
does not attempt to specify the strong public policies sufficient
12 to invalidate a settlor's choice of governing law. These public
policies will vary depending upon the locale and may change over
14 time.

16 Paragraph (2) provides a rule for trusts without governing law
provisions - the meaning and effect of the trust's terms are to
18 be determined by the law of the jurisdiction having the most
significant relationship to the matter at issue. Factors to
20 consider in determining the governing law include the place of
the trust's creation, the location of the trust property, and the
22 domicile of the settlor, the trustee, and the beneficiaries. See
Restatement (Second) of Conflict of Laws Sections 270 cmt. c and
24 272 cmt. d (1971). Other more general factors that may be
pertinent in particular cases include the relevant policies of
26 the forum, the relevant policies of other interested
jurisdictions and degree of their interest, the protection of
28 justified expectations and certainty, and predictability and
uniformity of result. See Restatement (Second) of Conflict of
30 Laws Section 6 (1971). Usually, the law of the trust's principal
place of administration will govern administrative matters and
32 the law of the place having the most significant relationship to
the trust's creation will govern the dispositive provisions.

34 This section is consistent with and was partially patterned on
36 the Hague Convention on the Law Applicable to Trusts and on their
Recognition, signed on July 1, 1985. Like this section, the Hague
38 Convention allows the settlor to designate the governing law.
Hague Convention art. 6. Absent a designation, the Convention
40 provides that the trust is to be governed by the law of the place
having the closest connection to the trust. Hague Convention art.
42 7. The Convention also lists particular public policies for which
the forum may decide to override the choice of law that would
44 otherwise apply. These policies are protection of minors and
incapable parties, personal and proprietary effects of marriage,
46 succession rights, transfer of title and security interests in
property, protection of creditors in matters of insolvency, and,
48 more generally, protection of third parties acting in good faith.
Hague Convention art. 15.

50

For the authority of a settlor to designate a trust's principal place of administration, see Section 108(a).

§108. Principal place of administration

1. Terms of trust controlling. Without precluding other means for establishing a sufficient connection with the designated jurisdiction, terms of a trust designating the principal place of administration are valid and controlling if:

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

B. All or part of the administration occurs in the designated jurisdiction.

2. Duty of trustee. 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.

3. Transfer of place of administration. Without precluding the right of the court to order, approve or disapprove a transfer, the trustee, in furtherance of the duty prescribed by subsection 2, may transfer the trust's principal place of administration to another state or to a jurisdiction outside of the United States.

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

A. The name of the jurisdiction to which the principal place of administration is to be transferred;

B. The address and telephone number at the new location at which the trustee can be contacted;

C. An explanation of the reasons for the proposed transfer;

D. The date on which the proposed transfer is anticipated to occur; and

E. The date, which may not be less than 60 days after the giving of the notice, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.

2 5. Objection to transfer. The authority of a trustee under
3 this section to transfer a trust's principal place of
4 administration terminates if a qualified beneficiary notifies the
5 trustee of an objection to the proposed transfer on or before the
6 date specified in the notice.

7
8 6. Transfer property to successor trustee. In connection
9 with a transfer of the trust's principal place of administration,
10 the trustee may transfer some or all of the trust property to a
11 successor trustee designated in the terms of the trust or
12 appointed pursuant to section 704.

13
14 **UNIFORM COMMENT**

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

22
23 Because of the difficult and variable situations sometimes
24 involved, the Uniform Trust Code does not attempt to further
25 define principal place of administration. A trust's principal
26 place of administration ordinarily will be the place where the
27 trustee is located. Determining the principal place of
28 administration becomes more difficult, however, when cotrustees
29 are located in different states or when a single institutional
30 trustee has trust operations in more than one state. In such
31 cases, other factors may become relevant, including the place
32 where the trust records are kept or trust assets held, or in the
33 case of an institutional trustee, the place where the trust
34 officer responsible for supervising the account is located.

35
36 A concept akin to principal place of administration is used by
37 the Office of the Comptroller of the Currency. Reserves that
38 national banks are required to deposit with state authorities is
39 based on the location of the office where trust assets are
40 primarily administered. See 12 C.F.R. Section 9.14(b).

41
42 Under the Uniform Trust Code, the fixing of a trust's principal
43 place of administration will determine where the trustee and
44 beneficiaries have consented to suit (Section 202), and the rules
45 for locating venue within a particular state (Section 204). It
46 may also be considered by a court in another jurisdiction in
47 determining whether it has jurisdiction, and if so, whether it is
48 a convenient forum.

50

2 A settlor expecting to name a trustee or cotrustees with
significant contacts in more than one state may eliminate
4 possible uncertainty about the location of the trust's principal
place of administration by specifying the jurisdiction in the
6 terms of the trust. Under subsection (a), a designation in the
terms of the trust is controlling if (1) a trustee is a resident
8 of or has its principal place of business in the designated
jurisdiction, or (2) all or part of the administration occurs in
10 the designated jurisdiction. Designating the principal place of
administration should be distinguished from designating the law
12 to determine the meaning and effect of the trust's terms, as
authorized by Section 107. A settlor is free to designate one
14 jurisdiction as the principal place of administration and another
to govern the meaning and effect of the trust's provisions.

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

26 Subsections (c)-(f) provide a procedure for changing the
principal place of administration to another state or country.
28 Such changes are often beneficial. A change may be desirable to
secure a lower state income tax rate, or because of relocation of
30 the trustee or beneficiaries, the appointment of a new trustee,
or a change in the location of the trust investments. The
32 procedure for transfer specified in this section applies only in
the absence of a contrary provision in the terms of the trust.
34 See Section 105. To facilitate transfer in the typical case,
where all concur that a transfer is either desirable or is at
36 least not harmful, a transfer can be accomplished without court
approval unless a qualified beneficiary objects. To allow the
38 qualified beneficiaries sufficient time to review a proposed
transfer, the trustee must give the qualified beneficiaries at
40 least 60 days prior notice of the transfer. Notice must be given
not only to qualified beneficiaries as defined in Section 103(12)
42 but also to those granted the rights of qualified beneficiaries
under Section 110. To assure that those receiving notice have
44 sufficient information upon which to make a decision, minimum
contents of the notice are specified. If a qualified beneficiary
46 objects, a trustee wishing to proceed with the transfer must seek
48 court approval.

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

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

22 **§109. Methods and waiver of notice**

24 **1. Manner.** Notice to a person under this Code or the
26 sending of a document to a person under this Code must be
accomplished in a manner reasonably suitable under the
28 circumstances and likely to result in receipt of the notice or
document. Permissible methods of notice or for sending a document
30 include first-class mail, personal delivery, delivery to the
person's last known place of residence or place of business or a
32 properly directed electronic message.

34 **2. Notice not required.** Notice otherwise required under
this Code or a document otherwise required to be sent under this
36 Code need not be provided to a person whose identity or location
is unknown to and not reasonably ascertainable by the trustee.

38 **3. Waiver.** Notice under this Code or the sending of a
40 document under this Code may be waived by the person to be
notified or sent the document.

42 **4. Notice of judicial proceeding.** Notice of a judicial
44 proceeding must be given as provided in the applicable Maine
Rules of Civil Procedure.

46
48 UNIFORM COMMENT

2 Subsection (a) clarifies that notices under the Uniform Trust
Code may be given by any method likely to result in its receipt
4 by the person to be notified. The specific methods listed in the
subsection are illustrative, not exhaustive. Subsection (b)
6 relieves a trustee of responsibility for what would otherwise be
an impossible task, the giving of notice to a person whose
8 identity or location is unknown and not reasonably ascertainable
by the trustee. The section does not define when a notice is
10 deemed to have been sent or delivered or person deemed to be
unknown or not reasonably ascertainable, the drafters preferring
12 to leave this issue to the enacting jurisdiction's rules of civil
procedure.

14 Under the Uniform Trust Code, certain actions can be taken upon
unanimous consent of the beneficiaries or qualified
16 beneficiaries. See Sections 411 (termination of noncharitable
irrevocable trust) and 704 (appointment of successor trustee).
18 Subsection (b) of this section only authorizes waiver of notice.
A consent required from a beneficiary in order to achieve
20 unanimity is not waived because the beneficiary is missing. But
the fact a beneficiary cannot be located may be a sufficient
22 basis for a substitute consent to be given by another person on
the beneficiary's behalf under the representation principles of
24 Article 3.

26 To facilitate administration, subsection (c) allows waiver of
notice by the person to be notified or sent the document. Among
28 the notices and documents to which this subsection can be applied
are notice of a proposed transfer of principal place of
30 administration (Section 108(d)) or of a trustee's report (Section
813(c)). This subsection also applies to notice to qualified
32 beneficiaries of a proposed trust combination or division
(Section 417), of a temporary assumption of duties without
34 accepting trusteeship (Section 701(c)(1)), and of a trustee's
resignation (Section 705(a)(1)).

36 Notices under the Uniform Trust Code are nonjudicial. Pursuant to
38 subsection (d), notice of a judicial proceeding must be given as
provided in the applicable rules of civil procedure.

40
42 **§110. Others treated as qualified beneficiaries**

44 **1. Charitable organization or person to enforce trust. A**
charitable organization expressly designated to receive
46 **distributions under the terms of a charitable trust or a person**
appointed to enforce a trust created for the care of an animal or
48 **another noncharitable purpose as provided in section 408 or 409**
has the rights of a qualified beneficiary under this Code.

2 2. Attorney General. The Attorney General has the rights
3 of a qualified beneficiary with respect to a charitable trust
4 having its principal place of administration in this State.

6 **UNIFORM COMMENT**

8
9 Under the Uniform Trust Code, certain notices need be given only
10 to the "qualified" beneficiaries. For the definition of
11 "qualified beneficiary," see Section 103(12). Among these notices
12 are notice of a transfer of the trust's principal place of
13 administration (Section 108(d)), notice of a trust division or
14 combination (Section 417), notice of a trustee resignation
15 (Section 705(a)(1)), and notice of a trustee's annual report
16 (Section 813(c)). Subsection (a) of this section authorizes other
17 beneficiaries to receive one or more of these notices by filing a
18 request for notice with the trustee.

19
20 Under the Code, certain actions, such as the appointment of a
21 successor trustee, can be accomplished by the consent of the
22 qualified beneficiaries. See, e.g., Section 704 (filling vacancy
23 in trusteeship). Subsection (a) only addresses notice, not
24 required consent. A person who requests notice under subsection
25 (a) does not thereby acquire a right to participate in actions
26 that can be taken only upon consent of the qualified
27 beneficiaries.

28
29 Charitable trusts do not have beneficiaries in the usual sense.
30 However, certain persons, while not technically beneficiaries, do
31 have an interest in seeing that the trust is enforced. In the
32 case of a charitable trust, this includes the state's attorney
33 general and charitable organizations expressly designated to
34 receive distributions under the terms of the trust, who under
35 subsections (b)-(c) are granted the rights of qualified
36 beneficiaries. Because the charitable organization must be named
37 in the terms of the trust and must be designated to receive
38 distributions, excluded are organizations who may receive
39 distributions only in the trustee's discretion and organizations
40 holding remainder interests subject to a contingency.

41
42 Subsection (b) similarly grants the rights of qualified
43 beneficiaries to persons appointed by the terms of the trust or
44 by the court to enforce a trust created for an animal or other
45 trust with a valid purpose but no ascertainable beneficiary. For
46 the requirements for creating such trusts, see Sections 408 and
47 409.

48

2 "Attorney general" is placed in brackets in subsection (c) to
accommodate jurisdictions which grant enforcement authority over
4 charitable trusts to another designated official.

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

10 2001 Amendment. By amendment in 2001, "charitable organization
expressly designated to receive distributions" was substituted
for "charitable organization expressly entitled to receive
12 benefits" in subsection (b). The amendment conforms the language
of this section to terminology used elsewhere in the Code.
14

16 **MAINE COMMENT**

18 Maine has deleted the Uniform Trust Code's subsection (a), which
stated:

20 Whenever notice to qualified beneficiaries of a trust is
22 required under the Uniform Trust Code, the trustee must also
give notice to any other beneficiary who has sent the
24 trustee a request for notice.

26 Uniform Trust Code subsections (b) and (c) have been renumbered 1
and 2, respectively, in the Maine version. The Uniform Comments,
28 referring to subparagraphs (a), (b) and (c), refer to the Uniform
Trust Code subsections before they have been renumbered in the
30 Maine version and should therefore be read accordingly.

32 The purpose of this section is to expand the class of persons who
are treated as a "qualified beneficiary" as defined in Uniform
34 Trust Code, section 103, subsection 12. The "qualified
beneficiary" concept of the uniform code is used to narrowly
36 define the class of beneficiaries who are entitled to notice of
certain matters related to the trust. See the Uniform Comments
38 under this section for further explanation.

40 The notice required to be given to qualified beneficiaries under
the Uniform Trust Code should not be confused with the notice
42 requirements of the Probate Code, section 1-401, which requires
that notice of a proceeding or hearing be given to any interested
44 person. The term "interested person" is a defined term under the
Probate Code, section 1-201, subsection (20) and defines a more
46 expansive group of persons than does the term "qualified
beneficiary." The provisions of the Probate Code, section 1-401
48 are limited to notice of a proceeding or hearing, i.e., a matter
involving the court. Note that the term "proceeding" is defined

2 in the Probate Code, section 1-201, subsection (32) as "including
any civil action in any court of competent jurisdiction."

4 This section is not intended to limit or affect the Attorney
General's authority to enforce charitable trusts under the common
6 law or Title 5, section 194.

8
10 **§111. Nonjudicial settlement agreements**

12 **1. Interested persons defined.** For purposes of this
section, "interested persons" means persons whose consent would
14 be required in order to achieve a binding settlement were the
settlement to be approved by the court.

16 **2. Binding nonjudicial settlement agreement.** Except as
otherwise provided in subsection 3, interested persons may enter
18 into a binding nonjudicial settlement agreement with respect to
any matter involving a trust.

20 **3. Validity of nonjudicial settlement agreement.** A
nonjudicial settlement agreement is valid only to the extent it
22 does not violate a material purpose of the trust and includes
24 terms and conditions that could be properly approved by the court
under this Code or other applicable law.

26 **4. Matters of nonjudicial settlement agreement.** Matters
that may be resolved by a nonjudicial settlement agreement
28 include:

30 **A. The interpretation or construction of the terms of the**
32 **trust;**

34 **B. The approval of a trustee's report or accounting;**

36 **C. Direction to a trustee to refrain from performing a**
38 **particular act or the grant to a trustee of any necessary or**
desirable power;

40 **D. The resignation or appointment of a trustee and the**
determination of a trustee's compensation;

42 **E. Transfer of a trust's principal place of administration;**
44 **and**

46 **F. Liability of a trustee for an action relating to the**
48 **trust.**

50 **5. Court approval.** Any interested person may request the
court to approve a nonjudicial settlement agreement, to determine

2 whether the representation as provided in chapter 3 was adequate
3 and to determine whether the agreement contains terms and
4 conditions the court could have properly approved.

6 **UNIFORM COMMENT**

8
10 While the Uniform Trust Code recognizes that a court may
11 intervene in the administration of a trust to the extent its
12 jurisdiction is invoked by interested persons or otherwise
13 provided by law (see Section 201(a)), resolution of disputes by
14 nonjudicial means is encouraged. This section facilitates the
15 making of such agreements by giving them the same effect as if
16 approved by the court. To achieve such certainty, however,
17 subsection (c) requires that the nonjudicial settlement must
18 contain terms and conditions that a court could properly approve.
19 Under this section, a nonjudicial settlement cannot be used to
20 produce a result not authorized by law, such as to terminate a
trust in an impermissible manner.

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

34
36 Subsection (d) is a nonexclusive list of matters to which a
37 nonjudicial settlement may pertain. Other matters which may be
38 made the subject of a nonjudicial settlement are listed in the
39 Article 3 General comment. The fact that the trustee and
40 beneficiaries may resolve a matter nonjudicially does not mean
41 that beneficiary approval is required. For example, a trustee may
42 resign pursuant to Section 705 solely by giving notice to the
43 qualified beneficiaries, a living settlor, and any cotrustees.
44 But a nonjudicial settlement between the trustee and
45 beneficiaries will frequently prove helpful in working out the
46 terms of the resignation.

48 Because of the great variety of matters to which a nonjudicial
49 settlement may be applied, this section does not attempt to
50 precisely define the "interested persons" whose consent is
required to obtain a binding settlement as provided in subsection

2 (a). However, the consent of the trustee would ordinarily be
required to obtain a binding settlement with respect to matters
4 involving a trustee's administration, such as approval of a
trustee's report or resignation.

6
8 **§112. Rules of construction**

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

14
16 **UNIFORM COMMENT**

18 This section is patterned after Restatement (Third) of Trusts
Section 25(2) and comment e (Tentative Draft No. 1, approved
20 1996), although this section, unlike the Restatement, also
applies to irrevocable trusts. The revocable trust is used
22 primarily as a will substitute, with its key provision being the
determination of the persons to receive the trust property upon
24 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
26 individual has chosen a will or revocable trust as the
individual's primary estate planning instrument. Over the years,
28 the legislatures of the States and the courts have developed a
series of rules of construction reflecting the legislative or
30 judicial understanding of how the average testator would wish to
dispose of property in cases where the will is silent or
32 insufficiently clear. Few legislatures have yet to extend these
rules of construction to revocable trusts, and even fewer to
34 irrevocable trusts, although a number of courts have done so as a
matter of judicial construction. See Restatement (Third) of
36 Trusts Section 25, Reporter's Notes to cmt. d and e (Tentative
Draft No. 1, approved 1996).

38 Because of the wide variation among the States on the rules of
40 construction applicable to wills, this Code does not attempt to
prescribe the exact rules to be applied to trusts but instead
42 adopts the philosophy of the Restatement that the rules
applicable to trusts ought to be the same, whatever those rules
44 might be.

46 Rules of construction are not the same as constructional
preferences. A constructional preference is general in nature,
48 providing general guidance for resolving a wide variety of
ambiguities. An example is a preference for a construction that
50 results in a complete disposition and avoid illegality. Rules of

2 construction, on the other hand, are specific in nature,
3 providing guidance for resolving specific situations or
4 construing specific terms. Unlike a constructional preference, a
5 rule of construction, when applicable, can lead to only one
6 result. See Restatement (Third) of Property: Donative Transfers
7 Section 11.3 and cmt. b (Tentative Draft No. 1, approved 1995).

8 Rules of construction attribute intention to individual donors
9 based on assumptions of common intention. Rules of construction
10 are found both in enacted statutes and in judicial decisions.
11 Rules of construction can involve the meaning to be given to
12 particular language in the document, such as the meaning to be
13 given to "heirs" or "issue." Rules of construction also address
14 situations the donor failed to anticipate. These include the
15 failure to anticipate the predecease of a beneficiary or to
16 specify the source from which expenses are to be paid. Rules of
17 construction can also concern assumptions as to how a donor would
18 have revised donative documents in light of certain events
19 occurring after execution. These include rules dealing with the
20 effect of a divorce and whether a specific devisee will receive a
21 substitute gift if the subject matter of the devise is disposed
22 of during the testator's lifetime.

24 Instead of enacting this section, a jurisdiction enacting this
25 Code may wish to enact detailed rules on the construction of
26 trusts, either in addition to its rules on the construction of
27 wills or as part of one comprehensive statute applicable to both
28 wills and trusts. For this reason and to encourage this
29 alternative, the section has been made optional. For possible
30 models, see Uniform Probate Code, Article 2, Parts 7 and 8, which
31 was added to the UPC in 1990, and California Probate Code
32 Sections 21101-21630, enacted in 1994.

34
35 **CHAPTER 2**

36
37 **JUDICIAL PROCEEDINGS**

38
39 **UNIFORM GENERAL COMMENT**

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

48 Section 201 makes clear that the jurisdiction of the court is
49 available as invoked by interested persons or as otherwise
50

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. Section 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. Sections 203 and 204 are optional, bracketed provisions relating to subject-matter jurisdiction and venue.

§201. Role of court in administration of trust

1. Intervention. 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.

2. Continuing judicial supervision. A trust is not subject to continuing judicial supervision unless ordered by the court.

3. Matter involving trust's administration. 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.

UNIFORM COMMENT

While the Uniform Trust Code encourages the resolution of disputes without resort to the courts by providing such options as the nonjudicial settlement authorized by Section 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 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

2 ordinarily instruct trustees on how to exercise discretion,
3 however. See Restatement (Second) of Trusts Section 187, 259
4 (1959). This section does not limit the court's equity
5 jurisdiction. Beyond mentioning petitions for instructions and
6 actions to declare rights, subsection (c) does not attempt to
7 list the types of judicial proceedings involving trust
8 administration that might be brought by a trustee or beneficiary.
9 Such an effort is made in California Probate Code Section 17200.
10 Excluding matters not germane to the Uniform Trust Code, the
11 California statute lists the following as items relating to the
12 "internal affairs" of a trust: determining questions of
13 construction; determining the existence or nonexistence of any
14 immunity, power, privilege, duty, or right; determining the
15 validity of a trust provision; ascertaining beneficiaries and
16 determining to whom property will pass upon final or partial
17 termination of the trust; settling accounts and passing upon the
18 acts of a trustee, including the exercise of discretionary
19 powers; instructing the trustee; compelling the trustee to report
20 information about the trust or account to the beneficiary;
21 granting powers to the trustee; fixing or allowing payment of the
22 trustee's compensation or reviewing the reasonableness of the
23 compensation; appointing or removing a trustee; accepting the
24 resignation of a trustee; compelling redress of a breach of trust
25 by any available remedy; approving or directing the modification
26 or termination of a trust; approving or directing the combination
27 or division of trusts; and authorizing or directing transfer of a
28 trust or trust property to or from another jurisdiction.

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MAINE COMMENT

32 This section supercedes the Probate Code, section 7-201, which
33 resembled California practice of describing the actions over
34 which the court has jurisdiction.

36

§202. Jurisdiction over trustee and beneficiary

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39 1. Trustee. By accepting the trusteeship of a trust having
40 its principal place of administration in this State or by moving
41 the principal place of administration to this State, the trustee
42 submits personally to the jurisdiction of the courts of this
43 State regarding any matter involving the trust.

44

45 2. Beneficiaries; recipients. With respect to their
46 interests in the trust, the beneficiaries of a trust having its
47 principal place of administration in this State are subject to
48 the jurisdiction of the courts of this State regarding any matter
involving the trust. By accepting a distribution from such a

2 trust, the recipient submits personally to the jurisdiction of
3 the courts of this State regarding any matter involving the trust.

4 3. Not exclusive. This section does not preclude other
5 methods of obtaining jurisdiction over a trustee, beneficiary or
6 other person receiving property from the trust.

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9
10 **UNIFORM COMMENT**

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

18
19 It also seems reasonable to require beneficiaries to go to the
20 seat of the trust when litigation has been instituted there
21 concerning a trust in which they claim beneficial interests, much
22 as the rights of shareholders of a corporation can be determined
23 at a corporate seat. The settlor has indicated a principal place
24 of administration by its selection of a trustee or otherwise, and
25 it is reasonable to subject rights under the trust to the
26 jurisdiction of the Court where the trust is properly
27 administered.

28
29 The jurisdiction conferred over the trustee and beneficiaries by
30 this section does not preclude jurisdiction by courts elsewhere
31 on some other basis. Furthermore, the fact that the courts in a
32 new State acquire jurisdiction under this section following a
33 change in a trust's principal place of administration does not
34 necessarily mean that the courts of the former principal place of
35 administration lose jurisdiction, particularly as to matters
36 involving events occurring prior to the transfer.

37
38 The jurisdiction conferred by this section is limited. Pursuant
39 to subsection (b), until a distribution is made, jurisdiction
40 over a beneficiary is limited to the beneficiary's interests in
41 the trust. Personal jurisdiction over a beneficiary is conferred
42 only upon the making of a distribution. Subsection (b) also gives
43 the court jurisdiction over other recipients of distributions.
44 This would include individuals who receive distributions in the
45 mistaken belief they are beneficiaries.

46
47 For a discussion of jurisdictional issues concerning trusts, see
48 5A Austin W. Scott & William F. Fratcher, The Law of Trusts
49 Sections 556-573 (4th ed. 1989).

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MAINE COMMENT

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This section supercedes the Probate Code, sections 7-103 and 7-104. Section 7-103 addressed the effect of registration upon jurisdiction over the trustee and beneficiary. The procedure for registering trusts has not been included in the Maine Uniform Trust Code because it has been utilized rarely and is thought to no longer serve a necessary or useful purpose.

10

12

§203. Subject matter jurisdiction

14

1. Concurrent jurisdiction. The Probate Court and the Superior Court have concurrent jurisdiction of all proceedings in this State involving a trust.

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2. Alternative dispute resolution not precluded. This section does not preclude judicial or nonjudicial alternative dispute resolution.

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UNIFORM COMMENT

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This section provides a means for distinguishing the jurisdiction of the court having primary jurisdiction for trust matters, whether denominated the probate court, chancery court, or by some other name, from other courts in a State that may on occasion resolve disputes concerning trusts. The section has been placed in brackets because the enacting jurisdiction may already address subject-matter jurisdiction by other statute or court rule. The topic also need not be addressed in States having unified court systems. For an explanation of types of proceedings which may be brought concerning the administration of a trust, see the comment to Section 201.

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MAINE COMMENT

40

This section supercedes the Probate Code, sections 7-201 and 7-204. Section 7-204 in part addressed the effect of registration upon jurisdiction. The effect of registration upon jurisdiction is not addressed in this section because the procedure for registering trusts has not been included in the Maine Uniform Trust Code.

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48

Section 203(a) of the Uniform Trust Code grants exclusive jurisdiction to the Probate Court of proceedings brought by a trustee or beneficiary concerning the administration of a trust.

50

And §203(b) of the Uniform Trust Code grants to the Probate Court

2 concurrent jurisdiction with other courts of other proceedings
involving a trust. **Uniform Trust Code §203 has not been adopted
because it is inconsistent with Maine law.**

4
6 Maine section 203, subsection 1 conforms to the Probate Code,
section 7-201 and Title 4, section 252, which grant to the
8 Probate Court concurrent jurisdiction with the Superior Court of
all matters concerning the internal affairs of trusts.

10 Section 203, subsection 2 was added to confirm that alternative
12 dispute resolution is not precluded.

14 **§204. Venue**

16 1. Trust. Except as otherwise provided in subsection 2,
18 venue for a judicial proceeding involving a trust is in the
20 county of this State in which the trust's principal place of
22 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.

24 2. Appointment of trustee. If a trust has no trustee,
26 venue for a judicial proceeding for the appointment of a trustee
28 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.

30
32 **UNIFORM COMMENT**

34 This optional, bracketed section is made available for
jurisdictions that conclude that venue for a judicial proceeding
36 involving a trust is not adequately addressed in local rules of
civil procedure. For jurisdictions enacting this section, general
38 rules governing venue continue to apply in cases not covered by
this section. This includes most proceedings where jurisdiction
40 over a trust, trust property, or parties to a trust is based on a
factor other than the trust's principal place of administration.
42 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 the enacting State.

44
46 **MAINE COMMENT**

48 This section supercedes the Probate Code, section 7-202, which in
part addressed the effect of registration upon venue. The effect
50 of registration upon venue is not addressed in this section

2 because the procedure for registering trusts has not been
included in the Maine Uniform Trust Code.

4
6 **CHAPTER 3**

8 **REPRESENTATION**

10 **UNIFORM COMMENT**

12 This article deals with representation of beneficiaries, both
14 representation by fiduciaries (personal representatives,
trustees, guardians, and conservators), and what is known as
16 virtual representation. Representation is a topic not adequately
addressed under the trust law of most States. Representation is
18 addressed in the Restatement (First) of Property Sections 180-186
(1936), but the coverage of this article is more complete.

20 Section 301 is the introductory section, laying out the scope of
the article. The representation principles of this article have
22 numerous applications under this Code. The representation
principles of the article apply for purposes of settlement of
24 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.

26 Sections 302-305 cover the different types of representation.
28 Section 302 deals with representation by the holder of a general
testamentary power of appointment. (Revocable trusts and
30 presently exercisable general powers of appointment are covered
by Section 603, which grant the settlor or holder of the power
32 all rights of the beneficiaries or persons whose interests are
subject to the power). Section 303 deals with representation by a
34 fiduciary, whether of an estate, trust, conservatorship, or
guardianship. The section also allows a parent without a conflict
36 of interest to represent and bind a minor or unborn child.
Section 304 is the virtual representation provision. It provides
38 for representation of and the giving of a binding consent by
another person having a substantially identical interest with
40 respect to the particular issue. Section 305 authorizes the court
to appoint a representative to represent the interests of
42 unrepresented persons or persons for whom the court concludes the
other available representation might be inadequate.

44 The provisions of this article are subject to modification in the
46 terms of the trust. See Section 105. Settlers are free to specify
their own methods for providing substituted notice and obtaining
48 substituted consent.

50

§301. Representation; basic effect

2
4 1. Notice. Notice to a person who may represent and bind
6 another person under this chapter has the same effect as if
8 notice were given directly to the other person.

10 2. Consent. The consent of a person who may represent and
12 bind another person under this chapter is binding on the person
14 represented unless the person represented objects to the
16 representation before the consent would otherwise have become
18 effective.

20 3. Notice and consent on settlor's behalf. Except as
22 otherwise provided in sections 411 and 602, a person who under
24 this chapter may represent a settlor who lacks capacity may
26 receive notice and give a binding consent on the settlor's behalf.

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UNIFORM COMMENT

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

Subsection (a) validates substitute notice to a person who may represent and bind another person as provided in the succeeding sections of this article. 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 Section 109(d), 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. For a model statute for the giving of notice in such cases, see Unif. Probate Code Section 1-403(3). Subsection (a) may be used to facilitate the giving of notice to the qualified beneficiaries of a proposed transfer of principal place of administration (Section 108(d)), of a proposed trust combination or division (Section 417), of a temporary assumption of duties without accepting trusteeship (Section 701(c)(1)), of a trustee's resignation (Section 705(a)(1)), and of a trustee's report (Section 813(c)).

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 beneficiaries to modification or termination of a trust, with or without the consent of the settlor (Section 411), agreement of the qualified beneficiaries on appointment of a successor trustee of a noncharitable trust (Section 704(c)(2)), and a beneficiary's consent to or release or affirmance of the actions of a trustee (Section 1009). A consent

2 by a representative bars a later objection by the person
3 represented, but a consent is not binding if the person
4 represented raises an objection prior to the date the consent
5 would otherwise become effective. The possibility that a
6 beneficiary might object to a consent given on the beneficiary's
7 behalf will not be germane in many cases because the person
8 represented will be unborn or unascertained. However, the
9 representation principles of this article will sometimes apply to
10 adult and competent beneficiaries. For example, while the trustee
11 of a revocable trust entitled to a pourover devise has authority
12 under Section 303 to approve the personal representative's
13 account on behalf of the trust beneficiaries, such consent would
14 not be binding on a trust beneficiary who registers an objection.
15 Subsection (b) implements cases such as Barber v. Barber, 837
16 P.2d 714 (Alaska 1992), which held that the a refusal to allow an
17 objection by an adult competent remainder beneficiary violated
18 due process.

19 Subsection (c) implements the policy of Sections 411 and 602
20 requiring express authority in the power of attorney or approval
21 of court before the settlor's agent, conservator or guardian may
22 consent on behalf of the settlor to the termination or revocation
23 of the settlor's revocable trust.

24

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MAINE COMMENT

28 The Probate Code, like the Uniform Trust Code, validates
29 substitute notice to a person who may represent and bind another
30 person. See the Maine Revised Statutes, Title 18-A, section
31 1-403. However, chapter 3 of the Maine Uniform Trust Code
32 significantly broadens the application of Maine's current
33 representation provisions. Maine's current law regarding
34 substitute notice and representation is limited to formal
35 proceedings involving a trust or estate of a decedent, minor,
36 protected person or incapacitated person and in a judicially
37 supervised settlement. Under the Uniform Trust Code,
38 representation provisions can be applied to nonjudicial
39 settlement proceedings, which are broadly defined under Uniform
40 Trust Code, section 111. According to Uniform Trust Code,
41 section 111, parties may enter into nonjudicial settlements
42 concerning any matters relating to trusts. Such agreements can
43 contain any term or condition that a court properly could approve.

44

45 Unlike the Uniform Trust Code, the Maine statute authorizing
46 substitute notice does not explicitly discuss the issue of
47 consent. Former section 7-303 of the Probate Code required
48 trustees to keep trust beneficiaries reasonably informed of the
49 trust administration and former section 7-307 of the Probate Code
50 permits beneficiaries to bring claims against trustees unless

2 otherwise barred by previous consent or an untimely claim. Both
of these sections were repealed in conjunction with the adoption
4 of the Maine Uniform Trust Code.

6 Enactment of the Uniform Trust Code provisions adds specificity
to Maine's former law on representation. Furthermore,
8 codification of the Uniform Trust Code representation provisions
assembles a variety of rules that are not currently codified in
10 one place under Maine's current law.

12 Maine Uniform Trust Code, section 301, subsection 3 implements
the policy of other Uniform Trust Code sections that authorize a
14 settlor's guardian or conservator to modify or terminate the
settlor's trust with court approval. It also extends the
16 authority of courts to modify trusts. See Canal National Bank v.
Old Folks' Home Association of Brunswick et al., 347 A.2d 428,
436 (Me. 1975).

18
20 **§302. Representation by holder of general testamentary power
of appointment**

22
24 To the extent there is no conflict of interest between the
holder of a general testamentary power of appointment and the
26 persons represented with respect to the particular question or
dispute, the holder may represent and bind persons whose
28 interests, as permissible appointees, takers in default or
otherwise, are subject to the power.

30
32 **UNIFORM COMMENT**

34 This section specifies the circumstances under which a holder of
a general testamentary power of appointment may receive notices
36 on behalf of and otherwise represent and bind persons whose
interests are subject to the power, whether as permissible
38 appointees, takers in default, or otherwise. Such representation
is allowed except to the extent there is a conflict of interest
40 with respect to the particular matter or dispute. Typically, the
holder of a general testamentary power of appointment is also a
42 life income beneficiary of the trust, oftentimes of a trust
intended to qualify for the federal estate tax marital deduction.
44 See I.R.C. Section 2056(b)(5). Without the exception for conflict
of interest, the holder of the power could act in a way that
46 could enhance the holder's income interests to the detriment of
the appointees or takers in default, whoever they may be.

48
50 **MAINE COMMENT**

2 The Maine Revised Statutes, Title 18-A, section 1-403, subsection
3 (2), paragraph (i) tracks the language in the Maine Uniform Trust
4 Code, section 302 closely. Both allow the holder of a general
5 testamentary power of appointment to bind and represent persons
6 whose interests are subject to the power. The Maine Uniform
7 Trust Code, however, more explicitly states that such
8 representation is limited to matters and disputes that do not
9 involve conflicts of interest between the representative and the
10 people who are represented.

11 **§303. Representation by fiduciaries and parents**

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

15 1. Conservator. A conservator may represent and bind the
16 estate that the conservator controls;

17 2. Guardian. A guardian may represent and bind the ward if
18 a conservator of the ward's estate has not been appointed;

19 3. Agent. An agent having authority to act with respect to
20 the particular question or dispute may represent and bind the
21 principal;

22 4. Trustee. A trustee may represent and bind the
23 beneficiaries of the trust;

24 5. Personal representative. A personal representative of a
25 decedent's estate may represent and bind persons interested in
26 the estate; and

27 6. Parent. A parent may represent and bind the parent's
28 minor or unborn child if a conservator or guardian for the child
29 has not been appointed.

30 **UNIFORM COMMENT**

31 This section allows for representation of persons by their
32 fiduciaries (conservators, guardians, agents, trustees, and
33 personal representatives), a principle that has long been part of
34 the law. Paragraph (6), which allows parents to represent their
35 children, is more recent, having originated in 1969 upon approval
36 of the Uniform Probate Code. This section is not limited to
37 representation of beneficiaries. It also applies to
38 representation of the settlor. Representation is not available if
39 the fiduciary or parent is in a conflict position with respect to
40 the particular matter or dispute, however. A typical conflict

2 would be where the fiduciary or parent seeking to represent the
beneficiary is either the trustee or holds an adverse beneficial
interest.

4
6 Paragraph (2) authorizes a guardian to bind and represent a ward
if a conservator of the ward's estate has not been appointed.
8 Granting a guardian authority to represent the ward with respect
to interests in the trust can avoid the need to seek appointment
10 of a conservator. This grant of authority to act with respect to
the ward's trust interest may broaden the authority of a guardian
12 in some States although not in States that have adopted the
Section 1-403 of the Uniform Probate Code, from which this
section was derived. Under the Uniform Trust Code, a
14 "conservator" is appointed by the court to manage the ward's
property, a "guardian" to make decisions with respect to the
16 ward's personal affairs. See Section 103.

18 Paragraph (3) authorizes an agent to represent a principal only
to the extent the agent has authority to act with respect to the
20 particular question or dispute. Pursuant to Sections 411 and 602,
an agent may represent a settlor with respect to the amendment,
22 revocation or termination of the trust only to the extent this
authority is expressly granted either in the trust or the power.
24 Otherwise, depending on the particular question or dispute, a
general grant of authority in the power may be sufficient to
26 confer the necessary authority.

28
30 **MAINE COMMENT**

32 For the most part, the Probate Code, section 1-403, subsection
(2), paragraph (ii) tracks the language of the Maine Uniform
Trust Code, section 303. However, the Probate Code, section
34 1-403, subsection (2), paragraph (ii) does not include agents
within the scope of representatives authorized to bind
36 represented individuals. To this extent, section 303 is a
reasonable and logical extension of Maine law.

38
40 **§304. Representation by person having substantially identical
interest**

42 Unless otherwise represented, a minor, an incapacitated or
44 unborn individual or a person whose identity or location is
46 unknown and not reasonably ascertainable may be represented by
48 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 conflict of interest between the
representative and the person represented.

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UNIFORM COMMENT

This section authorizes a person with a substantially identically 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, the drafters preferring to leave this issue to the courts. 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 conflict of interest between the representative and the person represented.

Restatement (First) of Property Sections 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 Section 185 (1936). Evidence of inactivity or lack of skill is material only to the extent it establishes such hostility. Restatement (First) of Property Section 185 cmt. b (1936).

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 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 Section 185 cmt. d (1936).

MAINE COMMENT

2
3 Section 304 extends the doctrine of virtual representation to
4 minors, incapacitated individuals and individuals whose identity
5 or location is unknown and not reasonably ascertainable. Section
6 304 also extends the applicability of virtual representation to
7 nonjudicial settlement proceedings. In light of the increasingly
8 widespread use of trusts that commonly last for decades and
9 frequently benefit minors or incapacitated individuals, the
10 expansion of virtual representation is regarded favorably. The
11 expected result is a reduction in complexity and the time it will
12 take to resolve issues, with similar reduction in trust expenses.

13 Unlike the Probate Code, section 1-403, subsection (2), paragraph
14 (iii), Maine Uniform Trust Code, section 304 does not expressly
15 discuss the adequacy of virtual representation; however, adequate
16 virtual representation is still required by the Maine Uniform
17 Trust Code. Virtual representation will be deemed inapplicable
18 if the represented interest is not sufficiently protected and
19 Maine Uniform Trust Code section 305 authorizes the court to
20 appoint a representative for an individual if the court
21 determines that the representation received by that individual
22 is, or is likely to be, inadequate. The appointed representative
23 may represent an individual in both judicial and nonjudicial
24 settings. It is expected that some showing of inadequate
25 representation or insufficient representation will be required;
26 the court should not reflexively appoint a representative
27 without such a showing.
28

29
30 **§305. Appointment of representative**

31
32 **1. Interest not represented; representation inadequate.** If
33 the court determines that an interest is not represented under
34 this chapter, or that the otherwise available representation
35 might be inadequate, the court may appoint a representative to
36 receive notice, give consent and otherwise represent, bind and
37 act on behalf of a minor, an incapacitated or unborn individual
38 or a person whose identity or location is unknown. A
39 representative may be appointed to represent several persons or
40 interests.

41
42 **2. Scope of representation.** A representative may act on
43 behalf of the individual represented with respect to any matter
44 arising under this Code, whether or not a judicial proceeding
45 concerning the trust is pending.

46
47 **3. Consider general benefit.** In making decisions, a
48 representative may consider general benefit accruing to the
49 living members of the individual's family.
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UNIFORM COMMENT

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. "Representative" is placed in brackets in case the enacting jurisdiction prefers a different term. The court may appoint a representative to act for a person even if the person could be represented under another section of this article.

MAINE COMMENT

Section 305 changes Maine law. It authorizes the court to appoint a "representative" rather than a "guardian ad litem" in cases where the court determines that the interests of an individual are not adequately represented. The representative is authorized to act with respect to nonjudicial settlements and is granted the authority to consider the "general benefit accruing to the living members of the individual's family" when making decisions. Section 305 also expressly authorizes the representative to receive notice and give consent on behalf of the individual who is represented. These powers are not granted expressly in the Probate Code, section 1-403, subsection (4).

CHAPTER 4

**CREATION, VALIDITY, MODIFICATION
AND TERMINATION OF TRUST**

UNIFORM COMMENT

Sections 401 through 409, which specify the requirements for the creation of a trust, largely codify traditional doctrine. Section 401 specifies the methods by which trusts are created, that is, by transfer of property, self-declaration, or exercise of a power of appointment. 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

2 listed in Section 402. Section 403 addresses the validity in the
enacting jurisdiction of trusts created in other jurisdictions. A
4 trust not created by will is validly created if its creation
5 complied with the law of specified jurisdictions in which the
6 settlor or trustee had a significant contact. Section 404 forbids
trusts for illegal or impossible purposes, and requires that a
8 trust and its terms must be for the benefit of its beneficiaries.
Section 405 recites the permitted purposes of a charitable trust.
Section 406 lists some of the grounds for contesting a trust.
10 Section 407 validates oral trusts. The remaining sections address
what are often referred to as "honorary" trusts, although such
12 trusts are valid and enforceable under this Code. Section 408
covers a trust for the care of an animal; Section 409 allows
14 creation of a trust for another noncharitable purpose such as
maintenance of a cemetery lot.

16 Sections 410 through 417 provide a series of interrelated rules
on when a trust may be terminated or modified other than by its
18 express terms. The overall objective of these sections is to
enhance flexibility consistent with the principle that preserving
20 the settlor's intent is paramount. Termination or modification
may be allowed upon beneficiary consent if the court concludes
22 that the trust or a particular provision no longer achieves a
material purpose or if the settlor concurs (Section 411), by the
24 court in response to unanticipated circumstances or due to
ineffective administrative terms (Section 412), or by the court
26 or trustee if continued administration under the trust's existing
terms would be uneconomical (Section 414). A trust may be
28 reformed to correct a mistake of law or fact (Section 415), or
modified to achieve the settlor's tax objectives (Section 416).
Trusts may be combined or divided (Section 417). A trustee or
32 beneficiary has standing to petition the court with respect to a
proposed termination or modification (Section 410).

34 Section 413 codifies and at the same time modifies the doctrine
of cy pres, at least as applied in most states. The Uniform Trust
36 Code authorizes the court to apply cy pres not only if the
original means becomes impossible or unlawful but also if the
38 means become impracticable or wasteful. Section 413 also creates
a presumption of general charitable intent. Upon failure of the
40 settlor's original plan, the court cannot divert the trust
property to a noncharity unless the terms of the trust expressly
42 so provide. Furthermore, absent a contrary provision in the terms
of the trust, limits are placed on when a gift over to a
44 noncharity can take effect upon failure or impracticality of the
original charitable purpose. The gift over is effective only if,
46 when the provision takes effect, the trust property is to revert
to the settlor and the settlor is still living, or fewer than 21
48 years have elapsed since the date of the trust's creation.

50

2 The requirements for a trust's creation, such as the necessary
level of capacity and the requirement that a trust have a legal
4 purpose, are controlled by statute and common law, not by the
settlor. See Section 105(b)(1), (3). Nor may the settlor negate
6 the court's ability to modify or terminate a trust as provided in
Sections 410 through 416. See Section 105(b)(4). However, a
8 settlor is free to restrict or modify the trustee's power to
terminate an uneconomic trust as provided in Sections 414, and
10 the trustee's power to combine and divide trusts as provided in
Section 417.

12 **§401. Methods of creating trust**

14 A trust may be created by:

16 1. Transfer of property. Transfer of property to another
18 person as trustee during the settlor's lifetime or by will or
other disposition taking effect upon the settlor's death;

20 2. Declaration. Declaration by the owner of property that
22 the owner holds identifiable property as trustee; or

24 3. Exercise of power. Exercise of a power of appointment
26 in favor of a trustee.

28 **UNIFORM COMMENT**

30 This section is based on Restatement (Third) of Trusts Section 10
32 (Tentative Draft No. 1, approved 1996), and Restatement (Second)
of Trusts Section 17 (1959). Under the methods specified for
34 creating a trust in this section, a trust is not created until it
receives property. For what constitutes an adequate property
36 interest, see Restatement (Third) of Trusts Sections 40-41
(Tentative Draft No. 2, approved 1999); Restatement (Second) of
38 Trusts Sections 74-86 (1959). The property interest necessary to
fund and create a trust need not be substantial. A revocable
40 designation of the trustee as beneficiary of a life insurance
policy or employee benefit plan has long been understood to be a
42 property interest sufficient to create a trust. See Section
103(11) ("property" defined). Furthermore, the property interest
44 need not be transferred contemporaneously with the signing of the
trust instrument. A trust instrument signed during the settlor's
46 lifetime is not rendered invalid simply because the trust was not
created until property was transferred to the trustee at a much
48 later date, including by contract after the settlor's death. A
pourover devise to a previously unfunded trust is also valid and
50 may constitute the property interest creating the trust. See

2 Unif. Testamentary Additions to Trusts Act Section 1 (1991),
3 codified at Uniform Probate Code Section 2-511 (pourover devise
4 to trust valid regardless of existence, size, or character of
5 trust corpus). See also Restatement (Third) of Trusts Section 19
6 (Tentative Draft No. 1, approved 1996).

7 While this section refers to transfer of property to a trustee, a
8 trust can be created even though for a period of time no trustee
9 is in office. See Restatement (Third) of Trusts Section 2 cmt. g
10 (Tentative Draft No. 1, approved 1996); Restatement (Second) of
11 Trusts Section 2 cmt. i (1959). A trust can also be created
12 without notice to or acceptance by a trustee or beneficiary. See
13 Restatement (Third) of Trusts Section 14 (Tentative Draft No. 1,
14 approved 1996); Restatement (Second) of Trusts Sections 35-36
15 (1959).

16 The methods specified in this section are not exclusive. Section
17 102 recognizes that trusts can also be created by special statute
18 or court order. See also Restatement (Third) of Trusts Section 1
19 cmt. a (Tentative Draft No. 1, approved 1996); Unif. Probate Code
20 Section 2-212 (elective share of incapacitated surviving spouse
21 to be held in trust on terms specified in statute); Unif. Probate
22 Code Section 5-411(a)(4) (conservator may create trust with court
23 approval); Restatement (Second) of Trusts Section 17 cmt. i
24 (1959) (trusts created by statutory right to bring wrongful death
25 action).

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

37 A trust created by self-declaration is best created by
38 reregistering each of the assets that comprise the trust into the
39 settlor's name as trustee. However, such reregistration is not
40 necessary to create the trust. See, e.g., *In re Estate of*
41 *Heggstad*, 20 Cal. Rptr. 2d 433 (Ct. App. 1993); Restatement
42 (Third) of Trusts Section 10 cmt. e (Tentative Draft No. 1,
43 approved 1996); Restatement (Second) of Trusts Section 17 cmt. a
44 (1959). A declaration of trust can be funded merely by attaching
45 a schedule listing the assets that are to be subject to the trust
46 without executing separate instruments of transfer. But such

2 practice can make it difficult to later confirm title with third party transferees and for this reason is not recommended.

4 While a trust created by will may come into existence immediately
6 at the testator's death and not necessarily only upon the later transfer of title from the personal representative, Section 701 makes clear that the nominated trustee does not have a duty to
8 act until there is an acceptance of the trusteeship, express or implied. To avoid an implied acceptance, a nominated testamentary
10 trustee who is monitoring the actions of the personal representative but who has not yet made a final decision on
12 acceptance should inform the beneficiaries that the nominated trustee has assumed only a limited role. The failure so to inform
14 the beneficiaries could result in liability if misleading conduct by the nominated trustee causes harm to the trust beneficiaries.
16 See Restatement (Third) of Trusts Section 35 cmt. b (Tentative Draft No. 2, approved 1999).

18 While this section confirms the familiar principle that a trust
20 may be created by means of the exercise of a power of appointment (paragraph (3)), this Code does not legislate comprehensively on
22 the subject of powers of appointment but addresses only selected issues. See Sections 302 (representation by holder of general
24 testamentary power of appointment); 505(b) (creditor claims against holder of power of withdrawal); and 603(c) (rights of
26 holder of power of withdrawal). For the law on powers of appointment generally, see Restatement (Second) of Property:
28 Donative Transfers Sections 11.1-24.4 (1986); Restatement (Third) of Property: Wills and Other Donative Transfers (in progress).

30
32 **MAINE COMMENT**

34 Maine law allows the creation of a trust without the transfer of property under the Probate Code, section 2-511, although all
36 rights of beneficiaries and all obligations of trustees are not invoked until the transfer of property. As explained in the
38 Uniform Comment, above, a pour over devise to a previously unfunded trust is valid and may be the transfer of property that
40 "creates" the trust. Although the terminology is different, the Probate Code, section 2-511 does not conflict with section 401
42 and has not been amended.

44 The transfer may be the transfer of an equitable interest in property as distinguished from an inter vivos gift. A gift
46 transfer in trust, to be effective, requires a delivery of the legal interest in property, and must at once completely pass
48 title so that the donor can have no further dominion over it. A gift in trust withholds the legal title from the donee, but the
50 equitable title passes to the donee. The declaration must be of

2 a present trust vesting the equitable title. Northwestern Mutual
Life Insurance Co. v. Collamore, 100 Me. 578; 62 A. 652 (1905).

4 The donor has parted irrevocably with the beneficial title,
6 whether the donor retains the legal title or transfers the legal
8 title to a 3rd person. Bath Savings Inst. v. Hathorn, 88 Me.
122, 33 A. 836 (1895); Norway Savings Bank v. Merriam et al., 88
Me. 146, 33 A. 840 (1895).

10 An express trust rests upon a declaration. No special phrase or
12 formula is requisite to creating a trust. It is enough to make
14 one's self a trustee for the benefit of another, if it be
16 explicitly, unconditionally and fully stated or declared in
writing or orally, if the property is personal, that it is held
in trust for that other person named. Cazallis v. Ingraham, 119
Me. 240; 110 A. 359 (1920).

18 **§402. Requirements for creation**

20 **1. Requirements. A trust is created only if:**

22 **A. The settlor has capacity to create a trust;**

24 **B. The settlor indicates an intention to create the trust;**

26 **C. The trust has a definite beneficiary or is:**

28 **(1) A charitable trust;**

30 **(2) A trust for the care of an animal, as provided in**
32 **section 408; or**

34 **(3) A trust for a noncharitable purpose, as provided**
36 **in section 409;**

38 **D. The trustee has duties to perform; and**

40 **E. The same person is not the sole trustee and sole**
beneficiary.

42 **2. Definite beneficiary. A beneficiary is definite if the**
44 **beneficiary can be ascertained now or in the future, subject to**
any applicable rule against perpetuities.

46 **3. Power to select beneficiary; failure of power. A power**
48 **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

2 the persons who would have taken the property had the power not
3 been conferred.

4
5 **UNIFORM COMMENT**

6
7 Subsection (a) codifies the basic requirements for the creation
8 of a trust. To create a valid trust, the settlor must indicate an
9 intention to create a trust. See Restatement (Third) of Trusts
10 Section 13 (Tentative Draft No. 1, approved 1996); Restatement
11 (Second) of Trusts Section 23 (1959). But only such
12 manifestations of intent as are admissible as proof in a judicial
13 proceeding may be considered. See Section 103(17) ("terms of a
14 trust" defined).

15
16 To create a trust, a settlor must have the requisite mental
17 capacity. To create a revocable or testamentary trust, the
18 settlor must have the capacity to make a will. To create an
19 irrevocable trust, the settlor must have capacity during lifetime
20 to transfer the property free of trust. See Section 601 (capacity
21 of settlor to create revocable trust), and see generally
22 Restatement (Third) of Trusts Section 11 (Tentative Draft No. 1,
23 approved 1996); Restatement (Second) of Trusts Sections 18-22
24 (1959); and Restatement (Third) of Property: Wills and Other
25 Donative Transfers Section 8.1 (Tentative Draft No. 3, 2001).

26
27 Subsection (a)(3) requires that a trust, other than a charitable
28 trust, a trust for the care of an animal, or a trust for another
29 valid noncharitable purpose, have a definite beneficiary. While
30 some beneficiaries will be definitely ascertained as of the
31 trust's creation, subsection (b) recognizes that others may be
32 ascertained in the future as long as this occurs within the
33 applicable perpetuities period. The definite beneficiary
34 requirement does not prevent a settlor from making a disposition
35 in favor of a class of persons. Class designations are valid as
36 long as the membership of the class will be finally determined
37 within the applicable perpetuities period. For background on the
38 definite beneficiary requirement, see Restatement (Third) of
39 Trusts Sections 44-46 (Tentative Draft No. 2, approved 1999);
40 Restatement (Second) of Trusts Sections 112-122 (1959).

41
42 Subsection (a)(4) recites standard doctrine that a trust is
43 created only if the trustee has duties to perform. See
44 Restatement (Third) of Trusts Section 2 (Tentative Draft No. 1,
45 approved 1996); Restatement (Second) of Trusts Section 2 (1959).
46 Trustee duties are usually active, but a validating duty may also
47 be passive, implying only that the trustee has an obligation not
48 to interfere with the trustee's enjoyment of the trust property.
49 Such passive trusts, while valid under this Code, may be
50 terminable under the enacting jurisdiction's Statute of Uses. See

2 Restatement (Third) of Trusts Section 6 (Tentative Draft No. 1,
approved 1996); Restatement (Second) of Trusts Sections 67-72
4 (1959).

6 Subsection (a)(5) addresses the doctrine of merger, which, as
traditionally stated, provides that a trust is not created if the
8 settlor is the sole trustee and sole beneficiary of all
beneficial interests. The doctrine of merger has been
10 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
12 beneficiaries of the remainder. The doctrine of merger is
properly applicable only if all beneficial interests, both life
14 interests and remainders, are vested in the same person, whether
in the settlor or someone else. An example of a trust to which
16 the doctrine of merger would apply is a trust of which the
settlor is sole trustee, sole beneficiary for life, and with the
18 remainder payable to the settlor's probate estate. On the
doctrine of merger generally, see Restatement (Third) of Trusts
20 Section 69 (Tentative Draft No. 3, 2001); Restatement (Second) of
Trusts Section 341 (1959).

22 Subsection (c) allows a settlor to empower the trustee to select
24 the beneficiaries even if the class from whom the selection may
be made cannot be ascertained. Such a provision would fail under
26 traditional doctrine; it is an imperative power with no
designated beneficiary capable of enforcement. Such a provision
28 is valid, however, under both this Code and the Restatement, if
there is at least one person who can meet the description. If the
30 trustee does not exercise the power within a reasonable time, the
power fails and the property will pass by resulting trust. See
32 Restatement (Third) of Trusts Section 46 (Tentative Draft No. 2,
approved 1999). See also Restatement (Second) of Trusts Section
34 122 (1959); Restatement (Second) of Property: Donative Transfers
Section 12.1 cmt. e (1986).

36
38 **MAINE COMMENT**

40 The creation of a trust also requires, in addition to the
transfer of property or the declaration of trust, the intention
42 to create a trust. See Gower v. Keene, 113 Me. 249. 93 A. 546
(1915).

44 Prior Maine law also required that an attempted trust must fail
46 for uncertainty and indefiniteness: A trust that by its terms
may be applied to objects not charitable in the legal sense, and
48 to persons not defined by name or by class, is too indefinite to
be carried out. Haskell v. Staples, 116 Me. 103; 100 A. 148
50 (1917). To the extent that trusts for the care of an animal,

2 section 408, or for a noncharitable purpose, section 409, may
have failed under prior law, section 402 is a change to Maine law.

4 Maine law has not addressed the doctrine of merger and whether a
trust payable to the settlor as beneficiary for life with
6 remainder payable to the settlor's probate estate is valid or
not, although this may be the practice for real estate nominee
8 trusts as initially created. This section clarifies and
supplements Maine law.

10
12 **§403. Trusts created in other jurisdictions**

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

18 1. Settlor. The settlor was domiciled, had a place of
20 abode or was a national;

22 2. Trustee. A trustee was domiciled or had a place of
24 business; or

26 3. Trust property. Any trust property was located.

28 **UNIFORM COMMENT**

30 The validity of a trust created by will is ordinarily determined
32 by the law of the decedent's domicile. No such certainty exists
with respect to determining the law governing the validity of
34 inter vivos trusts. Generally, at common law a trust was created
if it complied with the law of the state having the most
36 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
38 trust property, the place where the trust instrument was
executed, and the domicile of the beneficiary. See 5A Austin
40 Wakeman Scott & William Franklin Fratcher, The Law of Trusts
Sections 597, 599 (4th ed. 1987). Furthermore, if the trust has
42 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
44 validity, the tendency is to select the law upholding the
validity of the trust. See 5A Austin Wakeman Scott & William
46 Franklin Fratcher, The Law of Trusts 600 (4th ed. 1987).

48 Section 403 extends the common law rule by validating a trust if
its creation complies with the law of any of a variety of states
50 in which the settlor or trustee had significant contacts.

2 Pursuant to Section 403, a trust not created by will is validly
3 created if its creation complies with the law of the jurisdiction
4 in which the trust instrument was executed, or the law of the
5 jurisdiction in which, at the time of creation the settlor was
6 domiciled, had a place of abode, or was a national; the trustee
7 was domiciled or had a place of business; or any trust property
8 was located. Section 403 is comparable to Section 2-506 of the
9 Uniform Probate Code, which validates wills executed in
10 compliance with the law of a variety of places in which the
11 testator had a significant contact. Unlike the UPC, however,
12 Section 403 is not limited to execution of the instrument but
13 applies to the entire process of a trust's creation, including
14 compliance with the requirement that there be trust property. In
15 addition, unlike the UPC, Section 403 validates a trust valid
16 under the law of the domicile or place of business of the
17 designated trustee, or if valid under the law of the place where
18 any of the trust property is located.

19 The section does not supercede local law requirements for the
20 transfer of real property, such that title can be transferred
21 only by recorded deed.

22

24

MAINE COMMENT

25 There is little Maine law on this subject. The Maine Supreme
26 Judicial Court would likely have followed the common law rule as
27 described in the Uniform Comment, but this section clarifies
28 Maine law.

30

32 **§404. Trust purposes**

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

38

UNIFORM COMMENT

40

41 For an explication of the requirement that a trust must not have
42 a purpose that is unlawful or against public policy, see
43 Restatement (Third) of Trusts Sections 27-30 (Tentative Draft No.
44 2, approved 1999); Restatement (Second) of Trusts Sections 59-65
45 (1959). A trust with a purpose that is unlawful or against public
46 policy is invalid. Depending on when the violation occurred, the
47 trust may be invalid at its inception or it may become invalid at
48 a later date. The invalidity may also affect only particular
49 provisions. Generally, a trust has a purpose which is illegal if
50 (1) its performance involves the commission of a criminal or

2 tortious act by the trustee; (2) the settlor's purpose in
3 creating the trust was to defraud creditors or others; or (3) the
4 consideration for the creation of the trust was illegal. See
5 Restatement (Third) of Trusts Section 28 cmt. a (Tentative Draft
6 No. 2, approved 1999); Restatement (Second) of Trusts Section 60
7 cmt. a (1959). Purposes violative of public policy include those
8 that tend to encourage criminal or tortious conduct, that
9 interfere with freedom to marry or encourage divorce, that limit
10 religious freedom, or which are frivolous or capricious. See
11 Restatement (Third) of Trusts Section 29 cmt. d-h (Tentative
12 Draft No. 2, 1999); Restatement (Second) of Trusts Section 62
13 (1959).

14 Pursuant to Section 402(a), a trust must have an identifiable
15 beneficiary unless the trust is of a type that does not have
16 beneficiaries in the usual sense, such as a charitable trust or,
17 as provided in Sections 408 and 409, trusts for the care of an
18 animal or other valid noncharitable purpose. The general purpose
19 of trusts having identifiable beneficiaries is to benefit those
20 beneficiaries in accordance with their interests as defined in
21 the trust's terms. The requirement of this section that a trust
22 and its terms be for the benefit of its beneficiaries, which is
23 derived from Restatement (Third) of Trusts Section 27(2)
24 (Tentative Draft No. 2, approved 1999), implements this general
25 purpose. While a settlor has considerable latitude in specifying
26 how a particular trust purpose is to be pursued, the
27 administrative and other nondispositive trust terms must
28 reasonably relate to this purpose and not divert the trust
29 property to achieve a trust purpose that is invalid, such as one
30 which is frivolous or capricious. See Restatement (Third) of
31 Trusts Section 27 cmt. b (Tentative Draft No. 2, approved 1999).

32 Section 412(b), which allows the court to modify administrative
33 terms that are impracticable, wasteful, or impair the trust's
34 administration, is a specific application of the requirement that
35 a trust and its terms be for the benefit of the beneficiaries.
36 The fact that a settlor suggests or directs an unlawful or other
37 inappropriate means for performing a trust does not invalidate
38 the trust if the trust has a substantial purpose that can be
39 achieved by other methods. See Restatement (Third) of Trusts
40 Section 28 cmt. e (Tentative Draft No. 2, approved 1999).

42
43
44 **MAINE COMMENT**

45 For an explanation of the requirement under Maine law that a
46 trust may not have a purpose that is unlawful or against public
47 policy, see Holbrook Island Sanctuary v. Inhabitants of the Town
48 of Brooksville, 161 Me. 476; 214 A.2d 660 (1965).

2 **§405. Charitable purposes; enforcement**

4 **1. Purposes.** A charitable trust may be created for the
6 relief of poverty; the advancement of education or religion; the
8 promotion of health; governmental or municipal purposes; or other
10 purposes the achievement of which is beneficial to the community.

12 **2. Selection by court.** If the terms of a charitable trust
14 do not indicate a particular charitable purpose or beneficiary,
16 the court may select one or more charitable purposes or
18 beneficiaries. The selection must be consistent with the
20 settlor's intention to the extent it can be ascertained.

22 **3. Enforcement.** The settlor of a charitable trust, among
24 others, may maintain a proceeding to enforce the trust.

26 **UNIFORM COMMENT**

28 The required purposes of a charitable trust specified in
30 subsection (a) restate the well-established categories of
32 charitable purposes listed in Restatement (Third) of Trusts
34 Section 28 (Tentative Draft No. 3, approved 2001), and
36 Restatement (Second) of Trusts Section 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. The
drafters concluded that it should not be disturbed.

Charitable trusts are subject to the restriction in Section 404
that a trust purpose must be legal and not contrary to public
policy. This would include trusts that involve invidious
discrimination. See Restatement (Third) of Trusts Section 28 cmt.
f (Tentative Draft No. 3, approved 2001).

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 Section 397 cmt. d (1959).
Subsection (b) of this section is a corollary to Section 413,
which states the doctrine of cy pres. Under Section 413(a), 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. The court must instead apply the trust property in a

2 manner consistent with the settlor's charitable purposes to the extent they can be ascertained.

4 Subsection (b) does not apply to the long-established estate
6 planning technique of delegating to the trustee the selection of
8 the charitable purposes or recipients. In that case, judicial
10 intervention to supply particular terms is not necessary to
12 validate the creation of the trust. The necessary terms instead
14 will be supplied by the trustee. See Restatement (Second) of
16 Trusts Section 396 (1959). Judicial intervention under subsection
(b) will become necessary only if the trustee fails to make a
selection. See Restatement (Second) of Trusts Section 397 cmt. d
(1959). Pursuant to Section 110(b), the charitable organizations
selected by the trustee would not have the rights of qualified
beneficiaries under this Code because they are not expressly
designated to receive distributions under the terms of the trust.

18 Contrary to Restatement (Second) of Trusts Section 391 (1959),
20 subsection (c) grants a settlor standing to maintain an action to
22 enforce a charitable trust. The grant of standing to the settlor
24 does not negate the right of the state attorney general or
26 persons with special interests to enforce either the trust or
their interests. 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).

28
30 **MAINE COMMENT**

32 This section clarifies Maine law.

34 Maine law has long recognized the validity of charitable trusts.
36 See Tappan v. Deblois, 45 Me. 122 (Me. 1858); Howard v. American
38 Peace Society, 49 Me. 288 (Me. 1860); Drew v. Wakefield, 54 Me.
40 291 (Me. 1865). The language in section 405, subsection 1 has
been broadly drafted to permit the courts to determine as
charitable those purposes that are beneficial to the community so
long as the purposes are not contrary to public policy.

42 This section does appear to indicate a predisposition in favor of
44 finding charitable purposes and upholding the validity of
charitable gifts so as to give effect to the apparent intent of
the grantor. This is generally consistent with underlying
principles of Maine law that show a "special favoritism toward
46 charitable gift or trust." In re Thompson's Estate, 414 A.2d 881
(Me. 1980). See also Bills v. Pease, 116 Me. 98, 100 A. 146,
48 (1917).

50

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

12
14 **MAINE COMMENT**

16 The Maine Revised Statutes, Title 33, section 851 requires that a
trust concerning lands, except trust arising or resulting by
18 implication of law, be created or declared by some writing signed
by the party or the party's attorney. This exception to the
20 general rule of section 407 is preserved.

22 The burden of proof to be met by the proponent of an oral trust
is new. Prior Maine law did not clearly establish a clear and
24 convincing burden of proof for the creation of an oral trust.
See Cazallis v. Ingraham, 119 Me. 240, 110 A. 359 (1920); Gower
26 v. Keene, 113 Me. 249, 93 A. 546 (1915).

28 **§408. Trust for care of animal**

30
32 **1. To provide care for animal; termination.** A trust may be
created to provide for the care of an animal alive during the
34 settlor's lifetime. The trust terminates upon the death of the
animal or, if the trust was created to provide for the care of
36 more than one animal alive during the settlor's lifetime, upon
the death of the last surviving animal.

38 **2. Enforcement.** A trust authorized by this section may be
enforced by a person appointed in the terms of the trust or, if
40 no person is so appointed, by a person appointed by the court. A
person having an interest in the welfare of the animal may
42 request the court to appoint a person to enforce the trust or to
remove a person appointed.

44
46 **3. Intended use of property.** Property of a trust
authorized by this section may be applied only to its intended
48 use, except to the extent the court determines that the value of
the trust property exceeds the amount required for the intended
50 use. Except as otherwise provided in the terms of the trust,
property not required for the intended use must be distributed to

2 the settlor, if then living, otherwise, to the settlor's
3 successors in interest.

4
5 **UNIFORM COMMENT**

6
7 This section and the next section of the Code validate so called
8 honorary trusts. Unlike honorary trusts created pursuant to the
9 common law of trusts, which are arguably no more than powers of
10 appointment, the trusts created by this and the next section are
11 valid and enforceable. For a discussion of the common law
12 doctrine, see Restatement (Third) of Trusts Section 47 (Tentative
13 Draft No. 2, approved 1999); Restatement (Second) of Trusts
14 Section 124 (1959).

15 This section addresses a particular type of honorary trust, the
16 trust for the care of an animal. Section 409 specifies the
17 requirements for trusts without ascertainable beneficiaries that
18 are created for other noncharitable purposes. A trust for the
19 care of an animal may last for the life of the animal. While the
20 animal will ordinarily be alive on the date the trust is created,
21 an animal may be added as a beneficiary after that date as long
22 as the addition is made prior to the settlor's death. Animals in
23 gestation but not yet born at the time of the trust's creation
24 may also be covered by its terms. A trust authorized by this
25 section may be created to benefit one designated animal or
26 several designated animals.

27 Subsection (b) addresses enforcement. Noncharitable trusts
28 ordinarily may be enforced by their beneficiaries. Charitable
29 trusts may be enforced by the State's attorney general or by a
30 person deemed to have a special interest. See Restatement
31 (Second) of Trusts Section 391 (1959). But at common law, a trust
32 for the care of an animal or a trust without an ascertainable
33 beneficiary created for a noncharitable purpose was unenforceable
34 because there was no person authorized to enforce the trustee's
35 obligations.

36 Sections 408 and 409 close this gap. The intended use of a trust
37 authorized by either section may be enforced by a person
38 designated in the terms of the trust or, if none, by a person
39 appointed by the court. In either case, Section 110(b) grants to
40 the person appointed the rights of a qualified beneficiary for
41 the purpose of receiving notices and providing consents. If the
42 trust is created for the care of an animal, a person with an
43 interest in the welfare of the animal has standing to petition
44 for an appointment. The person appointed by the court to enforce
45 the trust should also be a person who has exhibited an interest
46 in the animal's welfare. The concept of granting standing to a
47 person with a demonstrated interest in the animal's welfare is
48
49
50

2 derived from the Uniform Guardianship and Protective Proceedings
3 Act, which allows a person interested in the welfare of a ward or
4 protected person to file petitions on behalf of the ward or
5 protected person. See, e.g., Uniform Probate Code Sections
6 5-210(b), 5-414(a).

7 Subsection (c) addresses the problem of excess funds. If the
8 court determines that the trust property exceeds the amount
9 needed for the intended purpose and that the terms of the trust
10 do not direct the disposition, a resulting trust is ordinarily
11 created in the settlor or settlor's successors in interest. See
12 Restatement (Third) of Trusts Section 47 (Tentative Draft No. 2,
13 approved 1999); Restatement (Second) of Trusts Section 124
14 (1959). Successors in interest include the beneficiaries under
15 the settlor's will, if the settlor has a will, or in the absence
16 of an effective will provision, the settlor's heirs. The settlor
17 may also anticipate the problem of excess funds by directing
18 their disposition in the terms of the trust. The disposition of
19 excess funds is within the settlor's control. See Section 105(a).
20 While a trust for an animal is usually not created until the
21 settlor's death, subsection (a) allows such a trust to be created
22 during the settlor's lifetime. Accordingly, if the settlor is
23 still living, subsection (c) provides for distribution of excess
24 funds to the settlor, and not to the settlor's successors in
25 interest.

26 Should the means chosen not be particularly efficient, a trust
27 created for the care of an animal can also be terminated by the
28 trustee or court under Section 414. Termination of a trust under
29 that section, however, requires that the trustee or court develop
30 an alternative means for carrying out the trust purposes. See
31 Section 414(c).

32 This section and the next section are suggested by Section 2-907
33 of the Uniform Probate Code, but much of this and the following
34 section is new.

35
36
37
38 **MAINE COMMENT**

39 This section is new Maine law. The question of the validity of a
40 trust for the care of a specific animal or animals has not
41 previously been addressed in Maine. These types of arrangements
42 are distinguishable from trusts having broader objectives such as
43 the prevention of cruelty to animals or the benefit of animals
44 generally such as through the maintenance of wildlife sanctuaries
45 or animal habitat. Maine case law has indirectly addressed the
46 question of whether arrangements for the care of animals
47 generally qualify as charitable activities. See, e.g., Holbrook
48 Island Sanctuary v. Inhabitants of Town of Brooksville, 214 A.2d
49

660, 161 Me. 476 (1965), a case concerning the charitable exemption for property taxes. Citing the Restatement (Second) of Trusts, Section 374 (1959), the Law Court stated: "A trust to prevent or alleviate the suffering of animals is charitable. Thus, a trust for the prevention of cruelty to animals, or a trust to establish a home for animals, or a trust for the prevention or cure or treatment of diseases or of injuries to animals, is charitable." However, the Law Court held that the operation of a wildlife sanctuary or preserve was not a charitable purpose.

Section 408 does not address these broader animal-related and wildlife-related arrangements, but section 409 may be applicable to those animal-related activities that do not qualify as charitable in nature.

§409. Noncharitable trust without ascertainable beneficiary

Except as otherwise provided in section 408 or by another statute, the following rules apply.

1. Noncharitable purpose. 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.

2. Enforcement. A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court.

3. Intended use of property. 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.

UNIFORM COMMENT

This section 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, on which see Section 408. 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

2 charitable, at common law the disposition was honorary only and
3 did not create a trust. Under this section, however, the
4 disposition is enforceable as a trust for a period of up to 21
5 years, although that number is placed in brackets to indicate
6 that States may wish to select a different time limit.

7 The most common example of a trust for a specific noncharitable
8 purpose is a trust for the care of a cemetery plot. The lead-in
9 language to the section recognizes that some special purpose
10 trusts, particularly those for care of cemetery plots, are
11 subject to other statutes. Such legislation will typically
12 endeavor to facilitate perpetual care as opposed to care limited
13 to 21 years as under this section.

14 For the requirement that a trust, particularly the type of trust
15 authorized by this section, must have a purpose that is not
16 capricious, see Section 404 comment. For examples of the types of
17 trusts authorized by this section, see Restatement (Third) of
18 Trusts Section 47 (Tentative Draft No. 2, approved 1999), and
19 Restatement (Second) of Trusts Section 62 cmt. w and Section 124
20 (1959). The case law on capricious purposes is collected in 2
21 Austin W. Scott & William F. Fratcher, The Law of Trusts Section
22 124.7 (4th ed. 1987).

23 This section is similar to Section 408, although less detailed.
24 Much of the comment to Section 408 also applies to this section.

28 MAINE COMMENT

29 This section supplements Maine law in 2 problem areas involving
30 trusts for a specific, noncharitable purpose for which there is
31 no ascertainable beneficiary. The most common and typical
32 example of this type of arrangement is a trust for the care of a
33 private cemetery plot or monument. This type of arrangement has,
34 historically, created conceptual problems both under the analysis
35 that a trust without a beneficiary is unenforceable and in the
36 application of the rule against perpetuities. Compare Swasey v.
37 American Bible Society, 57 Me. 523 (1869) with Piper v. Moulton,
38 72 Me. 155 (1881).

39 Cases involving a single cemetery plot or monument should be
40 distinguished from cases involving public cemeteries or burial
41 grounds. As the Law Court stated in Johnson v. South Blue Hill
42 Cemetery Association, 221 A.2d 280 (Me. 1966), the care,
43 maintenance and upkeep of public cemeteries is a public charity
44 under Maine statutes relating to cemeteries or burial grounds and
45 has been recognized as such by the great weight of authorities.
46 Such charitable trusts are valid notwithstanding the absence of
47 specific beneficiaries and may be enforced by the Attorney
48 General.

2 General. Existing state statutes regulating cemeteries and
mausoleums do not apply to private family burying grounds. See
4 the Maine Revised Statutes, Title 13. The enactment of section
6 409 will not affect the existing statutes regulating cemetery
plots and burial grounds.

8 The provision of section 409 limiting the duration of a
noncharitable trust without an ascertainable beneficiary to a
10 specified period of years, whether 21 or some other number, does
not appear appropriate in the case of a cemetery plot or fund.
Such arrangements are generally intended to be perpetual.

12 In addition to burial grounds and trusts for animals described in
14 section 408, other applications of trusts without ascertainable
beneficiaries occasionally arise. These might include trusts for
16 religious observances or memorials or gifts for a broad class of
unascertained persons that might not be viewed as charitable.
18 For example, a trust to provide an annual family reunion picnic
for the descendants of a particular individual or an annual
20 memorial dinner for a private club or group might fall into this
category, as might a trust for the purpose of maintaining a
22 family vacation property. Limiting the duration of these types
of trusts to 21 years seems unduly restrictive. Accordingly,
24 Maine has chosen to delete this limitation.

26 **§410. Modification or termination of trust; proceedings for**
28 **approval or disapproval**

30 **1. Termination.** In addition to the methods of termination
prescribed by sections 411 through 414, a trust terminates to the
32 extent the trust is revoked or expires pursuant to its terms, no
purpose of the trust remains to be achieved or the purposes of
34 the trust have become unlawful, contrary to public policy or
impossible to achieve.

36 **2. Modification or termination proceeding.** A proceeding to
38 approve or disapprove a proposed modification or termination
under sections 411 to 416, or trust combination or division under
40 section 417, may be commenced by a trustee or beneficiary, and a
proceeding to approve or disapprove a proposed modification or
42 termination under section 411 may be commenced by the settlor.
The settlor of a charitable trust may maintain a proceeding to
44 modify the trust under section 413.

46 **UNIFORM COMMENT**

48 Subsection (a) lists the grounds on which trusts typically
50 terminate. For a similar formulation, see Restatement (Third) of

2 Trusts Section 61 (Tentative Draft No. 3, approved 2001).
3 Terminations under subsection (a) may be in either in whole or in
4 part. Other types of terminations, all of which require action by
5 a court, trustee, or beneficiaries, are covered in Sections
6 411-414, which also address trust modification. Of these
7 sections, all but Section 411 apply to charitable trusts and all
8 but Section 413 apply to noncharitable trusts.

9
10 Withdrawal of the trust property is not an event terminating a
11 trust. The trust remains in existence although the trustee has no
12 duties to perform unless and until property is later contributed
13 to the trust.

14 Subsection (b) specifies the persons who have standing to seek
15 court approval or disapproval of proposed trust modifications,
16 terminations, combinations, or divisions. An approval or
17 disapproval may be sought for an action that does not require
18 court permission, including a petition questioning the trustee's
19 distribution upon termination of a trust under \$50,000 (Section
20 414), and a petition to approve or disapprove a proposed trust
21 division or consolidation (Section 417). Subsection (b) makes the
22 settlor an interested person with respect to a judicial
23 proceeding brought by the beneficiaries under Section 411 to
24 terminate or modify a trust. Contrary to Restatement (Second) of
25 Trusts Section 391 (1959), subsection (b) grants a settlor
26 standing to petition the court under Section 413 to apply cy pres
27 to modify the settlor's charitable trust.
28

29
30 **MAINE COMMENT**

31
32 This section is new Maine law.

33
34 Section 410, subsection 1 sets forth the general circumstances in
35 which a trust terminates by revocation, by the express terms of
36 the trust, when the purposes of the trust have been achieved, or
37 when circumstances have rendered the trust purposes unlawful,
38 against public policy or impossible to achieve. The genesis of
39 this section is the Restatement (Third) of Trusts Section 61
40 (Tentative Draft No. 3, approved 2001), and while there do not
41 appear to be any Maine cases directly on point, this provision is
42 consistent with general trust principles historically recognized
43 by Maine courts.
44

45
46 Section 410, subsection 2 describes the persons who have standing
47 to bring the proceedings contemplated by sections 411 to 417.

48
49 **§411. Modification or termination of noncharitable irrevocable**
50 **trust by consent**

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

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

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

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

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

2 trustee of additional powers. If virtual or other form of
representation is unavailable, Section 305 of the Code permits
4 the court to appoint a representative who may give the necessary
consent to the proposed modification or termination on behalf of
6 the minor, incapacitated, unborn, or unascertained beneficiary.
The ability to use virtual and other forms of representation to
8 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)
10 Section 337(1) (1959) (beneficiary must not be under incapacity),
with Hatch v. Riggs National Bank, 361 F.2d 559 (D.C. Cir. 1966)
12 (guardian ad litem authorized to consent on beneficiary's behalf).

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

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

40 Subsection (a) is similar to Restatement (Third) of Trusts
42 Section 65(2) (Tentative Draft No. 3, approved 2001), and
Restatement (Second) of Trusts Section 338(2) (1959), both of
44 which permit termination upon joint action of the settlor and
beneficiaries. Unlike termination by the beneficiaries alone
46 under subsection (b), termination with the concurrence of the
settlor does not require a finding that the trust no longer
48 serves a material purpose. No finding of failure of material
purpose is required because all parties with a possible interest
50 in the trust's continuation, both the settlor and beneficiaries,

2 agree there is no further need for the trust. Restatement Third
3 goes further than subsection (b) of this section and Restatement
4 Second, however, in also allowing the beneficiaries to compel
5 termination of a trust that still serves a material purpose if
6 the reasons for termination outweigh the continuing material
7 purpose.

8 Subsection (b), similar to Restatement Third but not Restatement
9 Second, allows modification by beneficiary action. The
10 beneficiaries may modify any term of the trust if the
11 modification is not inconsistent with a material purpose of the
12 trust. Restatement Third, though, goes further than this Code in
13 also allowing the beneficiaries to use trust modification as a
14 basis for removing the trustee if removal would not be
15 inconsistent with a material purpose of the trust. Under the
16 Code, however, Section 706 is the exclusive provision on removal
17 of trustees. Section 706(b)(4) recognizes that a request for
18 removal upon unanimous agreement of the qualified beneficiaries
19 is a factor for the court to consider, but before removing the
20 trustee the court must also find that such action best serves the
21 interests of all the beneficiaries, that removal is not
22 inconsistent with a material purpose of the trust, and that a
23 suitable cotrustee or successor trustee is available. Compare
24 Section 706(b)(4), with Restatement (Third) Section 65 cmt. f
25 (Tentative Draft No. 3, approved 2001).

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

31
32 Material purposes are not readily to be inferred. A finding of
33 such a purpose generally requires some showing of a particular
34 concern or objective on the part of the settlor, such as concern
35 with regard to the beneficiary's management skills, judgment, or
36 level of maturity. Thus, a court may look for some circumstantial
37 or other evidence indicating that the trust arrangement
38 represented to the settlor more than a method of allocating the
39 benefits of property among multiple beneficiaries, or a means of
40 offering to the beneficiaries (but not imposing on them) a
41 particular advantage. Sometimes, of course, the very nature or
42 design of a trust suggests its protective nature or some other
43 material purpose.

44
45 Restatement (Third) of Trusts Section 65 cmt. d (Tentative Draft
46 No. 3, approved 2001).

47
48 Subsection (c) of this section deals with the effect of a
49 spendthrift provision on the right of a beneficiary to concur in
50

2 a trust termination or modification. Spendthrift terms have
3 sometimes been construed to constitute a material purpose without
4 inquiry into the intention of the particular settlor. For
5 examples, see Restatement (Second) of Trusts Section 337 (1959);
6 George G. Bogert & George T. Bogert, The Law of Trusts and
7 Trustees Section 1008 (Rev. 2d ed. 1983); and 4 Austin W. Scott &
8 William F. Fratcher, The Law of Trusts Section 337 (4th ed.
9 1989). This result is troublesome because spendthrift provisions
10 are often added to instruments with little thought. Subsection
11 (c), similar to Restatement (Third) of Trusts Section 65 cmt. e
12 (Tentative Draft No. 3, approved 2001), does not negate the
13 possibility that continuation of a trust to assure spendthrift
14 protection might have been a material purpose of the particular
15 settlor. The question of whether that was the intent of a
16 particular settlor is instead a matter of fact to be determined
17 on the totality of the circumstances.

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

26 Subsection (e), similar to Restatement (Third) of Trusts Section
27 65 cmt. c (Tentative Draft No. 3, approved 2001), and Restatement
28 (Second) of Trusts Sections 338(2) & 340(2) (1959), addresses
29 situations in which a termination or modification is requested by
30 less than all the beneficiaries, either because a beneficiary
31 objects, the consent of a beneficiary cannot be obtained, or
32 representation is either unavailable or its application
33 uncertain. Subsection (e) allows the court to fashion an
34 appropriate order protecting the interests of the nonconsenting
35 beneficiaries while at the same time permitting the remainder of
36 the trust property to be distributed without restriction. The
37 order of protection for the nonconsenting beneficiaries might
38 include partial continuation of the trust, the purchase of an
39 annuity, or the valuation and cashout of the interest.

42

MAINE COMMENT

44

45 Section 411, subsection 1 permits an irrevocable noncharitable
46 trust to be modified or terminated by the beneficiaries with the
47 concurrence of the settlor, even if a material purpose of the
48 trust has not been fulfilled. This provision effects a change in
49 Maine law. Historically, the ability of the settlor and
50 concurring beneficiaries to deviate from the terms of the

2 original trust has been narrowly construed by Maine courts. See
3 Porter v. Porter, 138 Me. 1, 20 A.2d 465 (1941) and Skillin v.
4 Skillin, 133 Me. 347, 177 A. 706 (1935).

6 Section 411, subsection 1 also provides that consent to a trust
7 termination may be provided by an agent under a power of
8 attorney, but only to the extent expressly authorized by the
9 power of attorney or the terms of the trust. Although Maine has
10 not yet addressed this issue, the sections of the Probate Code
11 dealing with powers of attorney contain similar provisions
12 relating to the agent's ability to make gifts under a power of
13 attorney. The Probate Code, section 5-508 provides that an
14 attorney-in-fact is not authorized to make gifts to the
15 attorney-in-fact or others unless the durable financial power of
16 attorney explicitly authorizes such gifts.

18 Section 411, subsection 1 further provides that a legally
19 appointed conservator may consent to the modification or
20 termination of a trust with the court's approval. If a
21 conservator has not been appointed by the court, then the
22 settlor's guardian is authorized to provide consent on behalf of
23 the settlor with the approval of the court. The existing Maine
24 statutes dealing with a conservator's powers do not expressly
25 address this issue. The Probate Code, section 5-408 provides that
26 the court has the power, acting directly or through a
27 conservator, to create revocable or irrevocable trusts of
28 property that may extend beyond the protected person's disability
29 or life, but does not specifically authorize the termination of
30 an existing trust.

32 Section 411, subsection 2 is a clarification of Maine law. Maine
33 has recently addressed termination or modification of a
34 noncharitable trust in the case of University of Maine Foundation
35 v. Fleet Bank of Maine, 2003 ME 20, 817 A.2d 871. The court
36 recognized its long-standing authority to terminate a trust when
37 its purpose has been accomplished or when there is no good reason
38 for the trust to continue, and all beneficiaries are competent
39 and release their interests. The court noted, however, that a
40 trust may not be terminated early if (1) the time fixed by the
41 settlor has not elapsed, or (2) there is a purpose that has not
42 been accomplished. The court reasoned that the settlor intended
43 to restrict the life beneficiaries' access and control to the
44 trust assets, thereby creating a spendthrift provision. Citing
45 the Restatement (Second) of Trusts Section 337 (1959), the court
46 noted that spendthrift clauses carry out the intent of the
47 settlor and represent a material purpose of the settlor, such
48 that trusts containing a spendthrift provision could not be
prematurely terminated. The court ultimately approved a partial
termination of the trust of the surplus funds after ordering that

2 sufficient assets be retained in trust to provide for the life
beneficiaries' interests.

4 Section 411, subsection 3 provides that a spendthrift provision
6 in a trust is not presumed to be a material purpose of the
settlor. As discussed above, this conflicts with the Maine
8 court's opinion in the University of Maine Foundation case.
However, there is authority that Maine courts will not broadly
10 interpret a settlor's intent to create a spendthrift trust.
Tilton v. Davidson, 98 Me. 55, 56 A. 215 (1903). As explained by
12 the Uniform Comment, subsection 3 clearly leaves room for a court
to conclude that a spendthrift provision was a material purpose
14 of the settlor. Thus it may be most accurately described as an
extension of or incremental change in Maine law.

16 Section 411, subsection 5 is new Maine law, allowing a
modification or termination of a trust over a beneficiary's
18 objection. See, e.g., University of Maine Foundation v. Fleet
Bank, 2003 ME 20, 817 A.2d 871. The Uniform Comment provides
20 examples of when it might be useful for the courts to be able to
22 fashion appropriate remedies for requests for modification or
termination, such as partial continuation of the trust, purchase
24 of an annuity or the valuation and cashout of the beneficiary's
interest, similar to what the court ultimately did in the
University of Maine Foundation case, supra.

26
28 **§412. Modification or termination because of unanticipated
circumstances or inability to administer trust effectively**

30
32 **1. Modification or termination.** The court may modify the
administrative or dispositive terms of a trust or terminate the
34 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
36 made in accordance with the settlor's probable intention.

38 **2. Modification of administrative terms.** The court may
modify the administrative terms of a trust if continuation of the
40 trust on its existing terms would be impracticable or wasteful or
impair the trust's administration.

42
44 **3. Distribution after termination.** Upon termination of a
trust under this section, the trustee shall distribute the trust
46 property in a manner consistent with the purposes of the trust.

48 **UNIFORM COMMENT**

2 This section broadens the court's ability to apply equitable
deviation to terminate or modify a trust. Subsection (a) allows a
4 court to modify the dispositive provisions of the trust as well
as its administrative terms. For example, modification of the
6 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)
8 is similar to Restatement (Third) of Trusts Section 66(1)
(Tentative Draft No. 3, approved 2001), except that this section,
10 unlike the Restatement, does not impose a duty on the trustee to
petition the court if the trustee is aware of circumstances
12 justifying judicial modification. The purpose of the "equitable
deviation" authorized by subsection (a) is not to disregard the
14 settlor's intent but to modify inopportune details to effectuate
better the settlor's broader purposes. Among other things,
16 equitable deviation may be used to modify administrative or
dispositive terms due to the failure to anticipate economic
18 change or the incapacity of a beneficiary. For numerous
illustrations, see Restatement (Third) of Trusts Section 66 cmt.
20 b (Tentative Draft No. 3, approved 2001). While it is necessary
that there be circumstances not anticipated by the settlor before
22 the court may grant relief under subsection (a), the
circumstances may have been in existence when the trust was
24 created. This section thus complements Section 415, which allows
for reformation of a trust based on mistake of fact or law at the
26 creation of the trust.

28 Subsection (b) broadens the court's ability to modify the
administrative terms of a trust. The standard under subsection
30 (b) is similar to the standard for applying *cy pres* to a
charitable trust. See Section 413(a). Just as a charitable trust
32 may be modified if its particular charitable purpose becomes
impracticable or wasteful, so can the administrative terms of any
34 trust, charitable or noncharitable. Subsections (a) and (b) are
not mutually exclusive. Many situations justifying modification
36 of administrative terms under subsection (a) will also justify
modification under subsection (b). Subsection (b) is also an
38 application of the requirement in Section 404 that a trust and
its terms must be for the benefit of its beneficiaries. See also
40 Restatement (Third) of Trusts Section 27(2) & cmt. b (Tentative
Draft No. 2, approved 1999). Although the settlor is granted
42 considerable latitude in defining the purposes of the trust, the
principle that a trust have a purpose which is for the benefit of
44 its beneficiaries precludes unreasonable restrictions on the use
of trust property. An owner's freedom to be capricious about the
46 use of the owner's own property ends when the property is
impressed with a trust for the benefit of others. See Restatement
48 (Second) of Trusts Section 124 cmt. g (1959). Thus, attempts to
impose unreasonable restrictions on the use of trust property
50 will fail. See Restatement (Third) of Trusts Section 27

2 Reporter's Notes to cmt. b (Tentative Draft No. 2, approved
3 1999). Subsection (b), unlike subsection (a), does not have a
4 direct precedent in the common law, but various states have
5 insisted on such a measure by statute. See, e.g., Mo. Rev. Stat.
6 Section 456.590.1.

7
8 Upon termination of a trust under this section, subsection (c)
9 requires that the trust be distributed in a manner consistent
10 with the purposes of the trust. As under the doctrine of cy pres,
11 effectuating a distribution consistent with the purposes of the
12 trust requires an examination of what the settlor would have
13 intended had the settlor been aware of the unanticipated
14 circumstances. Typically, such terminating distributions will be
15 made to the qualified beneficiaries, often in proportion to the
16 actuarial value of their interests, although the section does not
17 so prescribe. For the definition of qualified beneficiary, see
18 Section 103(12).

19
20 Modification under this section, because it does not require
21 beneficiary action, is not precluded by a spendthrift provision.

22
23 **MAINE COMMENT**

24
25 As discussed above, Maine courts have exercised their equitable
26 powers to approve modification or deviation from the terms of a
27 trust due to unanticipated circumstances. See, e.g., Richardson
28 v. Knight, 69 Me. 285, (1879), and Porter v. Porter, 138 Me. 1,
29 20 A.2d 465 (1941). The power to modify or deviate from the
30 original terms of a trust has generally been exercised with
31 respect to administrative, rather than dispositive, terms, and
32 not merely to accommodate a beneficiary's demand for more income
33 or to increase a beneficiary's share of trust assets. The power
34 to modify even administrative terms of the trust will not be
35 exercised routinely, however, as the Porter court noted: "It is
36 plain that the situation considered must present an emergency or
37 exigency which menaces the trust estate, and the beneficiary."

38
39 Section 412, subsection 1 represents an expansion of Maine case
40 law in that it supports modification of dispositive provisions as
41 well as administrative provisions, provided the modification
42 furthers the purposes of the trust due to unanticipated
43 circumstances. There is no requirement that circumstances have
44 changed since the trust was created, nor does there seem to be
45 any requirement that an emergency exists or that the trust res is
46 otherwise threatened.

47
48 Section 412, subsection 2 also broadens the court's authority in
49 that it permits modification of administrative terms upon a

2 showing that continuation of the trust on its existing terms
would be "wasteful" or would "impair the trust's administration."

4
6 **§413. Cy pres**

8 **1. Charitable purpose becomes unlawful, impracticable,**
impossible to achieve or wasteful. Except as otherwise provided
in subsection 2, if a particular charitable purpose of a trust
becomes unlawful, impracticable, impossible to achieve or
wasteful:

12 **A. The trust does not fail, in whole or in part;**

14 **B. The trust property does not revert to the settlor or the**
settlor's successors in interest; and

18 **C. The court may apply cy pres to modify or terminate the**
trust by directing that the trust property be applied or
distributed, in whole or in part, in a manner consistent
with the settlor's charitable purposes.

22 **2. Noncharitable beneficiary. 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 1 to apply cy pres to modify or
terminate the trust only if, when the provision takes effect:

28 **A. The trust property is to revert to the settlor and the**
settlor is still living; or

30 **B. Fewer than 50 years have elapsed since the date of the**
trust's creation.

34
36 **UNIFORM COMMENT**

38 Subsection (a) codifies the court's inherent authority to apply
39 cy pres. The power may be applied to modify an administrative or
40 dispositive term. The court may order the trust terminated and
41 distributed to other charitable entities. Partial termination may
42 also be ordered if the trust property is more than sufficient to
43 satisfy the trust's current purposes. Subsection (a), which is
44 similar to Restatement (Third) of Trusts Section 67 (Tentative
45 Draft No. 3, approved 2001), modifies the doctrine of cy pres by
46 presuming that the settlor had a general charitable intent when a
47 particular charitable purpose becomes impossible or impracticable
48 to achieve. Traditional doctrine did not supply that presumption,
49 leaving it to the courts to determine whether the settlor had a
50 general charitable intent. If such an intent is found, the trust

2 property is applied to other charitable purposes. If not, the
charitable trust fails. See Restatement (Second) of Trusts
4 Section 399 (1959). In the great majority of cases the settlor
would prefer that the property be used for other charitable
6 purposes. Courts are usually able to find a general charitable
purpose to which to apply the property, no matter how vaguely
8 such purpose may have been expressed by the settlor. Under
subsection (a), if the particular purpose for which the trust was
10 created becomes impracticable, unlawful, impossible to achieve,
or wasteful, the trust does not fail. The court instead must
12 either modify the terms of the trust or distribute the property
of the trust in a manner consistent with the settlor's charitable
purposes.

14
16 The settlor, with one exception, may mandate that the trust
property pass to a noncharitable beneficiary upon failure of a
particular charitable purpose. Responding to concerns about the
18 clogging of title and other administrative problems caused by
remote default provisions upon failure of a charitable purpose,
20 subsection (b) invalidates a gift over to a noncharitable
beneficiary upon failure of a particular charitable purpose
22 unless the trust property is to revert to a living settlor or
fewer than 21 years have elapsed since the trust's creation.
24 Subsection (b) will not apply to a charitable lead trust, under
which a charity receives payments for a term certain with a
26 remainder to a noncharity. In the case of a charitable lead
trust, the settlor's particular charitable purpose does not fail
28 upon completion of the specified trust term and distribution of
the remainder to the noncharity. Upon completion of the specified
30 trust term, the settlor's particular charitable purpose has
instead been fulfilled. For a discussion of the reasons for a
32 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).

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

42
44 For the definition of charitable purpose, see Section 405(a).
Pursuant to Sections 405(c) and 410(b), a petition requesting a
46 court to enforce a charitable trust or to apply cy pres may be
maintained by a settlor. Such actions can also be maintained by a
48 cotrustee, the state attorney general, or by a person having a
special interest in the charitable disposition. See Restatement
(Second) of Trusts Section 391 (1959).

50

2

MAINE COMMENT

4 The doctrine of cy pres has been long recognized in Maine. See
6 Lynch v. South Congregational Parish of Augusta, 109 Me. 32, 82
8 A. 432 (1912). The basic idea behind the doctrine is that a
10 specific charitable gift that becomes impracticable or impossible
12 to carry out can be fulfilled in a modified manner that carries
14 out another charitable purpose that is believed to carry out the
16 original purpose of the trust as closely as possible. See
18 Petition of Pierce, 153 Me. 180, 136 A.2d 510 (1957). The basic
prerequisites for a cy pres action in Maine are (1) a valid
charitable trust; (2) proof that the specific purpose of the
trust is impossible or impractical to carry out; and (3) proof
that the creator of the trust had a general charitable intent.
In re Thompson's Estate, 414 A.2d 881 (Me. 1980); First Portland
National Bank v. Kaler-Vaill Memorial Home, 155 Me. 50, 151 A.2d
708 (1959).

20 Adoption of the Uniform Trust Code changes Maine law in this area.

22 Probably the most significant change involves the issue of
24 whether the grantor had general charitable intent. According to
26 the Uniform Comment to chapter 4, section 413 creates a
28 presumption that the creator of a charitable trust had a general
30 charitable intent and that the gift should not revert to
32 noncharitable beneficiaries. The text of section 413 is silent
34 as to how this presumption of general charitable intent can be
36 rebutted. The precedential value of cases such as In re
Thompson's Estate, 414 A.2d 881 (Me. 1980); Grigson v. Harding,
154 Me. 146, 144 A.2d 870 (1958); First Universalist Soc. of Bath
v. Swett, 148 Me. 142, 90 A.2d 812 (1952); Manufacturer's Nat.
Bank v. Woodward, 141 Me. 28, 38 A.2d 657 (1944); Bancroft v.
Maine Sanatorium Ass'n, 119 Me. 56, 109 A. 585 (1920); Gilman v.
Burnett, 116 Me. 382, 102 A. 108 (1917); and Allen v. Trustees of
Nasson Institute, 107 Me. 120, 77 A. 638 (1910) may be called
into question by the adoption of this section.

38 The grounds for the application of cy pres have been broadened
40 from the current standard of "impossible" or "impractical" to
42 include "wasteful" and "unlawful." This does not appear to be a
material change from Maine law.

44 Even when the governing instrument provides for an alternate
46 taker, section 413 provides that the terms of the governing
48 instrument would be given effect only if the trust property is to
revert to the settlor and the settlor is still living or if fewer
than 50 years have elapsed since the date of the trust's
creation. Previous Maine law provided that the cy pres doctrine
did not apply if the donor provided an alternative gift in the

2 event the charitable gift failed. See City of Belfast v.
3 Goodwill Farm, 150 Me. 17, 103 A.2d 517 (1954); Town of Lee v.
4 Town of Lincoln, 351 A.2d 554 (Me. 1976); and Estate of Champlin,
684 A.2d 798 (Me. 1996).

6 This section could affect gifts made in trust to governmental
7 units under the Maine Revised Statutes, Title 30-A, section
8 5653. Current Maine municipal law provides that a municipality
9 may receive money or other property in trust for any public
10 purpose. If the municipality fails to comply with the terms of
11 the trust, the property reverts to the donor or the donor's
12 heirs. There is no 50-year time limitation on this reversion.
13 To the extent there is no conflict between the 2 statutes,
14 section 413 controls.

16 **§414. Modification or termination of uneconomic trust**

18 **1. Termination by trustee after notice.** After notice to
19 the qualified beneficiaries, the trustee of a trust consisting of
20 trust property having a total value less than \$100,000 may
21 terminate the trust if the trustee concludes that the value of
22 the trust property is insufficient to justify the cost of
23 administration.

26 **2. Modification, termination, new trustee by court.** The
27 court may modify or terminate a trust or remove the trustee and
28 appoint a different trustee if it determines that the value of
29 the trust property is insufficient to justify the cost of
30 administration.

32 **3. Distribution after termination.** Upon termination of a
33 trust under this section, the trustee shall distribute the trust
34 property in a manner consistent with the purposes of the trust.

36 **4. Easement for conservation or preservation.** This section
37 does not apply to an easement for conservation or preservation.

40 **UNIFORM COMMENT**

42 Subsection (a) assumes that a trust with a value of \$50,000 or
43 less is sufficiently likely to be inefficient to administer that
44 a trustee should be able to terminate it without the expense of a
45 judicial termination proceeding. The amount has been placed in
46 brackets to signal to enacting jurisdictions that they may wish
47 to designate a higher or lower figure. Because subsection (a) is
48 a default rule, a settlor is free to set a higher or lower figure
or to specify different procedures or to prohibit termination

2 without a court order. See Section 105 and Article 4 General
comment.

4 Subsection (b) allows the court to modify or terminate a trust if
the costs of administration would otherwise be excessive in
6 relation to the size of the trust. The court may terminate a
trust under this section even if the settlor has forbidden it.
8 See Section 105(b)(4). Judicial termination under this subsection
may be used whether or not the trust is larger or smaller than
10 \$50,000.

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

20 Upon termination of a trust under this section, subsection (c)
22 requires that the trust property be distributed in a manner
consistent with the purposes of the trust. In addition to
24 outright distribution to the beneficiaries, Section 816(21)
authorizes payment to be made by a variety of alternate payees.
26 Distribution under this section will typically be made to the
qualified beneficiaries in proportion to the actuarial value of
28 their interests.

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

48 While this section is not directed principally at honorary
50 trusts, it may be so applied. See Sections 408, 409.

2 Because termination of a trust under this section is initiated by
4 the trustee or ordered by the court, termination is not precluded
by a spendthrift provision.

6

MAINE COMMENT

8

10 Section 414, subsections 1 and 2, which allow the termination of
relatively uneconomic trusts, even though a material purpose of
12 the trust remains unfulfilled, are new Maine law. See University
of Maine Foundation v. Fleet Bank, 2003 ME 20, 817 A.2d 871.

14 Former Probate Code, sections 7-201 and 7-305, providing for
appointment, removal and replacement of trustees, are repealed as
16 part of the adoption of the Maine Uniform Trust Code.

18

§415. Reformation to correct mistakes

20

The court may reform the terms of a trust, even if
22 unambiguous, to conform the terms to the settlor's intention if
it is proved by clear and convincing evidence that both the
24 settlor's intent and the terms of the trust were affected by a
mistake of fact or law, whether in expression or inducement.

26

28

UNIFORM COMMENT

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

36 This section applies whether the mistake is one of expression or
one of inducement. A mistake of expression occurs when the terms
38 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
40 not intended to be excluded. A mistake in the inducement occurs
when the terms of the trust accurately reflect what the settlor
42 intended to be included or excluded but this intention was based
on a mistake of fact or law. See Restatement (Third) of Property:
44 Donative Transfers Section 12.1 cmt. i (Tentative Draft No. 1,
approved 1995). Mistakes of expression are frequently caused by
46 scribes' errors while mistakes of inducement often trace to
errors of the settlor.

48

50 Reformation is different from resolving an ambiguity. Resolving
an ambiguity involves the interpretation of language already in

2 the instrument. Reformation, on the other hand, may involve the
3 addition of language not originally in the instrument, or the
4 deletion of language originally included by mistake, if necessary
5 to conform the instrument to the settlor's intent. Because
6 reformation may involve the addition of language to the
7 instrument, or the deletion of language that may appear clear on
8 its face, reliance on extrinsic evidence is essential. To guard
9 against the possibility of unreliable or contrived evidence in
10 such circumstance, the higher standard of clear and convincing
11 proof is required. See Restatement (Third) of Property: Donative
12 Transfers Section 12.1 cmt. e (Tentative Draft No. 1, approved
13 1995).

14 In determining the settlor's original intent, the court may
15 consider evidence relevant to the settlor's intention even though
16 it contradicts an apparent plain meaning of the text. The
17 objective of the plain meaning rule, to protect against
18 fraudulent testimony, is satisfied by the requirement of clear
19 and convincing proof. See Restatement (Third) of Property:
20 Donative Transfers Section 12.1 cmt. d and Reporter's Notes
21 (Tentative Draft No. 1, approved 1995). See also John H. Langbein
22 & Lawrence W. Waggoner, Reformation of Wills on the Ground of
23 Mistake: Change of Direction in American Law?, 130 U. Pa. L. Rev.
24 521 (1982).

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

32 **MAINE COMMENT**

34 Section 415 is an extension of Maine law, in that it gives courts
35 the power to reform dispositive, as well as administrative
36 provisions of trusts in case of mistake. See In re Estate of
37 Burdon-Muller, 456 A.2d 1266 (Me. 1983) and Canal National Bank
38 v. Old Folks' Home Association of Brunswick, 347 A.2d 428, 436
39 (Me. 1975). Also new is the "clear and convincing" evidentiary
40 standard, which may offset somewhat the expansion of the court's
41 power to reform.

44 **§416. Modification to achieve settlor's tax objectives**

46 To achieve the settlor's tax objectives, the court may
47 modify the terms of a trust in a manner that is not contrary to
48 the settlor's probable intention. The court may provide that the
49 modification has retroactive effect.

2

UNIFORM COMMENT

4 This section is copied from Restatement (Third) of Property:
6 Donative Transfers Section 12.2 (Tentative Draft No. 1, approved
8 1995). "Modification" under this section is to be distinguished
10 from the "reformation" authorized by Section 415. Reformation
12 under Section 415 is available when the terms of a trust fail to
14 reflect the donor's original, particularized intention. The
16 mistaken terms are then reformed to conform to this specific
18 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
Section 413), and the deviation doctrine for unanticipated
circumstances (see Section 412).

20 Whether a modification made by the court under this section will
22 be recognized under federal tax law is a matter of federal law.
24 Absent specific statutory or regulatory authority, binding
26 recognition is normally given only to modifications made prior to
28 the taxing event, for example, the death of the testator or
30 settlor in the case of the federal estate tax. See Rev. Rul.
32 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.

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

40

MAINE COMMENT

42 Section 416 is a modest expansion of Maine law that will make it
44 easier for courts modify trusts to achieve the settlor's tax
46 objectives. See In re Estate of Burdon-Muller, 456 A.2d 1266
48 (Me. 1983), appeal after remand, Estate of Burdon-Muller, 470
50 A.2d 1267 (Me. 1984). However, as noted in the Uniform Comment,
the question of whether such modifications will be effective for
federal tax purposes is a matter of federal law and
after-the-fact changes or modifications may not achieve the
desired tax consequence.

2
4 **§417. Combination and division of trusts**

6 After notice to the qualified beneficiaries, a trustee may
8 combine 2 or more trusts into a single trust or divide a trust
10 into 2 or more separate trusts, if the result does not impair
12 rights of any beneficiary or adversely affect achievement of the
14 purposes of the trust.

12 **UNIFORM COMMENT**

14 This section, which authorizes the combination or division of
16 trusts, is subject to contrary provision in the terms of the
18 trust. See Section 105 and Article 4 General comment. Many trust
20 instruments and standardized estate planning forms include
22 comprehensive provisions governing combination and division of
trusts. Except for the requirement that the qualified
beneficiaries receive advance notice of a proposed combination or
division, this section is similar to Restatement (Third) of
Trusts Section 68 (Tentative Draft No. 3, approved 2001).

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

44 Division of trusts is often beneficial and, in certain
46 circumstances, almost routine. Division of trusts is frequently
48 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
50 are identical, the division will permit differing investment

2 objectives to be pursued and allow for discretionary
distributions to be made from one trust and not the other. Given
4 the substantial tax benefits often involved, a failure by the
trustee to pursue a division might in certain cases be a breach
6 of fiduciary duty. The opposite could also be true if the
division is undertaken to increase fees or to fit within the
small trust termination provision. See Section 414.

8
10 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
12 division, although as in the case with a proposed combination of
trusts, the more the terms of the divided trusts diverge from the
14 original plan, the less likely it is that the settlor's purposes
would be achieved and that the division could be approved.

16
18 This section does not require that a combination or division be
approved either by the court or by the beneficiaries. Prudence
may dictate, however, that court approval under Section 410 be
20 sought and beneficiary consent obtained whenever the terms of the
trusts to be combined or the trusts that will result from a
22 division differ substantially one from the other. For the
provisions relating to beneficiary consent or ratification of a
24 transaction, or release of trustee from liability, see Section
1009.

26
28 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
30 or division is required. This is consistent with Section 813,
which requires that the trustee keep the beneficiaries reasonably
32 informed of trust administration, including the giving of advance
notice to the qualified beneficiaries of several specified
34 actions that may have a major impact on their interests.

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

46
48 For a provision authorizing a trustee, in distributing the assets
of the divided trust, to make non-pro-rata distributions, see
Section 816(22).

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MAINE COMMENT

Section 417 replaces and expands former Probate Code, section 7-402, subsection (27), which allowed division, but not combination, of trusts and was repealed as part of the adoption of the Maine Uniform Trust Code.

CHAPTER 5

CREDITOR'S CLAIMS; SPENDTHRIFT AND DISCRETIONARY TRUSTS

UNIFORM COMMENT

This article addresses the validity of a spendthrift provision and the rights of creditors, both of the settlor and beneficiaries, to reach a trust to collect a debt. Sections 501 and 502 state the general rules. To the extent that 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, however, the creditor can reach the beneficiary's interest subject to the court's power to limit the relief. Section 503 lists the categories of creditors whose claims are not subject to a spendthrift restriction. Sections 504 through 507 address special categories in which the rights of a beneficiary's creditors are the same whether or not the trust contains a spendthrift provision. Section 504 deals with discretionary trusts and trusts for which distributions are subject to a standard. Section 505 covers creditor claims against a settlor, whether the trust is revocable or irrevocable, and if revocable, whether the claim is made during the settlor's lifetime or incident to the settlor's death. Section 506 provides a creditor with a remedy if a trustee fails to make a mandated distribution within a reasonable time. Section 507 clarifies that although the trustee holds legal title to trust property, that property is not subject to the trustee's personal debts.

The provisions of this article relating to the validity and effect of a spendthrift provision and the rights of certain creditors and assignees to reach the trust may not be modified by the terms of the trust. See Section 105(b)(5).

This article does not supersede state exemption statutes nor an enacting jurisdiction's Uniform Fraudulent Transfers Act which, when applicable, invalidates any type of gratuitous transfer, including transfers into trust.

2 **§501. Rights of beneficiary's creditor or assignee**

4 To the extent a beneficiary's interest is not protected by a
6 spendthrift provision, the court may authorize a creditor or
8 assignee of the beneficiary to reach the beneficiary's interest
10 by attachment of present or future distributions to or for the
12 benefit of the beneficiary or other means. The court may limit
14 the award to such relief as is appropriate under the
16 circumstances.

18 **UNIFORM COMMENT**

20 Absent a valid spendthrift provision, a creditor may reach the
22 interest of a beneficiary the same as any other of the
24 beneficiary's assets. This does not necessarily mean that the
26 creditor can collect all distributions made to the beneficiary.
28 Other creditor law of the State may limit the creditor to a
30 specified percentage of a distribution. See, e.g., Cal. Prob.
Code Section 15306.5. This section does not prescribe the
procedures for reaching a beneficiary's interest or of priority
among claimants, leaving those issues to the enacting State's
laws on creditor rights. The section does clarify, however, that
an order obtained against the trustee, whatever state procedure
may have been used, may extend to future distributions whether
made directly to the beneficiary or to others for the
beneficiary's benefit. By allowing an order to extend to future
payments, the need for the creditor periodically to return to
court will be reduced.

32 A creditor typically will pursue a claim by serving an order on
34 the trustee attaching the beneficiary's interest. Assuming that
36 the validity of the order cannot be contested, the trustee will
38 then pay to the creditor instead of to the beneficiary any
payments the trustee would otherwise be required to make to the
beneficiary, as well as discretionary distributions the trustee
decides to make. The creditor may also, in theory, force a
judicial sale of a beneficiary's interest.

40 Because proceedings to satisfy a claim are equitable in nature,
42 the second sentence of this section ratifies the court's
44 discretion to limit the award as appropriate under the
46 circumstances. In exercising its discretion to limit relief, the
48 court may appropriately consider the support needs of a
beneficiary and the beneficiary's family. See Restatement (Third)
of Trusts Section 56 cmt. e (Tentative Draft No. 2, approved
1999).

50

§502. Spendthrift provision

2
4 1. Restrains voluntary and involuntary transfers. A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.

6
8 2. Terminology. 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.

10
12 3. No transfer by beneficiary; creditors and assignees. A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this chapter, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

20
22 **UNIFORM COMMENT**

24 Under this section, a settlor has the power to restrain the transfer of a beneficiary's interest, regardless of whether the beneficiary has an interest in income, in principal, or in both. 26 Unless one of the exceptions under this article applies, 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. This section is similar to 28 Restatement (Third) of Trusts Section 58 (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Sections 30 152-153 (1959). For the definition of spendthrift provision, see Section 103(15). 32

34 For a spendthrift provision to be effective under this Code, it 36 must prohibit both the voluntary and involuntary transfer of the beneficiary's interest, that is, a settlor may not allow a 38 beneficiary to assign while prohibiting a beneficiary's creditor from collecting, and vice versa. See Restatement (Third) of 40 Trusts Section 58 cmt. b (Tentative Draft No. 2, approved 1999). See also Restatement (Second) of Trusts Section 152(2) (1959). A 42 spendthrift provision valid under this Code will also be recognized as valid in a federal bankruptcy proceeding. See 11 44 U.S.C. Section 541(c)(2).

46 Subsection (b), which is derived from Texas Property Code Section 112.035(b), allows a settlor to provide maximum spendthrift 48 protection simply by stating in the instrument that all interests are held subject to a "spendthrift trust" or words of similar 50 effect.

2 A disclaimer, because it is a refusal to accept ownership of an
4 interest and not a transfer of an interest already owned, is not
6 affected by the presence or absence of a spendthrift provision.
8 Most disclaimer statutes expressly provide that the validity of a
10 disclaimer is not affected by a spendthrift protection. See,
e.g., Unif. Probate Code Section 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
Section 58 cmt. c (Tentative Draft No. 2, approved 1999).

12 A spendthrift provision is ineffective against a beneficial
14 interest retained by the settlor. See Restatement (Third) of
Trusts Section 58(2) (Tentative Draft No. 2, approved 1999). This
16 is a necessary corollary to Section 505(a)(2), which allows a
creditor or assignee of the settlor to reach the maximum amount
that can be distributed to or for the settlor's benefit. This
18 right to reach the trust applies whether or not the trust
contains a spendthrift provision.

20 A valid spendthrift provision makes it impossible for a
22 beneficiary to make a legally binding transfer, but the trustee
may choose to honor the beneficiary's purported assignment. The
24 trustee may recommence distributions to the beneficiary at
anytime. The beneficiary, not having made a binding transfer, can
26 withdraw the beneficiary's direction but only as to future
payments. See Restatement (Third) of Trusts Section 58 cmt. d
28 (Tentative Draft No. 2, approved 1999); Restatement (Second) of
Trusts Section 152 cmt. i (1959).

30

32 **MAINE COMMENT**

34 This section codifies existing Maine case law.

36

38 **§503. Exceptions to spendthrift provision**

38

40 There are no exceptions to spendthrift provisions except as
provided in sections 504, 505 and 506.

42

44 **UNIFORM COMMENT**

44

46 This section exempts the claims of certain categories of
creditors from the effects of a spendthrift restriction.

48

50 The exception in subsection (b) for judgments or orders to
support a beneficiary's child or current or former spouse is in
accord with Restatement (Third) of Trusts Section 59(a)

2 (Tentative Draft No. 2, approved 1999), Restatement (Second) of
Trusts Section 157(a) (1959), and numerous state statutes. It is
4 also consistent with federal bankruptcy law, which exempts such
support orders from discharge. The effect of this exception is to
6 permit the claimant for unpaid support to attach present or
future distributions that would otherwise be made to the
8 beneficiary. Distributions subject to attachment include
distributions required by the express terms of the trust, such as
10 mandatory payments of income, and distributions the trustee has
otherwise decided to make, such as through the exercise of
12 discretion. Subsection (b), unlike Section 504, does not
authorize the spousal or child claimant to compel a distribution
14 from the trust. Section 504 authorizes a spouse or child claimant
to compel a distribution to the extent the trustee has abused a
discretion or failed to comply with a standard for distribution.

16 Subsection (b) refers both to "support" and "maintenance" in
18 order to accommodate differences among the States in terminology
employed. No difference in meaning between the two terms is
20 intended.

22 The definition of "child" in subsection (a) accommodates the
differing approaches States take to defining the class of
24 individuals eligible for child support, including such issues as
whether support can be awarded to stepchildren. However the State
26 making the award chooses to define "child" will be recognized
under this Code, whether the order sought to be enforced was
28 entered in the same or different State.

30 The exception in subsection (b) for a judgment creditor who has
provided services for the protection of a beneficiary's interest
32 in the trust is in accord with Restatement (Third) of Trusts
Section 59(b) (Tentative Draft No. 2, approved 1999), and
34 Restatement (Second) of Trusts Section 157(c) (1959). This
exception allows a beneficiary of modest means to overcome an
36 obstacle preventing the beneficiary's obtaining services
essential to the protection or enforcement of the beneficiary's
38 rights under the trust. See Restatement (Third) of Trusts Section
59 cmt. d (Tentative Draft No. 2, approved 1999).

40 Subsection (c), which is similar to Restatement (Third) of Trusts
Section 59 cmt. a (Tentative Draft No. 2, approved 1999), exempts
42 certain governmental claims from a spendthrift restriction.
Federal preemption guarantees that certain federal claims, such
44 as claims by the Internal Revenue Service, may bypass a
spendthrift provision no matter what this Code might say. The
46 case law and relevant Internal Revenue Code provisions on the
exception for federal tax claims are collected in George G.
48 Bogert & George T. Bogert, The Law of Trusts and Trustees Section
224 (Rev. 2d ed. 1992); and 2A Austin W. Scott & William F.
50

2 Fratcher, The Law of Trusts Section 157.4 (4th ed. 1987).
3 Regarding claims by state governments, this subsection recognizes
4 that States take a variety of approaches with respect to
5 collection, depending on whether the claim is for unpaid taxes,
6 for care provided at an institution, or for other charges.
7 Acknowledging this diversity, subsection (c) does not prescribe a
8 rule, but refers to other statutes of the State on whether
9 particular claims are subject to or exempted from spendthrift
10 provisions.

11 Unlike Restatement (Third) of Trusts Section 59(2) (Tentative
12 Draft No. 2, approved 1999), and Restatement (Second) of Trusts
13 Section 157(b) (1959), this Code does not create an exception to
14 the spendthrift restriction for creditors who have furnished
15 necessary services or supplies to the beneficiary. Most of these
16 cases involve claims by governmental entities, which the drafters
17 concluded are better handled by the enactment of special
18 legislation as authorized by subsection (c). The drafters also
19 declined to create an exception for tort claimants. For a
20 discussion of the exception for tort claims, which has not
21 generally been recognized, see Restatement (Third) of Trusts
22 Section 59 Reporter's Notes to cmt. a (Tentative Draft No. 2,
23 approved 1999). For a discussion of other exceptions to a
24 spendthrift restriction, recognized in some States, see George G.
25 Bogert & George T. Bogert, The Law of Trusts and Trustees Section
26 224 (Rev. 2d ed. 1992); and 2A Austin W. Scott & William F.
27 Fratcher, The Law of Trusts Sections 157-157.5 (4th ed. 1987).

28
29
30 **MAINE COMMENT**

31
32 Uniform Trust Code, section 503, which proposed to exempt certain
33 judgments or orders from the spendthrift provisions of trusts
34 created by 3rd parties was not adopted in Maine. Third parties,
35 parents, for example, should be free to create trusts for the
36 benefit of their children or other issue with the confidence that
37 the assets with which they fund the trust will be reserved for
38 the intended purpose, and cannot be attached by any of the
39 beneficiaries' creditors. Proposed Uniform Trust Code section
40 504, dealing with discretionary distributions, was materially
41 amended for the same reason. Uniform Trust Code, section 505,
42 which provides different rules for self-settled trusts, was
43 enacted as proposed.

44
45 **§504. Discretionary trusts; effect of standard**

46
47 **1. Creditor may not compel distribution. Whether or not a**
48 **trust contains a spendthrift provision, a creditor of a**

beneficiary may not compel a distribution that is subject to the trustee's discretion, even if:

A. The discretion is expressed in the form of a standard of distribution; or

B. The trustee has abused the discretion.

2. Right of beneficiary not limited. This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

UNIFORM COMMENT

This section addresses the ability of a beneficiary's creditor to reach the beneficiary's discretionary trust interest, whether or not the exercise of the trustee's discretion is subject to a standard. This section, similar to the Restatement, eliminates the distinction between discretionary and support trusts, unifying the rules for all trusts fitting within either of the former categories. See Restatement (Third) of Trusts Section 60 Reporter's Notes to cmt. a (Tentative Draft No. 2, approved 1999).

This section will have limited application. Pursuant to Section 502, the effect of a valid spendthrift provision, where applicable, is to prohibit a creditor from collecting on a distribution prior to its receipt by the beneficiary. Only if the trust is not protected by a spendthrift provision, or if the creditor falls within one of the exceptions to spendthrift enforcement created by Section 503, does this section become relevant.

For a discussion of the definition of "child" in subsection (a), see Section 503 comment.

Subsection (b), which establishes the general rule, forbids a creditor from compelling a distribution from the trust, even if the trustee has failed to comply with the standard of distribution or has abused a discretion. Under subsection (d), the power to force a distribution due to an abuse of discretion or failure to comply with a standard belongs solely to the beneficiary. Under Section 814(a), a trustee must always exercise a discretionary power in good faith and with regard to the purposes of the trust and the interests of the beneficiaries.

Subsection (c) creates an exception for support claims of a child, spouse, or former spouse who has a judgment or order against a beneficiary for support or maintenance. While a creditor of a beneficiary generally may not assert that a trustee

2 has abused a discretion or failed to comply with a standard of
3 distribution, such a claim may be asserted by the beneficiary's
4 child, spouse, or former spouse enforcing a judgment or court
5 order against the beneficiary for unpaid support or maintenance.
6 The court must direct the trustee to pay the child, spouse or
7 former spouse such amount as is equitable under the circumstances
8 but not in excess of the amount the trustee was otherwise
9 required to distribute to or for the benefit of the beneficiary.
10 Before fixing this amount, the court having jurisdiction over the
11 trust should consider that in setting the respective support
12 award, the family court has already considered the respective
13 needs and assets of the family. The Uniform Trust Code does not
14 prescribe a particular procedural method for enforcing a judgment
15 or order against the trust, leaving that matter to local
16 collection law.

16

18

MAINE COMMENT

20

Portions of the proposed Uniform Trust Code, section 503 and
section 504, subsections 1 and 3 were deleted on the belief that
these sections constituted an undesirable expansion of existing
Maine law.

22

24

§505. Creditor's claim against settlor

26

1. Creditor's claims. Whether or not the terms of a trust
contain a spendthrift provision, the following rules apply.

28

30

A. During the lifetime of the settlor, the property of a
revocable trust is subject to claims of the settlor's
creditors.

32

34

B. With respect to an irrevocable trust, a creditor or
assignee of the settlor may reach the maximum amount that
can be distributed to or for the settlor's benefit. If a
trust has more than one settlor, the amount the creditor or
assignee of a particular settlor may reach may not exceed
the settlor's interest in the portion of the trust
attributable to that settlor's contribution.

36

38

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42

C. 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 at
the settlor's death is subject to claims of the settlor's
creditors, costs of administration of the settlor's estate,
the expenses of the settlor's funeral and disposal of
remains, and statutory allowances to a surviving spouse and
children to the extent the settlor's probate estate is

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46

48

50

2 settlor-beneficiary. If the trustee has discretion to distribute
the entire income and principal to the settlor, the effect of
4 this subsection is to place the settlor's creditors in the same
position as if the trust had not been created. For the definition
6 of "settlor," see Section 103(14).

8 This section does not address possible rights against a settlor
who was insolvent at the time of the trust's creation or was
10 rendered insolvent by the transfer of property to the trust. This
subject is instead left to the State's law on fraudulent
12 transfers. A transfer to the trust by an insolvent settlor might
also constitute a voidable preference under federal bankruptcy
14 law.

16 Subsection (a)(3) recognizes that a revocable trust is usually
employed as a will substitute. As such, the trust assets,
18 following the death of the settlor, should be subject to the
settlor's debts and other charges. However, in accordance with
20 traditional doctrine, the assets of the settlor's probate estate
must normally first be exhausted before the assets of the
22 revocable trust can be reached. This section does not attempt to
address the procedural issues raised by the need first to exhaust
24 the decedent's probate estate before reaching the assets of the
revocable trust. Nor does this section address the priority of
26 creditor claims or liability of the decedent's other nonprobate
assets for the decedent's debts and other charges. Subsection
28 (a)(3), however, does ratify the typical pourover will, revocable
trust plan. As long as the rights of the creditor or family
30 member claiming a statutory allowance are not impaired, the
settlor is free to shift liability from the probate estate to the
32 revocable trust. Regarding other issues associated with potential
liability of nonprobate assets for unpaid claims, see Section
34 6-102 of the Uniform Probate Code, which was added to that Code
in 1998.

36 Subsection (b)(1) treats a power of withdrawal as the equivalent
of a power of revocation because the two powers are functionally
38 identical. This is also the approach taken in Restatement (Third)
of Trusts Section 56 cmt. b (Tentative Draft No. 2, approved
40 1999). If the power is unlimited, the property subject to the
power will be fully subject to the claims of the power holder's
42 creditors, the same as the power holder's other assets. If the
power holder retains the power until death, the property subject
44 to the power may be liable for claims and statutory allowances to
the extent the power holder's probate estate is insufficient to
46 satisfy those claims and allowances. For powers limited either in
time or amount, such as a right to withdraw a \$10,000 annual
48 exclusion contribution within 30 days, this subsection would
limit the creditor to the \$10,000 contribution and require the

2 creditor to take action prior to the expiration of the 30-day
period.

4 Upon the lapse, release, or waiver of a power of withdrawal, the
property formerly subject to the power will normally be subject
6 to the claims of the power holder's creditors and assignees the
same as if the power holder were the settlor of a now irrevocable
8 trust. Pursuant to subsection (a)(2), a creditor or assignee of
the power holder generally may reach the power holder's entire
10 beneficial interest in the trust, whether or not distribution is
subject to the trustee's discretion. However, following the lead
12 of Arizona Revised Statutes Section 14-7705(g) and Texas Property
Code Section 112.035(e), subsection (b)(2) creates an exception
14 for trust property which was subject to a Crummey or five and
five power. Upon the lapse, release, or waiver of a power of
16 withdrawal, the holder is treated as the settlor of the trust
only to the extent the value of the property subject to the power
18 at the time of the lapse, release, or waiver exceeded the greater
of the amounts specified in IRC Sections 2041(b)(2) or 2514(e)
20 [greater of 5% or \$5,000], or IRC Section 2503(b) [\$10,000 in
2001].

22 The Uniform Trust Code does not address creditor issues with
24 respect to property subject to a special power of appointment or
a testamentary general power of appointment. For creditor rights
26 against such interests, see Restatement (Property) Second:
Donative Transfers Sections 13.1-13.7 (1986).

28
30 **MAINE COMMENT**

32 This section will fill the void in Maine trust law regarding a
creditor's claims against the settlor of self-settled trusts.

34
36 **§506. Overdue distribution**

38 Whether or not a trust contains a spendthrift provision, a
39 creditor or assignee of a beneficiary may reach a mandatory
40 distribution of income or principal, including a distribution
41 upon termination of the trust, if the trustee has not made the
42 distribution to the beneficiary within a reasonable time after
43 the designated distribution date.

44
46 **UNIFORM COMMENT**

48 The effect of a spendthrift provision is generally to insulate
totally a beneficiary's interest until a distribution is made and
50 received by the beneficiary. See Section 502. But this section,

2 along with several other sections in this article, recognizes
3 exceptions to this general rule. Whether a trust contains a
4 spendthrift provision or not, a trustee should not be able to
5 avoid creditor claims against a beneficiary by refusing to make a
6 distribution required to be made by the express terms of the
7 trust. On the other hand, a spendthrift provision would become
8 largely a nullity were a beneficiary's creditors able to attach
9 all required payments as soon as they became due. This section
10 reflects a compromise between these two competing principles. A
11 creditor can reach a mandatory distribution, including a
12 distribution upon termination, if the trustee has failed to make
13 the payment within a reasonable time after the designated
14 distribution date. Following this reasonable period, payments
15 mandated by the express terms of the trust are in effect being
16 held by the trustee as agent for the beneficiary and should be
17 treated as part of the beneficiary's personal assets.

18 This section is similar to Restatement (Third) of Trusts Section
19 58 cmt. d (Tentative Draft No. 2, approved 1999).

20 2001 Amendment. By amendment in 2001, "designated distribution
21 date" was substituted for "required distribution date." The
22 amendment conforms the language of this section to terminology
23 used elsewhere in the Code.

26
27 **MAINE COMMENT**

28 This section codifies existing Maine common law.

30
31 **§507. Personal obligations of trustee**

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

36
37 **UNIFORM COMMENT**

38 Because the beneficiaries of the trust hold the beneficial
39 interest in the trust property and the trustee holds only legal
40 title without the benefits of ownership, the creditors of the
41 trustee have only a personal claim against the trustee. See
42 Restatement (Third) Section 5 cmt. k (Tentative Draft No.1,
43 approved 1996); Restatement (Second) of Trusts Section 12 cmt. a
44 (1959). Similarly, a personal creditor of the trustee who
45 attaches trust property to satisfy the debt does not acquire
46 title as a bona fide purchaser even if the creditor is unaware of
47 the trust. See Restatement (Second) of Trusts Section 308 (1959).
48 The protection afforded by this section is consistent with that
49
50

2 provided by the Bankruptcy Code. Property in which the trustee
holds legal title as trustee is not part of the trustee's
4 bankruptcy estate. 11 U.S.C. Section 541(d).

6 The exemption of the trust property from the personal obligations
of the trustee is the most significant feature of Anglo-American
8 trust law by comparison with the devices available in civil law
countries. A principal objective of the Hague Convention on the
10 Law Applicable to Trusts and on their Recognition is to protect
the Anglo-American trust with respect to transactions in civil
12 law countries. See Hague Convention art. 11. See also Henry
Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative
14 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).

18 **MAINE COMMENT**

20 This section fills a void in Maine law, making it clear that the
personal creditors of a trustee may not attach property interests
22 titled to the trustee for benefit of 3rd-party beneficiaries.
This position follows common law, Restatement (Second) of Trusts
24 Section 12, cmt. (a) (1959) and Restatement (Third) of Trusts,
Section 5, cmt. (k) (tentative draft no. 1, 1996), all of which
26 the Law Court has relied upon in the past when presented with
trust and fiduciary issues of first impression in Maine.

28 **CHAPTER 6**

30 **REVOCABLE TRUSTS**

32 **UNIFORM COMMENT**

34 This article deals with issues of significance not totally
36 settled under prior law. Because of the widespread use in recent
years of the revocable trust as an alternative to a will, this
38 short article is one of the more important articles of the Code.
This article and the other articles of the Code treat the
40 revocable trust as the functional equivalent of a will. Section
601 provides that the capacity standard for wills applies in
42 determining whether the settlor had capacity to create a
revocable trust. Section 602, after providing that a trust is
44 presumed revocable unless stated otherwise, prescribes the
procedure for revocation or amendment, whether the trust contains
46 one or several settlors. Section 603 provides that while a trust
is revocable and the settlor has capacity, the rights of the
48 beneficiaries are subject to the settlor's control. Section 604
prescribes a statute of limitations on contest of revocable
50 trusts.

2 Sections 601 and 604, because they address requirements relating
to creation and contest of trusts, are not subject to alteration
4 or restriction in the terms of the trust. See Section 105.
Sections 602 and 603, by contrast, are not so limited and are
6 fully subject to the settlor's control.

8

§601. Capacity of settlor of revocable trust

10

The capacity required to create, amend, revoke or add
12 property to a revocable trust, or to direct the actions of the
trustee of a revocable trust, is the same as that required to
14 make a will.

16

UNIFORM COMMENT

18 This section is patterned after Restatement (Third) of Trusts
Section 11(1) (Tentative Draft No. 1, approved 1996). The
20 revocable trust is used primarily as a will substitute, with its
key provision being the determination of the persons to receive
22 the trust property upon the settlor's death. To solidify the use
of the revocable trust as a device for transferring property at
24 death, the settlor usually also executes a pourover will. The use
of a pourover will assures that property not transferred to the
26 trust during life will be combined with the property the settlor
did manage to convey. Given this primary use of the revocable
28 trust as a device for disposing of property at death, the
capacity standard for wills rather than that for lifetime gifts
30 should apply. The application of the capacity standard for wills
does not mean that the revocable trust must be executed with the
32 formalities of a will. There are no execution requirements under
this Code for a trust not created by will, and a trust not
34 containing real property may be created by an oral statement. See
Section 407 and comment.

36

The Uniform Trust Code does not explicitly spell out the standard
38 of capacity necessary to create other types of trusts, although
Section 402 does require that the settlor have capacity. This
40 section includes a capacity standard for creation of a revocable
trust because of the uncertainty in the case law and the
42 importance of the issue in modern estate planning. No such
uncertainty exists with respect to the capacity standard for
44 other types of trusts. To create a testamentary trust, the
settlor must have the capacity to make a will. To create an
46 irrevocable trust, the settlor must have the capacity that would
be needed to transfer the property free of trust. See generally
48 Restatement (Third) of Trusts Section 11 (Tentative Draft No. 1,
approved 1996); Restatement (Third) of Property: Wills and Other

Donative Transfers Section 8.1 (Tentative Draft No. 3, approved 2001).

MAINE COMMENT

This is a change from the Maine common law, which required the same capacity that would be needed to transfer property.

§602. Revocation or amendment of revocable trust

1. Revocable unless expressly provided. Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This subsection does not apply to a trust created under an instrument executed before July 1, 2005.

2. Revocable trust with more than one settlor. If a revocable trust is created or funded by more than one settlor:

A. 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;

B. 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

C. Upon the revocation or amendment of the trust by fewer than all of the settlors, the trustee shall notify the other settlors of the revocation or amendment.

3. Revoke or amend. The settlor may revoke or amend a revocable trust:

A. By substantial compliance with a method provided in the terms of the trust; or

B. If the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by:

(1) 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

2 a trust. See Restatement (Third) of Trusts Section 63 cmt. g
(Tentative Draft No. 3, approved 2001); Restatement (Second) of
Trusts Section 331 cmt. g & h (1959).

4
6 Subsection (b), which is similar to Restatement (Third) of Trusts
Section 63 cmt. k (Tentative Draft No. 3, approved 2001),
8 provides default rules for revocation or amendment of a trust
having several settlors. The settlor's authority to revoke or
10 modify the trust depends on whether the trust contains community
property. To the extent the trust contains community property,
12 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
14 provision, and the reason for the use of joint trusts in
community property states, is to preserve the community character
of property transferred to the trust. While community property
16 does not prevail in a majority of states, contributions of
community property to trusts created in noncommunity property
18 states does occur. This is due to the mobility of settlors, and
the fact that community property retains its community character
20 when a couple move from a community to a noncommunity state. For
this reason, subsection (b), and its provision on contributions
22 of community property, should be enacted in all states, whether
community or noncommunity.

24
26 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
28 may revoke or amend the trust as to the portion of the trust
contributed by that settlor. The inclusion of a rule for
30 contributions of separate property does not mean that the
drafters of this Code concluded that the use of joint trusts
32 should be encouraged. The rule is included because of the
widespread use of joint trusts in noncommunity property states in
34 recent years. Due to the desire to preserve the community
character of trust property, joint trusts are a necessity in
36 community property states. Unless community property will be
contributed to the trust, no similarly important reason exists
38 for the creation of a joint trust in a noncommunity property
state. Joint trusts are often poorly drafted, confusing the
40 dispositive provisions of the respective settlors. Their use can
also lead to unintended tax consequences. See Melinda S. Merk,
42 Joint Revocable Trusts for Married Couples Domiciled in
Common-Law Property States, 32 Real Prop. Prob. & Tr. J. 345
44 (1997).

46 Subsection (b) does not address the many technical issues that
can arise in determining the settlors' proportionate contribution
48 to a joint trust. Most problematic are contributions of
jointly-owned property. In the case of joint tenancies in real
50 estate, each spouse would presumably be treated as having made an

2 equal contribution because of the right to sever the interest and
3 convert it into a tenancy in common. This is in contrast to joint
4 accounts in financial institutions, ownership of which in most
5 states is based not on fractional interest but on actual dollar
6 contribution. See, e.g., Unif. Probate Code Section 6-211. Most
7 difficult may be determining a contribution rule for entireties
8 property. In *Holdener v. Fieser*, 971 S.W. 2d 946 (Mo. Ct. App.
9 1998), the court held that a surviving spouse could revoke the
10 trust with respect to the entire interest but did not express a
11 view as to revocation rights while both spouses were living.

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

31 Subsection (c), which is similar to Restatement (Third) of Trusts
32 Section 63 cmt. h & i (Tentative Draft No. 3, approved 2001),
33 specifies the method of revocation and amendment. Revocation of a
34 trust differs fundamentally from revocation of a will. Revocation
35 of a will, because a will is not effective until death, cannot
36 affect an existing fiduciary relationship. With a trust, however,
37 because a revocation will terminate an already existing fiduciary
38 relationship, there is a need to protect a trustee who might act
39 without knowledge that the trust has been revoked. There is also
40 a need to protect trustees against the risk that they will
41 misperceive the settlor's intent and mistakenly assume that an
42 informal document or communication constitutes a revocation when
43 that was not in fact the settlor's intent. To protect trustees
44 against these risks, drafters habitually insert provisions
45 providing that a revocable trust may be revoked only by delivery
46 to the trustee of a formal revoking document. Some courts require
47 strict compliance with the stated formalities. Other courts,
48 recognizing that the formalities were inserted primarily for the
49 trustee's and not the settlor's benefit, will accept other
50

2 methods of revocation as long as the settlor's intent is clear.
3 See Restatement (Third) of Trusts Section 63 Reporter's Notes to
4 cmt. h-j (Tentative Draft No. 3, approved 2001).

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

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

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

40 Revocation or amendment by will is mentioned in subsection (c)
41 not to encourage the practice but to make clear that it is not
42 precluded by omission. See Restatement (Third) of Property: Will
43 and Other Donative Transfers Section 7.2 cmt. e (Tentative Draft
44 No. 3, approved 2001), which validates revocation or amendment of
45 will substitutes by later will. Situations do arise, particularly
46 in death-bed cases, where revocation by will may be the only
47 practicable method. In such cases, a will, a solemn document
48 executed with a high level of formality, may be the most reliable
49 method for expressing intent. A revocation in a will ordinarily
50

2 becomes effective only upon probate of the will following the
testator's death. For the cases, see Restatement (Third) of
Trusts Section 63 Reporter's Notes to cmt. h-i (Tentative Draft
4 No. 3, approved 2001).

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

16 Subsection (c) does not require that a trustee concur in the
revocation or amendment of a trust. Such a concurrence would be
18 necessary only if required by the terms of the trust. If the
trustee concludes that an amendment unacceptably changes the
20 trustee's duties, the trustee may resign as provided in Section
705.

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

26 A settlor's power to revoke is not terminated by the settlor's
incapacity. The power to revoke may instead be exercised by an
28 agent under a power of attorney as authorized in subsection (e),
30 by a conservator or guardian as authorized in subsection (f), or
by the settlor personally if the settlor regains capacity.

32 Subsection (e), which is similar to Restatement (Third) of Trusts
34 Section 63 cmt. 1 (Tentative Draft No. 3, approved 2001),
authorizes an agent under a power of attorney to revoke or modify
36 a revocable trust only to the extent the terms of the trust or
power of attorney expressly so permit. An express provision is
38 required because most settlors usually intend that the revocable
trust, and not the power of attorney, to function as the
40 settlor's principal property management device. The power of
attorney is usually intended as a backup for assets not
42 transferred to the revocable trust or to address specific topics,
such as the power to sign tax returns or apply for government
44 benefits, which may be beyond the authority of a trustee or are
not customarily granted to a trustee.

46 Subsection (f) addresses the authority of a conservator or
48 guardian to revoke or amend a revocable trust. Under the Uniform
Trust Code, a "conservator" is appointed by the court to manage
50 the ward's party, a "guardian" to make decisions with respect to

2 the ward's personal affairs. See Section 103. Consequently,
3 subsection (f) authorizes a guardian to exercise a settlor's
4 power to revoke or amend a trust only if a conservator has not
5 been appointed.

6 Many state conservatorship statutes authorize a conservator to
7 exercise the settlor's power of revocation with the prior
8 approval of the court supervising the conservatorship. See, e.g.,
9 Unif. Probate Code Section 411(a)(4). Subsection (f) ratifies
10 this practice. Under the Code, a conservator may exercise a
11 settlor's power of revocation, amendment, or right to withdraw
12 trust property upon approval of the court supervising the
13 conservatorship. Because a settlor often creates a revocable
14 trust for the very purpose of avoiding conservatorship, this
15 power should be exercised by the court reluctantly. Settlers
16 concerned about revocation by a conservator may wish to deny a
17 conservator a power to revoke. However, while such a provision in
18 the terms of the trust is entitled to considerable weight, the
19 court may override the restriction if it concludes that the
20 action is necessary in the interests of justice. See Section
21 105(b)(13).

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

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

38
39
40 2001 Amendment. By amendment in 2001, revocation by "executing a
41 later will or codicil" in subsection (c)(2)(A) was changed to
42 revocation by a "later will or codicil" to avoid an implication
43 that the trust is revoked immediately upon execution of the will
44 or codicil and not at the testator's death.

45
46
47
48 **MAINE COMMENT**

2 Referencing section 602, subsection 2 and the Uniform Comment,
Maine has not as yet adopted the Uniform Probate Code, section
4 6-211. Referencing section 602, subsection 6 and the Uniform
Comment, the reference to section 411, subsection (a), paragraph
6 (4) of the Uniform Trust Code appears covered by the Probate
Code, section 5-408.

8
10 **§603. Settlor's powers; powers of withdrawal**

12 **1. Revocable trust.** While a trust is revocable and the
settlor has capacity to revoke the trust, rights of the
14 beneficiaries are subject to the control of, and the duties of
the trustee are owed exclusively to, the settlor.

16 **2. Rights of settlor of revocable trust.** During the period
the power may be exercised, the holder of a power of withdrawal
18 has the rights of a settlor of a revocable trust under this
section to the extent of the property subject to the power.

20
22 **UNIFORM COMMENT**

24 This section has the effect of postponing enforcement of the
rights of the beneficiaries of a revocable trust until the death
26 or incapacity of the settlor or other person holding the power to
revoke the trust. This section thus recognizes that the settlor
28 of a revocable trust is in control of the trust and should have
the right to enforce the trust.

30 Pursuant to this section, the duty under Section 813 to inform
32 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
34 having several settlors, subsection (b) clarifies that this duty
extends to all settlors having capacity. Should fewer than all
36 settlors revoke or modify their portion of the trust, the trustee
must notify the other settlor or settlors of the action. See
38 Section 602 comment.

40 If the settlor loses capacity, subsection (a) no longer applies,
with the consequence that the rights of the beneficiaries are no
42 longer subject to the settlor's control. The beneficiaries are
entitled to request information concerning the trust and the
44 trustee must provide the beneficiaries with annual trustee
reports and whatever other information may be required under
46 Section 813. However, because this section may be freely
overridden in the terms of the trust, a settlor is free to deny
48 the beneficiaries these rights, even to the point of directing
the trustee not to inform them of the existence of the trust.
50 Also, should an incapacitated settlor later regain capacity, the

2 beneficiaries' rights will again be subject to the settlor's
control. The cessation of the settlor's control upon the
4 settlor's incapacity or death does not mean that the
beneficiaries may reopen transactions the settlor approved while
having capacity.

6
8 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
10 against the trustee for breach of fiduciary duty will pass to the
settlor's agent or conservator.

12
14 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
16 equivalent power to control the trust. For the definition of
power of withdrawal, see Section 103(10).

18
20 2001 Amendment. By a 2001 amendment, former subsection (b) was
deleted. Former subsection (b) provided: "While a trust is
revocable and the settlor does not have capacity to revoke the
22 trust, rights of the beneficiaries are held by the
beneficiaries." No substantive change was intended by this
24 amendment. Former subsection (b) was superfluous. Rights of the
beneficiaries are always held by the beneficiaries unless taken
26 away by some other provision. Subsection (a) grants these rights
to the settlor of a revocable trust while the settlor has
28 capacity. Upon a settlor's loss of capacity, these rights are
held by the beneficiaries with or without former subsection (b).

30
32 **§604. Limitation on action contesting validity of revocable
trust; distribution of trust property**

34
36 **1. Revocable trust. A person may commence a judicial
proceeding to contest the validity of a trust that was revocable
at the settlor's death within the earlier of:**

38 **A. Three years after the settlor's death; or**

40
42 **B. One hundred and twenty 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
44 and address and of the time allowed for commencing a
proceeding.**

46
48 **2. Trustee liability for distributions. Upon the death of
the settlor of a trust that was revocable at the settlor's death,
the trustee may proceed to distribute the trust property in**

2 accordance with the terms of the trust. The trustee is not
3 subject to liability for doing so unless:

4 A. The trustee knows of a pending judicial proceeding
5 contesting the validity of the trust; or

6
7 B. A potential contestant has notified the trustee of a
8 possible judicial proceeding to contest the trust and a
9 judicial proceeding is commenced within 60 days after the
10 contestant sent the notification.

11 3. Beneficiary to return distribution. A beneficiary of a
12 trust that is determined to have been invalid is liable to return
13 any distribution received.
14

15
16
17 **UNIFORM COMMENT**

18
19 This section provides finality to the question of when a contest
20 of a revocable trust may be brought. The section is designed to
21 allow an adequate time in which to bring a contest while at the
22 same time permitting the expeditious distribution of the trust
23 property following the settlor's death.

24
25 A trust can be contested on a variety of grounds. For example,
26 the contestant may allege that no trust was created due to lack
27 of intent to create a trust or lack of capacity (see Section
28 402), that undue influence, duress, or fraud was involved in the
29 trust's creation (see Section 406), or that the trust had been
30 revoked or modified (see Section 602). A "contest" is an action
31 to invalidate all or part of the terms of the trust or of
32 property transfers to the trustee. An action against a
33 beneficiary or other person for intentional interference with an
34 inheritance or gift, not being a contest, is not subject to this
35 section. For the law on intentional interference, see Restatement
36 (Second) of Torts Section 774B (1979). Nor does this section
37 preclude an action to determine the validity of a trust that is
38 brought during the settlor's lifetime, such as a petition for a
39 declaratory judgment, if such action is authorized by other law.
40 See Section 106 (Uniform Trust Code supplemented by common law of
41 trusts and principles of equity).

42
43 This section applies only to a revocable trust that becomes
44 irrevocable by reason of the settlor's death. A trust that became
45 irrevocable by reason of the settlor's lifetime release of the
46 power to revoke is outside its scope. A revocable trust does not
47 become irrevocable upon a settlor's loss of capacity. Pursuant to
48 Section 602, the power to revoke may be exercised by the
49 settlor's agent, conservator, or guardian, or personally by the
50 settlor if the settlor regains capacity.

2 Subsection (a) specifies a time limit on when a contest can be
brought. A contest is barred upon the first to occur of two
4 possible events. The maximum possible time for bringing a contest
is three years from the settlor's death. This should provide
6 potential contestants with ample time in which to determine
whether they have an interest that will be affected by the trust,
8 even if formal notice of the trust is lacking. The three-year
period is derived from Section 3-108 of the Uniform Probate Code.
10 Three years is the maximum limit under the UPC for contesting a
nonprobated will. Enacting jurisdictions prescribing shorter or
12 longer time limits for contest of a nonprobated will should
substitute their own time limit. To facilitate this process, the
14 "three-year" period has been placed in brackets.

16 A trustee who wishes to shorten the contest period may do so by
giving notice. Drawing from California Probate Code Section
18 16061.7, subsection (a)(2) bars a contest by a potential
contestant 120 days after the date the trustee sent that person a
20 copy of the trust instrument and informed the person of the
trust's existence, of the trustee's name and address, and of the
22 time allowed for commencing a contest. The reference to "120"
days is placed in brackets to suggest to the enacting
24 jurisdiction that it substitute its statutory time period for
contesting a will following notice of probate. The 120 day period
26 in subsection (a)(2) is subordinate to the three-year bar in
subsection (a)(1). A contest is automatically barred three years
28 after the settlor's death even if notice is sent by the trustee
less than 120 days prior to the end of that period.

30 Because only a small minority of trusts are actually contested,
32 trustees should not be restrained from making distributions
because of concern about possible liability should a contest
34 later be filed. Absent a protective statute, a trustee is
ordinarily absolutely liable for misdelivery of the trust assets,
36 even if the trustee reasonably believed that the distribution was
proper. See Restatement (Second) of Trusts Section 226 (1959).
38 Subsection (b) addresses liability concerns by allowing the
trustee, upon the settlor's death, to proceed expeditiously to
40 distribute the trust property. The trustee may distribute the
trust property in accordance with the terms of the trust until
42 and unless the trustee receives notice of a pending judicial
proceeding contesting the validity of the trust, or until
44 notified by a potential contestant of a possible contest,
followed by its filing within 60 days.

46 Even though a distribution in compliance with subsection (b)
48 discharges the trustee from potential liability, subsection (c)
makes the beneficiaries of what later turns out to have been an
50 invalid trust liable to return any distribution received. Issues

2 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.

4
6 For purposes of notices under this section, the substitute
representation principles of Article 3 are applicable. The notice
by the trustee under subsection (a)(2) or by a potential
8 contestant under subsection (b)(2) must be given in a manner
reasonably suitable under the circumstances and likely to result
10 in its receipt. See Section 109(a).

12 This section does not address possible liability for the debts of
the deceased settlor or a trustee's possible liability to
14 creditors for distributing trust assets. For possible liability
of the trust, see Section 505(a)(3) and comment. Whether a
16 trustee can be held personally liable for creditor claims
following distribution of trust assets is addressed in Uniform
18 Probate Code Section 6-102, which was added to that Code in 1998.

20
22 **MAINE COMMENT**

24 Maine has not adopted Uniform Probate Code section 6-102 as added
to that Code in 1998.

26
28 **CHAPTER 7**

30 **OFFICE OF TRUSTEE**

32 **UNIFORM COMMENT**

34 This article contains a series of default rules dealing with the
office of trustee. Sections 701 and 702 address the process for
getting a trustee into office, including the procedures for
36 indicating an acceptance and whether bond will be required.
Section 703 addresses cotrustees, permitting the cotrustees to
38 act by majority action and specifying the extent to which one
trustee may delegate to another. Sections 704 through 707 address
40 changes in the office of trustee, specifying the circumstances
when a vacancy must be filled, the procedure for resignation, the
42 grounds for removal, and the process for appointing a successor.
Sections 708 and 709 prescribe the standards for determining
44 trustee compensation and reimbursement for expenses advanced.

46 Except for the court's authority to order bond, all of the
provisions of this article are subject to modification in the
48 terms of the trust. See Section 105.

50

§701. Accepting or declining trusteeship

1. Acceptance. Except as otherwise provided in subsection 3, a person designated as trustee accepts the trusteeship:

A. By substantially complying with a method of acceptance provided in the terms of the trust; or

B. 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.

2. Rejection. 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 is deemed to have rejected the trusteeship.

3. Action without acceptance. A person designated as trustee, without accepting the trusteeship, may:

A. 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

B. Inspect or investigate trust property to determine potential liability under environmental or other law or for any other purpose.

UNIFORM COMMENT

This section, which specifies the requirements for a valid acceptance of the trusteeship, implicates many of the same issues that arise in determining whether a trust has been revoked. Consequently, the two provisions track each other closely. Compare Section 701(a), with Section 602(c) (procedure for revoking or modifying trust). Procedures specified in the terms of the trust are recognized, but only substantial, not literal compliance is required. A failure to meet technical requirements, such as notarization of the trustee's signature, does not result in a failure to accept. Ordinarily, the trustee will indicate acceptance by signing the trust instrument or signing a separate written instrument. However, this section validates any other method demonstrating the necessary intent, such as by knowingly exercising trustee powers, unless the terms of the trust make the specified method exclusive. This section also does not preclude an acceptance by estoppel. For general background on issues

2 relating to trustee acceptance and rejection, see Restatement
(Third) of Trusts Section 35 (Tentative Draft No. 2, approved
1999); Restatement (Second) of Trusts Section 102 (1959).
4 Consistent with Section 201(b), which emphasizes that continuing
judicial supervision of a trust is the rare exception, not the
6 rule, the Uniform Trust Code does not require that a trustee
qualify in court.

8
10 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
12 accept within a reasonable time constitutes a rejection of the
trusteeship. What will constitute a reasonable time depends on
14 the facts and circumstances of the particular case. A major
consideration is possible harm that might occur if a vacancy in a
16 trusteeship is not filled in a timely manner. A trustee's
rejection normally precludes a later acceptance but does not
18 cause the trust to fail. See Restatement (Third) of Trusts
Section 35 cmt. c (Tentative Draft No. 2, approved 1999).
20 Regarding the filling of a vacancy in the event of a rejection,
see Section 704.

22
24 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
26 the rejection depends upon the circumstances. Ordinarily, it
would be appropriate to communicate the rejection to the person
28 who informed the designee of the proposed trusteeship. If
judicial proceedings involving the trust are pending, the
30 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
32 communicate the rejection to the settlor. In any event, it would
be best to inform a beneficiary with a significant interest in
34 the trust because that beneficiary might be more motivated than
others to seek appointment of a new trustee.

36
38 Subsection (c)(1) makes clear that a nominated trustee may act
expeditiously to protect the trust property without being
considered to have accepted the trusteeship. However, upon
40 conclusion of the intervention, the nominated trustee must send a
rejection of office to the settlor, if living and competent,
42 otherwise to a qualified beneficiary.

44 Because of the potential liability that can inhere in
trusteeship, subsection (c)(2) allows a person designated as
46 trustee to inspect the trust property without accepting the
trusteeship. The condition of real property is a particular
48 concern, including possible tort liability for the condition of
the premises or liability for violation of state or federal
50 environmental laws such as CERCLA, 42 U.S.C. Section 9607. For a

2 provision limiting a trustee's personal liability for obligations
arising from ownership or control of trust property, see Section
4 1010(b).

6 **MAINE COMMENT**

8 Section 701, subsection 3, paragraph B is consistent with the
10 Probate Code, Section 1-111.

12 **§702. Trustee's bond**

14 1. Bond. A trustee shall give bond to secure performance
16 of the trustee's duties only if the court finds that a bond is
18 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.

20 2. Amount. The court may specify the amount of a bond, its
22 liabilities, and whether sureties are necessary. The court may
modify or terminate a bond at any time.

24 3. Financial institution. A financial institution
26 qualified to do trust business in this State need not give bond,
even if required by the terms of the trust.

28 4. Cost charged to trust. Unless otherwise directed by the
30 court, the cost of a bond is charged to the trust.

32 **UNIFORM COMMENT**

34 This provision is consistent with the Restatement Third and with
36 the bonding provisions of the Uniform Probate Code. See
Restatement (Third) of Trusts Section 34(3) and cmt. a (Tentative
38 Draft No. 2, approved 1999); Uniform Probate Code Sections 3-604
(personal representatives), 5-415 (conservators), and 7-304
40 (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
42 necessary to protect the interests of beneficiaries, bond should
rarely be required under this Code.

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

2 This section does not attempt to detail all of the technical
bonding requirements that the court may impose. Typical
4 requirements are listed in the Uniform Probate Code sections
cited above. The amount of a bond otherwise required may be
6 reduced by the value of trust property deposited in a manner that
prevents its unauthorized disposition, and by the value of real
8 property which the trustee, by express limitation of power, lacks
power to convey without court authorization. Also, the court may
10 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.

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

24
26 **MAINE COMMENT**

28 Section 702 replaces the Probate Code, section 7-304, which was
repealed as part of the adoption of the Uniform Trust Code.

30 In section 702, subsection 3, the term "financial institution"
32 was used to be consistent with Title 9-B and other Maine
statutes.

34 Subsection 4 has been added to section 702 of the Uniform Trust
36 Code to make clear that unless a court determines otherwise, the
cost of a bond should be charged to the trust.

38
40 **§703. Cotrustees**

42 **1. Unanimous decision; majority decision.** Cotrustees who
are unable to reach a unanimous decision may act by majority
44 decision.

46 **2. Vacancy.** If a vacancy occurs in a cotrusteeship, the
remaining cotrustees may act for the trust.

48 **3. Participation by cotrustee.** A cotrustee must
50 participate in the performance of a trustee's function unless the

cotrustee is unavailable to perform the function because of absence, illness, disqualification or other temporary incapacity or the cotrustee has properly delegated the performance of the function to another trustee.

4. Cotrustee unavailable. If a cotrustee is unavailable to perform duties because of absence, illness, disqualification or other temporary incapacity, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.

5. Delegation. 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.

6. Liability. Except as otherwise provided in subsection 7, a trustee who does not join in an action of another trustee is not liable for the action.

7. Reasonable care. Each trustee shall exercise reasonable care to:

A. Prevent a cotrustee from committing a serious breach of trust; and

B. Compel a cotrustee to redress a serious breach of trust.

8. Dissenting trustee. A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified in writing 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.

UNIFORM COMMENT

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

Cotrustees are appointed for a variety of reasons. Having multiple decision-makers serves as a safeguard against eccentricity or misconduct. Cotrustees are often appointed to gain the advantage of differing skills, perhaps a financial

2 institution for its permanence and professional skills, and a
family member to maintain a personal connection with the
4 beneficiaries. On other occasions, cotrustees are appointed to
make certain that all family lines are represented in the trust's
management.

6
Cotrusteeship should not be called for without careful
8 reflection. Division of responsibility among cotrustees is often
confused, the accountability of any individual trustee is
10 uncertain, obtaining consent of all trustees can be burdensome,
and unless an odd number of trustees is named deadlocks requiring
12 court resolution can occur. Potential problems can be reduced by
addressing division of responsibilities in the terms of the
14 trust. Like the other sections of this article, this section is
freely subject to modification in the terms of the trust. See
16 Section 105.

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

24
Subsection (a) is in accord with Restatement (Third) of Trusts
26 Section 39 (Tentative Draft No. 2, approved 1999), which rejects
the common law rule, followed in earlier Restatements, requiring
28 unanimity among the trustees of a private trust. See Restatement
(Second) of Trusts Section 194 (1959). This section is consistent
30 with the prior Restatement rule applicable to charitable trusts,
which allowed for action by a majority of trustees. See
32 Restatement (Second) of Trusts Section 383 (1959).

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

38
Pursuant to subsection (c), a cotrustee must participate in the
40 performance of a trustee function unless the cotrustee has
properly delegated performance to another cotrustee, or the
42 cotrustee is unable to participate due to temporary incapacity or
disqualification under other law. Other laws under which a
44 cotrustee might be disqualified include federal securities law
and the ERISA prohibited transactions rules. Subsection (d)
46 authorizes a cotrustee to assume some or all of the functions of
another trustee who is unavailable to perform duties as provided
48 in subsection (c).

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

26 By permitting the trustees to act by a majority, this section
27 contemplates that there may be a trustee or trustees who might
28 dissent. Trustees who dissent from the acts of a cotrustee are in
29 general protected from liability. Subsection (f) protects
30 trustees who refused to join in the action. Subsection (h)
31 protects a dissenting trustee who joined the action at the
32 direction of the majority, such as to satisfy a demand of the
33 other side to a transaction, if the trustee expressed the dissent
34 to a cotrustee at or before the time of the action in question.
35 However, the protections provided by subsections (f) and (h) no
36 longer apply if the action constitutes a serious breach of trust.
37 In that event, subsection (g) may impose liability against a
38 dissenting trustee for failing to take reasonable steps to
39 rectify the improper conduct. The responsibility to take action
40 against a breaching cotrustee codifies the substance of Sections
41 184 and 224 of the Restatement (Second) of Trusts (1959).

42

44

MAINE COMMENT

46 Section 703 fills a void in Maine law, which had few specific
47 provisions relating to cotrustees. See former Probate Code,
48 sections 7-403 and 7-405, which have been repealed as part of the
49 adoption of the Uniform Trust Code.

50

2 In section 703, subsections 3 and 4, the phrase "disqualification
4 under other law" in the Uniform Trust Code was changed to
6 "disqualification" because the modification "under other law"
8 seemed unduly, or perhaps misleadingly, restrictive. For
example, a cotrustee who is also a beneficiary might be
disqualified from participating in certain trustee decisions by
the provisions of the trust instrument itself.

10 Section 703, subsection 4 deletes the requirement in the Uniform
12 Trust Code that remaining trustees or a majority thereof may act
14 if a cotrustee is otherwise unavailable only if prompt action is
16 necessary to achieve the purposes of the trust or to avoid injury
18 to the trust property. Section 703, subsection 4 allows the
remaining trustees or a majority thereof to act in any case in
which a cotrustee is unavailable to perform his or her duties
because of absence, illness, disqualification or other temporary
incapacity.

20 **§704. Vacancy in trusteeship; appointment of successor**

22 **1. Vacancy.** A vacancy in a trusteeship occurs if:

24 **A. A person designated as trustee rejects the trusteeship;**

26 **B. A person designated as trustee can not be identified or
28 does not exist;**

30 **C. A trustee resigns;**

32 **D. A trustee is disqualified or removed;**

34 **E. A trustee dies; or**

36 **F. A guardian or conservator is appointed for an individual
serving as trustee.**

38 **2. Filling of vacancies.** If one or more cotrustees remain
40 in office, a vacancy in a trusteeship need not be filled. A
42 vacancy in a trusteeship must be filled if the trust has no
remaining trustee.

44 **3. Order of priority; noncharitable trust.** A vacancy in a
46 trusteeship of a noncharitable trust that is required to be
48 filled must be filled in the following order of priority:

**A. By a person designated in the terms of the trust to act
as successor trustee;**

2 B. By a person appointed by unanimous agreement of the
qualified beneficiaries; or

4 C. By a person appointed by the court.

6 4. Order of priority; charitable trust. A vacancy in a
trusteeship of a charitable trust that is required to be filled
8 must be filled in the following order of priority:

10 A. By a person designated in the terms of the trust to act
as successor trustee;

12 B. By a person appointed by unanimous agreement of the
14 charitable organizations expressly designated to receive
16 distributions under the terms of the trust if the Attorney
General concurs in the appointment; or

18 C. By a person appointed by the court.

20 5. Appointment by court. Whether or not a vacancy in a
trusteeship exists or is required to be filled, the court may
22 appoint an additional trustee or special fiduciary whenever the
court considers the appointment necessary for the administration
24 of the trust.

26 **UNIFORM COMMENT**

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

38 The disqualification of a trustee referred to in subsection
40 (a)(4) would include a financial institution whose right to
engage in trust business has been revoked or removed. Such
42 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
44 to act.

46 Subsection (b) provides that a vacancy in the cotrusteeship must
be filled only if the trust has no remaining trustee. If a
48 vacancy in the cotrusteeship is not filled, Section 703
authorizes the remaining cotrustees to continue to administer the
50 trust. However, as provided in subsection (e), the court,

2 exercising its inherent equity authority, may always appoint
3 additional trustees if the appointment would promote better
4 administration of the trust. See Restatement (Third) of Trusts
5 Section 34 cmt. e (Tentative Draft No. 2, approved 1999);
6 Restatement (Second) of Trusts Section 108 cmt. e (1959).

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

23 If the qualified beneficiaries fail to make an appointment,
24 subsection (c)(3) authorizes the court to fill the vacancy. In
25 making the appointment, the court should consider the objectives
26 and probable intention of the settlor, the promotion of the
27 proper administration of the trust, and the interests and wishes
28 of the beneficiaries. See Restatement (Third) of Trusts Section
29 34 cmt. f (Tentative Draft No. 2, approved 1999); Restatement
30 (Second) of Trusts Section 108 cmt. d (1959).

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

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

44 2001 Amendment. Subsection (d), which creates a procedure for the
45 filling of a vacancy in the trusteeship of a charitable trust,
46 was added by a 2001 amendment.

2

MAINE COMMENT

4

Section 704 fills a void in Maine law, which has no specific provisions concerning vacancies in trusteeship.

6

8

In section 704, subsection 4, paragraph B, the phrase "selected by" in the Uniform Trust Code was changed to "appointed by unanimous agreement of" to conform to the procedure in section 704, subsection 3, paragraph B for filling a vacancy in a noncharitable trust. This seemed to provide more specific directions to the charitable beneficiaries, as well.

10

12

14

16

§705. Resignation of trustee

18

1. Resignation. A trustee may resign:

20

A. Upon at least 30 days' notice to the qualified beneficiaries, the settlor, if living, and all cotrustees; or

22

B. With the approval of the court.

24

26

2. Approval by court. In approving a resignation, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property.

28

30

3. Liability. 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.

32

34

UNIFORM COMMENT

36

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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 Section 36 (Tentative Draft No.2, approved 1999); Restatement (Second) of Trusts Section 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.

40

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48

2 Restatement (Third) of Trusts Section 36 cmt. d (Tentative Draft
4 No. 2, approved 1999), and Restatement (Second) of Trusts Section
6 106 cmt. b (1959), provide, similar to subsection (c), that a
8 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).

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

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

20 2001 Amendment. By a 2001 amendment, subsection (a)(1) was
22 amended to require that notice of a trustee's resignation be
24 given to a living settlor. Previously, notice to a living settlor
26 was required for a revocable but not irrevocable trust. Notice to
the settlor of a revocable trust was required because the rights
of the qualified beneficiaries, including the right to receive a
trustee's resignation, are subject to the settlor's exclusive
control. See Section 603.

28 **MAINE COMMENT**

30 Section 705 fills a void in Maine law, which has no specific
32 provisions concerning resignation of a trustee.

34 **§706. Removal of trustee**

36 **1. Request to remove trustee. The settlor, a cotrustee or**
38 **a beneficiary may request the court to remove a trustee, or a**
trustee may be removed by the court on its own initiative.

40 **2. Removal by court. The court may remove a trustee if:**

42 **A. The trustee has committed a serious breach of trust;**

44 **B. Lack of cooperation among cotrustees substantially**
46 **impairs the administration of the trust;**

48 **C. Because of unfitness, unwillingness or persistent**
failure of the trustee to administer the trust effectively,

2 the court determines that removal of the trustee best serves
3 the interests of the beneficiaries; or

4 D. There has been a substantial change of circumstances or
5 removal is requested by all of the qualified beneficiaries,
6 the court finds that removal of the trustee best serves the
7 interests of all of the beneficiaries and is not
8 inconsistent with a material purpose of the trust, and a
9 suitable cotrustee or successor trustee is available.

10 3. Appropriate relief. Pending a final decision on a
11 request to remove a trustee, or in lieu of or in addition to
12 removing a trustee, the court may order such appropriate relief
13 under section 1001, subsection 2 as may be necessary to protect
14 the trust property or the interests of the beneficiaries.

16
17
18 **UNIFORM COMMENT**

19
20 Subsection (a), contrary to the common law, grants the settlor of
21 an irrevocable trust the right to petition for removal of a
22 trustee. The right to petition for removal does not give the
23 settlor of an irrevocable trust any other rights, such as the
24 right to an annual report or to receive other information
25 concerning administration of the trust. The right of a
26 beneficiary to petition for removal does not apply to a revocable
27 trust while the settlor has capacity. Pursuant to Section 603(a),
28 while a trust is revocable and the settlor has capacity, the
29 rights of the beneficiaries are subject to the settlor's
30 exclusive control.

31
32 Trustee removal may be regulated by the terms of the trust. See
33 Section 105. In fashioning a removal provision for an irrevocable
34 trust, the drafter should be cognizant of the danger that the
35 trust may be included in the settlor's federal gross estate if
36 the settlor retains the power to be appointed as trustee or to
37 appoint someone who is not independent. See Rev. Rul. 95-58,
38 1995-2 C.B. 191.

39
40 Subsection (b) lists the grounds for removal of the trustee. The
41 grounds for removal are similar to those found in Restatement
42 (Third) of Trusts Section 37 cmt. e (Tentative Draft No. 2,
43 approved 1999). A trustee may be removed for untoward action,
44 such as for a serious breach of trust, but the section is not so
45 limited. A trustee may also be removed under a variety of
46 circumstances in which the court concludes that the trustee is
47 not best serving the interests of the beneficiaries. The term
48 "interests of the beneficiaries" means the beneficial interests
49 as provided in the terms of the trust, not as defined by the
50 beneficiaries. See Section 103(7). Removal for conduct

2 detrimental to the interests of the beneficiaries is a
3 well-established standard for removal of a trustee. See
4 Restatement (Third) of Trusts Section 37 cmt. d (Tentative Draft
5 No. 2, approved 1999); Restatement (Second) of Trusts Section 107
6 cmt. a (1959).

7
8 Subsection (b)(1), consistent with Restatement (Third) of Trusts
9 Section 37 cmt. e and g (Tentative Draft No, 2, approved 1999),
10 makes clear that not every breach of trust justifies removal of
11 the trustee. The breach must be "serious." A serious breach of
12 trust may consist of a single act that causes significant harm or
13 involves flagrant misconduct. A serious breach of trust may also
14 consist of a series of smaller breaches, none of which
15 individually justify removal when considered alone, but which do
16 so when considered together. A particularly appropriate
17 circumstance justifying removal of the trustee is a serious
18 breach of the trustee's duty to keep the beneficiaries reasonably
19 informed of the administration of the trust or to comply with a
20 beneficiary's request for information as required by Section 813.
21 Failure to comply with this duty may make it impossible for the
22 beneficiaries to protect their interests. It may also mask more
23 serious violations by the trustee.

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

34
35 Subsection (b)(2) deals only with lack of cooperation among
36 cotrustees, not with friction between the trustee and
37 beneficiaries. Friction between the trustee and beneficiaries is
38 ordinarily not a basis for removal. However, removal might be
39 justified if a communications breakdown is caused by the trustee
40 or appears to be incurable. See Restatement (Third) of Trusts
41 Section 37 cmt. e (Tentative Draft No. 2, approved 1999).

42
43 Subsection (b)(3) authorizes removal for a variety of grounds,
44 including unfitness, unwillingness, or persistent failure to
45 administer the trust effectively. Removal in any of these cases
46 is allowed only if it best serves the interests of the
47 beneficiaries. For the definition of "interests of the
48 beneficiaries," see Section 103(7). "Unfitness" may include not
49 only mental incapacity but also lack of basic ability to
50 administer the trust. Before removing a trustee for unfitness the

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

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

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

47 Subsection (c) authorizes the court to intervene pending a final
48 decision on a request to remove a trustee. Among the relief that
49
50

2 the court may order under Section 1001(b) is an injunction
3 prohibiting the trustee from performing certain acts and the
4 appointment of a special fiduciary to perform some or all of the
5 trustee's functions. Pursuant to Section 1004, the court may also
6 award attorney's fees as justice and equity may require.

8 **MAINE COMMENT**

10 Section 706 fills a void in Maine law, which has very limited
11 statutory provisions concerning removal of a trustee. Former
12 Probate Code, section 7-305 has removal provisions related only
13 to the place of administration of a trust moving to another state
14 and was repealed as part of the adoption of the Uniform Trust
15 Code. A number of Maine cases discuss the removal of trustees
16 and the provisions of section 706 would provide helpful standards
17 to guide trustees, beneficiaries and the courts.

18
19 **§707. Delivery of property by former trustee**

21 **1. Duties of former trustee.** Unless a cotrustee remains in
22 office or the court otherwise orders, and until the trust
23 property is delivered to the cotrustee, successor trustee or
24 other person entitled to it, a trustee who has resigned or been
25 removed or disqualified has the duties of a trustee and the
26 powers necessary to protect the trust property.

27
28 **2. Expeditious delivery.** A trustee who has resigned or
29 been removed or disqualified shall proceed expeditiously to
30 deliver the trust property within the trustee's possession to the
31 cotrustee, successor trustee or other person entitled to it.

32
33 **UNIFORM COMMENT**

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35
36
37 This section addresses the continuing authority and duty of a
38 resigning or removed trustee. Subject to the power of the court
39 to make other arrangements or unless a cotrustee remains in
40 office, a resigning or removed trustee has continuing authority
41 until the trust property is delivered to a successor. If a
42 cotrustee remains in office, there is no reason to grant a
43 resigning or removed trustee any continuing authority, and none
44 is granted under this section. In addition, if a cotrustee
45 remains in office, the former trustee need not submit a final
46 trustee's report. See Section 813(c).

47
48
49 There is ample authority in the Uniform Trust Code for the
50 appointment of a special fiduciary, an appointment which can

2 avoid the need for a resigning or removed trustee to exercise
3 residual powers until a successor can take office. See Sections
4 704(e) (court may appoint additional trustee or special fiduciary
5 whenever court considers appointment necessary for administration
6 of trust), 705(b) (in approving resignation, court may impose
7 conditions necessary for protection of trust property), 706(c)
8 (pending decision on petition for removal, court may order
9 appropriate relief), and 1001(b)(5) (to remedy breach of trust,
10 court may appoint special fiduciary as necessary to protect trust
11 property or interests of beneficiary).

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

24
25 **MAINE COMMENT**

26 Section 707 fills a void in Maine law, which has no specific
27 provisions concerning delivery of property by a former trustee.
28 The phrase "the cotrustee" was inserted between "delivered to"
29 and "successor trustee" in subsection 1 to make it harmonious
30 with subsection 2.
31

32
33 **§708. Compensation of trustee**

34
35 **1. Reasonable.** If the terms of a trust do not specify the
36 trustee's compensation, a trustee is entitled to compensation
37 that is reasonable under the circumstances. A percentage fee is
38 allowable under this section only if the fee is reasonable.
39 Among the factors a court may consider as guides in determining
40 the reasonableness of fees under this section are the following:

41
42 **A. The time and labor required, the novelty and difficulty**
43 **of the questions involved and the skill requisite to perform**
44 **the service properly;**

45
46 **B. The likelihood, if apparent to the trustee, that the**
47 **acceptance of the particular employment will preclude the**
48 **person employed from other employment;**
49
50

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

12 Because "trustee" as defined in Section 103(19) includes not only
14 an individual trustee but also cotrustees, each trustee,
including a cotrustee, is entitled to reasonable compensation
16 under the circumstances. The fact that a trust has more than one
trustee does not mean that the trustees together are entitled to
18 more compensation than had either acted alone. Nor does the
appointment of more than one trustee mean that the trustees are
20 eligible to receive the compensation in equal shares. The total
amount of the compensation to be paid and how it will be divided
22 depend on the totality of the circumstances. Factors to be
considered include the settlor's reasons for naming more than one
24 trustee and the level of responsibility assumed and exact
services performed by each trustee. Often the fees of cotrustees
26 will be in the aggregate higher than the fees for a single
trustee because of the duty of each trustee to participate in
28 administration and not delegate to a cotrustee duties the settlor
expected the trustees to perform jointly. See Restatement (Third)
30 of Trusts Section 38 cmt. i (Tentative Draft No. 2, approved
1999). The trust may benefit in such cases from the enhanced
32 quality of decision-making resulting from the collective
deliberations of the trustees.

34 Financial institution trustees normally base their fees on
36 published fee schedules. Published fee schedules are subject to
the same standard of reasonableness under the Uniform Trust Code
38 as are other methods for computing fees. The courts have
generally upheld published fee schedules but this is not
40 automatic. Among the more litigated topics is the issue of
termination fees. Termination fees are charged upon termination
42 of the trust and sometimes upon transfer of the trust to a
successor trustee. Factors relevant to whether the fee is
44 appropriate include the actual work performed; whether a
termination fee was authorized in the terms of the trust; whether
46 the fee schedule specified the circumstances in which a
termination fee would be charged; whether the trustee's overall
48 fees for administering the trust from the date of the trust's
creation, including the termination fee, were reasonable; and the
50 general practice in the community regarding termination fees.

2 Because significantly less work is normally involved, termination
3 fees are less appropriate upon transfer to a successor trustee
4 than upon termination of the trust. For representative cases, see
5 Cleveland Trust Co. v. Wilmington Trust Co., 258 A.2d 58 (Del.
6 1969); In re Trusts Under Will of Dwan, 371 N.W. 2d 641 (Minn.
7 Ct. App. 1985); Mercer v. Merchants National Bank, 298 A.2d 736
8 (N.H. 1972); In re Estate of Payson, 562 N.Y.S. 2d 329 (Surr. Ct.
9 1990); In re Indenture Agreement of Lawson, 607 A. 2d 803 (Pa.
10 Super. Ct. 1992); In re Estate of Ischy, 415 A.2d 37 (Pa. 1980);
11 Memphis Memorial Park v. Planters National Bank, 1986 Tenn. App.
12 LEXIS 2978 (May 7, 1986); In re Trust of Sensenbrenner, 252 N.W.
13 2d 47 (Wis. 1977).

14 This Code does not take a specific position on whether dual fees
15 may be charged when a trustee hires its own law firm to represent
16 the trust. The trend is to authorize dual compensation as long as
17 the overall fees are reasonable. For a discussion, see Ronald C.
18 Link, Developments Regarding the Professional Responsibility of
19 the Estate Administration Lawyer: The Effect of the Model Rules
20 of Professional Conduct, 26 Real Prop. Prob. & Tr. J. 1, 22-38
21 (1991).

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

36 Compensation may be set by agreement. A trustee may enter into an
37 agreement with the beneficiaries for lesser or increased
38 compensation, although an agreement increasing compensation is
39 not binding on a nonconsenting beneficiary. See Section 111(d)
40 (matters that may be resolved by nonjudicial settlement). See
41 also Restatement (Third) of Trusts Section 38 cmt. f (Tentative
42 Draft No. 2, approved 1999); Restatement (Second) of Trusts
43 Section 242 cmt. i (1959). A trustee may also agree to waive
44 compensation and should do so prior to rendering significant
45 services if concerned about possible gift and income taxation of
46 the compensation accrued prior to the waiver. See Rev. Rul.
47 66-167, 1966-1 C.B. 20. See also Restatement (Third) of Trusts
48

2 Section 38 cmt. g (Tentative Draft No. 2, approved 1999);
Restatement (Second) of Trusts Section 242 cmt. j (1959).

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

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

26
28 **MAINE COMMENT**

30 This section is a considerable departure from the Uniform Trust
Code. It combines the provisions of the Uniform Trust Code with
32 the provisions of prior Maine law addressing trustee compensation
found in the Probate Code, section 7-205, which was repealed as
34 part of the adoption of the Uniform Trust Code.

36 Subsection (a) of the Uniform Trust Code, as proposed, required
the trustee compensation, if not specified in the trust
38 instrument, to be "reasonable under the circumstances." The
provisions of the former Probate Code, section 7-205 represent an
40 attempt to define reasonableness of trustee compensation under
the circumstances. Because these provisions have been widely
42 accepted in Maine by trustees, settlors and beneficiaries, they
were incorporated.

44 A new subsection 3 was added, to preserve the ability of
46 qualified trust beneficiaries in Maine to obtain judicial review
of the reasonableness of trustee compensation as provided in
48 former Probate Code, section 7-206 and the remedy provided in
former Probate Code, section 7-205.

50

2 **§709. Reimbursement of expenses**

4 **1. Reimbursement.** A trustee is entitled to be reimbursed
6 out of the trust property, with interest as appropriate, for:

8 A. Expenses that were properly incurred in the
10 administration of the trust; and

12 B. To the extent necessary to prevent unjust enrichment of
14 the trust, expenses that were not properly incurred in the
16 administration of the trust.

18 **2. Advance by trustee.** An advance by the trustee of money
20 for the protection of the trust gives rise to a lien against
22 trust property to secure reimbursement with reasonable interest.

24 **UNIFORM COMMENT**

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

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

As provided in subsection (a)(2), a trustee is entitled to
reimbursement for unauthorized expenses only if the unauthorized
expenditures benefitted the trust. The purpose of this provision,
which is derived from Restatement (Second) of Trusts Section 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;

2 and (5) whether indemnity can be allowed without defeating or
impairing the purposes of the trust. See Restatement (Second) of
Trusts Section 245 cmt. g (1959).

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

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

18 **MAINE COMMENT**

20 Section 709 adds specificity to existing Maine law. Former
Probate Code, section 7-402, especially subsection (18), which
22 was repealed as part of the adoption of the Uniform Trust Code,
authorizes the trustee to expend money for the benefit of the
24 trust and subsection (18) gives the trustee a lien on trust
assets to secure any such expenditures.

28 **CHAPTER 8**

30 **DUTIES AND POWERS OF TRUSTEE**

32 **UNIFORM COMMENT**

34 This article states the fundamental duties of a trustee and lists
the trustee's powers. The duties listed are not new, but how the
36 particular duties are formulated and applied has changed over the
years. This article was drafted where possible to conform with
38 the 1994 Uniform Prudent Investor Act, which has been enacted in
approximately two thirds of the States. The Uniform Prudent
40 Investor Act prescribes a trustee's responsibilities with respect
to the management and investment of trust property. The Uniform
42 Trust Code also addresses a trustee's duties with respect to
distribution to beneficiaries.

44 Because of the widespread adoption of the Uniform Prudent
46 Investor Act, it was decided not to disassemble and fully
integrate the Prudent Investor Act into the Uniform Trust Code.
48 Instead, States enacting the Uniform Trust Code are encouraged to
recodify their version of the Prudent Investor Act by reenacting
50 it as Article 9 of this Code rather than leaving it elsewhere in

2 their statutes. Where the Uniform Trust Code and Uniform Prudent
Investor Act overlap, States should enact the provisions of this
4 article and not enact the duplicative provisions of the Prudent
Investor Act. Sections of this article which overlap with the
6 Prudent Investor Act are Sections 802 (duty of loyalty), 803
(impartiality), 805 (costs of administration), 806 (trustee's
skills), and 807 (delegation). For more complete instructions on
8 how to enact the Uniform Prudent Investor Act as part of this
Code, see the General comment to Article 9.

10 All of the provisions of this article may be overridden in the
12 terms of the trust except for certain aspects of the trustee's
duty to keep the beneficiaries informed of administration (see
14 Section 105(b)(8)-(9)), and the trustee's fundamental obligation
to act in good faith, in accordance with the purposes of the
16 trust, and for the benefit of the beneficiaries (see Section
105(b)(2)-(3)).

18
20 **§801. Duty to administer trust**

22 Upon acceptance of a trusteeship, the trustee shall
24 administer the trust in good faith, in accordance with its terms
and purposes and the interests of the beneficiaries and in
26 accordance with this Code.

28 **UNIFORM COMMENT**

30 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
32 faith. Only if the terms of a trust are silent or for some reason
invalid on a particular issue does this Code govern the trustee's
duties. This section also confirms that a trustee does not have a
34 duty to act until the trustee has accepted the trusteeship. For
the procedure for accepting a trusteeship, see Section 701.

36 In administering the trust, the trustee must not only comply with
38 this section but also with the other duties specified in this
article, particularly the obligation not to place the interests
40 of others above those of the beneficiaries (Section 802), the
duty to act with prudence (Section 804), and the duty to keep the
42 qualified beneficiaries reasonably informed about the
administration of the trust (Section 813).

44 While a trustee generally must administer a trust in accordance
46 with its terms and purposes, the purposes and particular terms of
the trust can on occasion conflict. If such a conflict occurs
48 because of circumstances not anticipated by the settlor, it may
be appropriate for the trustee to petition under Section 412 to
50 modify or terminate the trust. Pursuant to Section 404, the

trustee is not required to perform a duty prescribed by the terms of the trust if performance would be impossible, illegal or contrary to public policy.

For background on the trustee's duty to administer the trust, see Restatement (Second) of Trusts Sections 164-169 (1959).

MAINE COMMENT

This section replaces the Probate Code, section 7-301, repealed in conjunction with the adoption of the Uniform Trust Code.

§802. Duty of loyalty

1. Interests of beneficiaries. A trustee shall administer the trust solely in the interests of the beneficiaries.

2. Voidable transaction; exceptions. Subject to the rights of persons dealing with or assisting the trustee as provided in section 1012, a sale, encumbrance or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or that is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:

A. The transaction was authorized by the terms of the trust;

B. The transaction was approved by the court;

C. The beneficiary did not commence a judicial proceeding within the time allowed by section 1005;

D. The beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with section 1009; or

E. The transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.

3. Transaction presumed affected by conflict. A sale, encumbrance or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:

A. The trustee's spouse;

2 B. The trustee's descendants, siblings or parents, or their
3 spouses;

4 C. An agent or attorney of the trustee; or

6 D. A corporation or other person or enterprise in which the
7 trustee, or a person that owns a significant interest in the
8 trustee, has an interest that might affect the trustee's
9 best judgment.

11 4. Transaction between trustee and beneficiary. A
12 transaction between a trustee and a beneficiary that does not
13 concern trust property but that occurs during the existence of
14 the trust or while the trustee retains significant influence over
15 the beneficiary and from which the trustee obtains an advantage
16 beyond the normal commercial advantage for such a transaction is
17 voidable by the beneficiary unless the trustee establishes that
18 the transaction was fair to the beneficiary.

19 5. Opportunity belonging to trust. A transaction not
20 concerning trust property in which the trustee engages in the
21 trustee's individual capacity involves a conflict between
22 personal and fiduciary interests if the transaction concerns an
23 opportunity properly belonging to the trust.

24 6. Investment. An investment by a trustee in securities of
25 an investment company or investment trust to which the trustee,
26 or its affiliate, provides services in a capacity other than as
27 trustee is not presumed to be affected by a conflict between
28 personal and fiduciary interests if the investment complies with
29 the prudent investor rule of chapter 9. In addition to its
30 compensation for acting as trustee, the trustee may be
31 compensated by the investment company or investment trust for
32 providing those services out of fees charged to the trust. If
33 the trustee receives compensation from the investment company or
34 investment trust for providing investment advisory or investment
35 management services, the trustee at least annually shall notify
36 the persons entitled under section 813 to receive a copy of the
37 trustee's annual report of the rate and method by which that
38 compensation was determined.

39 7. Act in best interests of beneficiaries. In voting
40 shares of stock or in exercising powers of control over similar
41 interests in other forms of enterprise, the trustee shall act in
42 the best interests of the beneficiaries. If the trust is the sole
43 owner of a corporation or other form of enterprise, the trustee
44 shall elect or appoint directors or other managers who will
45 manage the corporation or enterprise in the best interests of the
46 beneficiaries.

2 8. Transactions not precluded. This section does not
3 preclude the following transactions, if fair to the beneficiaries:

4 A. An agreement between a trustee and a beneficiary
5 relating to the appointment or compensation of the trustee;

6 B. Payment of reasonable compensation to the trustee;

7 C. A transaction between a trust and another trust or a
8 decedent's estate, a conservatorship or a guardianship of
9 which the trustee is a fiduciary or in which a beneficiary
10 has an interest;

11 D. A deposit of trust money in a regulated financial
12 service institution operated by the trustee; or

13 E. An advance by the trustee of money for the protection of
14 the trust.

15 9. Appointment of special fiduciary. The court may appoint
16 a special fiduciary to make a decision with respect to any
17 proposed transaction that might violate this section if entered
18 into by the trustee.

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48
UNIFORM COMMENT

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 Section 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* Section 543 (Rev. 2d ed. 1993); and 2A Austin W. Scott &
William F. Fratcher, *The Law of Trusts* Sections 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 Section 103(7).

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

2 trust's charitable purposes. See Restatement (Second) of Trusts
Section 379 cmt. a (1959).

4 Duty of loyalty issues often arise in connection with the
6 settlor's designation of the trustee. For example, it is not
8 uncommon that the trustee will also be a beneficiary. Or the
10 settlor will name a friend or family member who is an officer of
12 a company in which the settlor owns stock. In such cases,
14 settlors should be advised to consider addressing in the terms of
16 the trust how such conflicts are to be handled. Section 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.

18 Subsection (b) states the general rule with respect to
20 transactions involving trust property that are affected by a
22 conflict of interest. A transaction affected by a conflict
24 between the trustee's fiduciary and personal interests is
26 voidable by a beneficiary who is affected by the transaction.
28 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 Section
170 cmt. b (1959).

32 The rule is less severe with respect to transactions involving
34 trust property entered into with persons who have close business
36 or personal ties with the trustee. Under subsection (c), a
38 transaction between a trustee and certain relatives and business
40 associates is presumptively voidable, not void. Also
42 presumptively voidable are transactions with corporations or
44 other enterprises in which the trustee, or a person who owns a
46 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.

48 Even where the presumption under subsection (c) does not apply, a
50 transaction may still be voided by a beneficiary if the
beneficiary proves that a conflict between personal and fiduciary

2 interests existed and that the transaction was affected by the
3 conflict. The right of a beneficiary to void a transaction
4 affected by a conflict of interest is optional. If the
5 transaction proves profitable to the trust and unprofitable to
6 the trustee, the beneficiary will likely allow the transaction to
7 stand. For a comparable provision regulating fiduciary
8 investments by national banks, see 12 C.F.R. Section 9.12(a).

9
10 As provided in subsection (b), no breach of the duty of loyalty
11 occurs if the transaction was authorized by the terms of the
12 trust or approved by the court, or if the beneficiary failed to
13 commence a judicial proceeding within the time allowed or chose
14 to ratify the transaction, either prior to or subsequent to its
15 occurrence. In determining whether a beneficiary has consented to
16 a transaction, the principles of representation from Article 3
17 may be applied.

18 Subsection (b)(5), which is derived from Section 3-713(1) of the
19 Uniform Probate Code, allows a trustee to implement a contract or
20 pursue a claim that the trustee entered into or acquired before
21 the person became or contemplated becoming trustee. While this
22 subsection allows the transaction to proceed without
23 automatically being voidable by a beneficiary, the transaction is
24 not necessarily free from scrutiny. In implementing the contract
25 or pursuing the claim, the trustee must still complete the
26 transaction in a way that avoids a conflict between the trustee's
27 fiduciary and personal interests. Because avoiding such a
28 conflict will frequently be difficult, the trustee should
29 consider petitioning the court to appoint a special fiduciary, as
30 authorized by subsection (i), to work out the details and
31 complete the transaction.

32
33 Subsection (d) creates a presumption that a transaction between a
34 trustee and a beneficiary not involving trust property is an
35 abuse by the trustee of a confidential relationship with the
36 beneficiary. This subsection has limited scope. If the trust has
37 terminated, there must be proof that the trustee's influence with
38 the beneficiary remained. Furthermore, whether or not the trust
39 has terminated, there must be proof that the trustee obtained an
40 advantage from the relationship. The fact the trustee profited is
41 insufficient to show an abuse if a third party would have
42 similarly profited in an arm's length transaction. Subsection (d)
43 is based on Cal. Prob. Code Section 16004(c). See also 2A Austin
44 W. Scott & William F. Fratcher Section 170.25 (4th ed. 1987),
45 which states the same principle in a slightly different form:
46 "Where he deals directly with the beneficiaries, the transaction
47 may stand, but only if the trustee makes full disclosure and
48 takes no advantage of his position and the transaction is in all
49 respects fair and reasonable."
50

2 Subsection (e), which allows a beneficiary to void a transaction
3 entered into by the trustee that involved an opportunity
4 belonging to the trust, is based on Restatement (Second) of
5 Trusts Section 170 cmt. k (1959). While normally associated with
6 corporations and with their directors and officers, what is
7 usually referred to as the corporate opportunity doctrine also
8 applies to other types of fiduciary. The doctrine prohibits the
9 trustee's pursuit of certain business activities, such as
10 entering into a business in direct competition with a business
11 owned by the trust, or the purchasing of an investment that the
12 facts suggest the trustee was expected to purchase for the trust.
13 For discussion of the corporate opportunity doctrine, see Kenneth
14 B. Davis, Jr., *Corporate Opportunity and Comparative Advantage*,
15 84 Iowa L. Rev. 211 (1999); and Richard A. Epstein, *Contract and*
16 *Trust in Corporate Law: The Case of Corporate Opportunity*, 21
17 *Del. J. Corp. L.* 5 (1996). See also *Principles of Corporate*
18 *Governance: Analysis and Recommendations* Section 5.05 (American
19 *Law Inst.* 1994).

20 Subsection (f) creates an exception to the no further inquiry
21 rule for trustee investment in mutual funds. This exception
22 applies even though the mutual fund company pays the
23 financial-service institution trustee a fee for providing
24 investment advice and other services, such as custody, transfer
25 agent, and distribution, that would otherwise be provided by
26 agents of the fund. Mutual funds offer several advantages for
27 fiduciary investing. By comparison with common trust funds,
28 mutual fund shares may be distributed in-kind when trust
29 interests terminate, avoiding liquidation and the associated
30 recognition of gain for tax purposes. Mutual funds commonly offer
31 daily pricing, which gives trustees and beneficiaries better
32 information about performance. Because mutual funds can combine
33 fiduciary and nonfiduciary accounts, they can achieve larger
34 size, which can enhance diversification and produce economies of
35 scale that can lower investment costs.

36 Mutual fund investment also has a number of potential
37 disadvantages. It adds another layer of expense to the trust, and
38 it causes the trustee to lose control over the nature and timing
39 of transactions in the fund. Trustee investment in mutual funds
40 sponsored by the trustee, its affiliate, or from which the
41 trustee receives extra fees has given rise to litigation
42 implicating the trustee's duty of loyalty, the duty to invest
43 with prudence, and the right to receive only reasonable
44 compensation. Because financial institution trustees ordinarily
45 provide advisory services to and receive compensation from the
46 very funds in which they invest trust assets, the contention is
47 made that investing the assets of individual trusts in these
48 funds is imprudent and motivated by the effort to generate
49 additional fee income. Because the financial institution trustee
50

2 often will also charge its regular fee for administering the
trust, the contention is made that the financial institution
trustee's total compensation, both direct and indirect, is
4 excessive.

6 Subsection (f) attempts to retain the advantages of mutual funds
while at the same time making clear that such investments are
8 subject to traditional fiduciary responsibilities. Nearly all of
the States have enacted statutes authorizing trustees to invest
10 in funds from which the trustee might derive additional
compensation. Portions of subsection (f) are based on these
12 statutes. Subsection (f) makes clear that such dual
investment-fee arrangements are not automatically presumed to
14 involve a conflict between the trustee's personal and fiduciary
interests, but subsection (f) does not otherwise waive or lessen
16 a trustee's fiduciary obligations. The trustee, in deciding
whether to invest in a mutual fund, must not place its own
18 interests ahead of those of the beneficiaries. The investment
decision must also comply with the enacting jurisdiction's
20 prudent investor rule. To obtain the protection afforded by
subsection (f), the trustee must disclose at least annually to
22 the beneficiaries entitled to receive a copy of the trustee's
annual report the rate and method by which the additional
24 compensation was determined. Furthermore, the selection of a
mutual fund, and the resulting delegation of certain of the
26 trustee's functions, may be taken into account under Section 708
in setting the trustee's regular compensation. See also Uniform
28 Prudent Investor Act Sections 7 and 9 and comments; Restatement
(Third) of Trusts: Prudent Investor Rule Section 227 cmt. m
30 (1992).

32 Subsection (f) applies whether the services to the fund are
provided directly by the trustee or by an affiliate. While the
34 term "affiliate" is not used in subsection (c), the individuals
and entities listed there are examples of affiliates. The term is
36 also used in the regulations under ERISA. An "affiliate" of a
fiduciary includes (1) any person who directly or indirectly,
38 through one or more intermediaries, controls, is controlled by,
or is under common control with the fiduciary; (2) any officer,
40 director, partner, employee, or relative of the fiduciary, and
any corporation or partnership of which the fiduciary is an
42 officer, director or partner. See 29 C.F.R. Section 2510.3-21(e).

44 Subsection (g) addresses an overlap between trust and corporate
law. It is based on Restatement of Trusts (Second) Section 193
46 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
48 the interest of the beneficiary," and that the fiduciary
responsibility of a trustee in voting a control block "is heavier
50 than where he holds only a small fraction of the shares."

2 Similarly, the Department of Labor construes ERISA's duty of
loyalty to make share voting a fiduciary function. See 29 C.F.R.
4 Section 2509.94-2. When the trust owns the entirety of the shares
of a corporation, the corporate assets are in effect trust assets
6 that the trustee determines to hold in corporate form. The
trustee may not use the corporate form to escape the fiduciary
8 duties of trust law. Thus, for example, a trustee whose duty of
impartiality would require the trustee to make current
10 distributions for the support of current beneficiaries may not
evade that duty by holding assets in corporate form and pleading
12 the discretion of corporate directors to determine dividend
policy. Rather, the trustee must vote for corporate directors who
14 will follow a dividend policy consistent with the trustee's
trust-law duty of impartiality.

16 Subsection (h) contains several exceptions to the general duty of
loyalty, which apply if the transaction was fair to the
18 beneficiaries. Subsection (h)(1)-(2) clarify that a trustee is
free to contract about the terms of appointment and rate of
20 compensation. Consistent with Restatement (Second) of Trusts
Section 170 cmt. r (1959), subsection (h)(3) authorizes a trustee
22 to engage in a transaction involving another trust of which the
trustee is also trustee, a transaction with a decedent's estate
24 or a conservatorship estate of which the trustee is personal
representative or conservator, or a transaction with another
26 trust or other fiduciary relationship in which a beneficiary of
the trust has an interest. The authority of a trustee to deposit
28 funds in a financial institution operated by the trustee, as
provided in subsection (h)(4), is recognized in Restatement
30 (Second) of Trusts Section 170 cmt. m (1959). The power to
deposit funds in its own institution does not negate the
32 trustee's responsibility to invest prudently, including the
obligation to earn a reasonable rate of interest on deposits.
34 Subsection (h)(5) authorizes a trustee to advance money for the
protection of the trust. Such advances usually are of small
36 amounts and are made in emergencies or as a matter of
convenience. Pursuant to Section 709(b), the trustee has a lien
38 against the trust property for any advances made.

40

MAINE COMMENT

42

44 Section 802, subsection 1 replaces former Probate Code, section
7-302, subsection (e), repealed in conjunction with the adoption
of the Uniform Trust Code.

46

48 Section 802, subsection 2 changes Maine law, to the extent that
Estate of Spear 689 A.2d 590 (Me. 1997) or Probate Code, section
7-404, repealed in conjunction with the adoption of this Code,

2 requires court approval before or after such a transaction in every case.

4 The trustee's duty must be primarily construed and understood within the context of the written trust document.

6 Financial institutions that serve as trustees often have other
8 business relationships with trust beneficiaries. Subsection 4 is not intended to place an undue burden on such trustees to defend
10 actions that may be clearly within the scope of commercial reasonableness and on competitive terms with services offered by
12 3rd parties. Therefore, the phrase "beyond the normal commercial advantage from such a transaction" was inserted in subsection 4
14 after the words "obtains an advantage." This phrase was included in an earlier version of the Uniform Trust Code.

16 Since a guardian has authority over the finances of its ward if
18 no conservator is appointed for the ward, the word "guardianship" was added to subsection 8, paragraph C.

20 Subsection 9 should not be read to limit the rights of a court to
22 authorize a single transaction for a person under a disability, including the creation of a trust for such person, pursuant to
24 the provisions of the Probate Code, section 5-409.

26 **§803. Impartiality**

28 If a trust has 2 or more beneficiaries, the trustee shall
30 act impartially in investing, managing and distributing the trust
32 property, giving due regard to the beneficiaries' respective
interests.

34 **UNIFORM COMMENT**

36 The duty of impartiality is an important aspect of the duty of
38 loyalty. This section is identical to Section 6 of the Uniform Prudent Investor Act, except that this section also applies to
40 all aspects of trust administration and to decisions by a trustee with respect to distributions. The Prudent Investor Act is
42 limited to duties with respect to the investment and management of trust property. The differing beneficial interests for which
44 the trustee must act impartially include those of the current beneficiaries versus those of beneficiaries holding interests in
46 the remainder; and among those currently eligible to receive distributions. In fulfilling the duty to act impartially, the
48 trustee should be particularly sensitive to allocation of receipts and disbursements between income and principal and
50 should consider, in an appropriate case, a reallocation of income

2 to the principal account and vice versa, if allowable under local
law. For an example of such authority, see Uniform Principal and
Income Act Section 104 (1997).

4
6 The duty to act impartially does not mean that the trustee must
7 treat the beneficiaries equally. Rather, the trustee must treat
8 the beneficiaries equitably in light of the purposes and terms of
9 the trust. A settlor who prefers that the trustee, when making
10 decisions, generally favor the interests of one beneficiary over
11 those of others should provide appropriate guidance in the terms
12 of the trust. See Restatement (Second) of Section 183 cmt. a
(1959).

14
16 **MAINE COMMENT**

18 This section replaces former Probate Code, section 7-302,
19 subsection (f), which was repealed in conjunction with the
adoption of the Uniform Trust Code.

20
22 **§804. Prudent administration**

24 A trustee shall administer the trust as a prudent person
25 would, by considering the purposes, terms, distributional
26 requirements and other circumstances of the trust. In satisfying
27 this standard, the trustee shall exercise reasonable care, skill
28 and caution.

30
32 **UNIFORM COMMENT**

34 The duty to administer a trust with prudence is a fundamental
35 duty of the trustee. This duty does not depend on whether the
36 trustee receives compensation. The duty may be altered by the
37 terms of the trust. See Section 105. This section is similar to
38 Section 2(a) of the Uniform Prudent Investor Act and Restatement
(Third) of Trusts: Prudent Investor Rule Section 227 (1992).

40 The language of this section diverges from the language of the
41 previous Restatement. The prior Restatement can be read as
42 applying the same standard - "man of ordinary prudence would
43 exercise in dealing with his own property" - regardless of the
44 type or purposes of the trust. See Restatement (Second) of Trusts
45 Section 174 cmt. a (1959). This section appropriately bases the
46 standard on the purposes and other circumstances of the
particular trust.

48
50 A settlor who wishes to modify the standard of care specified in
this section is free to do so, but there is a limit. Section 1008

2 prohibits a settlor from exculpating a trustee from liability for
breach of trust committed in bad faith or with reckless
4 indifference to the purposes of the trust or to the interests of
the beneficiaries.

6
8 **§805. Costs of administration**

10 In administering a trust, the trustee may incur only costs
that are reasonable in relation to the trust property, the
12 purposes of the trust and the skills of the trustee.

14 **UNIFORM COMMENT**

16 This section is similar to Section 7 of the Uniform Prudent
Investor Act and is consistent with the rules concerning costs in
18 Restatement (Third) of Trusts: Prudent Investor Rule Section
227(c)(3) (1992). For related rules concerning compensation and
20 reimbursement of trustees, see Sections 708 and 709. The duty not
to incur unreasonable costs applies when a trustee decides
22 whether and how to delegate to agents, as well as to other
aspects of trust administration. In deciding whether and how to
24 delegate, the trustee must be alert to balancing projected
benefits against the likely costs. To protect the beneficiary
26 against excessive costs, the trustee should also be alert to
adjusting compensation for functions which the trustee has
28 delegated to others. The obligation to incur only necessary or
appropriate costs of administration has long been part of the law
30 of trusts. See Restatement (Second) of Trusts Section 188 (1959).

32 **MAINE COMMENT**

34 Section 805 replaces the former Probate Code, section 7-302,
36 subsection (g), which was repealed in conjunction with the
adoption of the Uniform Trust Code.

38
40 **§806. Trustee's skills**

42 A trustee who has special skills or expertise, or is named
trustee in reliance upon the trustee's representation that the
44 trustee has special skills or expertise, shall use those special
skills or expertise.

46
48 **UNIFORM COMMENT**

2 This section is similar to Section 7-302 of the Uniform Probate
Code, Restatement (Second) of Trusts Section 174 (1959), and
4 Section 2(f) of the Uniform Prudent Investor Act.

6 **MAINE COMMENT**

8 Section 806 replaces the former Probate Code, section 7-302,
subsection (b), paragraph (6), which was repealed in conjunction
10 with the adoption of the Uniform Trust Code.

12 **§807. Delegation by trustee**

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

20 A. Selecting an agent;

22 B. Establishing the scope and terms of the delegation,
consistent with the purposes and terms of the trust; and

24 C. Periodically reviewing the agent's actions in order to
26 monitor the agent's performance and compliance with the
terms of the delegation.

28 2. Agent's duty to trust. In performing a delegated
30 function, an agent owes a duty to the trust to exercise
reasonable care to comply with the terms of the delegation.

32 3. Liability of trustee. A trustee who complies with
34 subsection 1 is not liable to the beneficiaries or to the trust
for an action of the agent to whom the function was delegated.

36 4. Agent submits to jurisdiction. By accepting a
38 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
40 jurisdiction of the courts of this State.

42 5. Review of agent. Upon petition of a qualified
44 beneficiary, after notice to all qualified beneficiaries, the
trustee and the agent of the trustee, the court may review the
46 employment of any agent by the trustee and the reasonableness of
the agent's compensation. Any agent who is found to have
48 received excess compensation from a trust may be ordered to make
appropriate refunds.

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UNIFORM COMMENT

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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 Section 9 of the Uniform Prudent Investor Act. See also John H. Langbein, Reversing the Nondelegation Rule of Trust-Investment Law, 59 Mo. L. Rev. 105 (1994) (discussing prior law).

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12
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16

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.

18
20

This section applies only to delegation to agents, not to delegation to a cotrustee. For the provision regulating delegation to a cotrustee, see Section 703(e).

22

MAINE COMMENT

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Section 807 of the Uniform Trust Code is enacted as section 807, subsections 1 to 4 of the Maine Uniform Trust Code. These replace former Probate Code, section 7-302, subsection (i), which is repealed in conjunction with the adoption of the Uniform Trust Code.

32
34

Subsection 5 was added to preserve existing Maine law. The Probate Code, section 7-205, which contains provisions for review of the propriety of fees charged by agents of a trustee, is repealed in conjunction with adoption of this Code.

36

§808. Powers to direct

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42

1. Revocable trust; direction of settlor. While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.

44
46
48

2. Directions of person conferred power to direct trustee. 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

2 that the person holding the power owes to the beneficiaries of
3 the trust.

4 3. Modification or termination. The terms of a trust may
5 confer upon a trustee or other person a power to direct the
6 modification or termination of the trust.

8 4. Power to direct; fiduciary duty. A person, other than a
9 beneficiary, who holds a power to direct is presumptively a
10 fiduciary who, as such, is required to act in good faith with
11 regard to the purposes of the trust and the interests of the
12 beneficiaries. The holder of a power to direct is liable for any
13 loss that results from breach of a fiduciary duty.

14
15
16 **UNIFORM COMMENT**

17 Subsection (a) is an application of Section 603(a), which
18 provides that a revocable trust is subject to the settlor's
19 exclusive control as long as the settlor has capacity. Because of
20 the settlor's degree of control, subsection (a) of this section
21 authorizes a trustee to rely on a direction from the settlor even
22 if it is contrary to the terms of the trust. The direction of the
23 settlor might be regarded as an amendment of the trust.
24 Subsection (a) has limited application upon a settlor's
25 incapacity. An agent, conservator, or guardian has authority to
26 give the trustee instructions contrary to the terms of the trust
27 only if the agent, conservator, or guardian succeeds to the
28 settlor's powers with respect to revocation, amendment, or
29 distribution as provided in Section 602(e).

30
31 Subsections (b)-(d) ratify the use of trust protectors and
32 advisers. Subsections (b) and (d) are based in part on
33 Restatement (Second) of Trusts Section 185 (1959). Subsection (c)
34 is similar to Restatement (Third) of Trusts Section 64(2)
35 (Tentative Draft No. 3, approved 2001). "Advisers" have long been
36 used for certain trustee functions, such as the power to direct
37 investments or manage a closely-held business. "Trust protector,"
38 a term largely associated with offshore trust practice, is more
39 recent and usually connotes the grant of greater powers,
40 sometimes including the power to amend or terminate the trust.
41 Subsection (c) ratifies the recent trend to grant third persons
42 such broader powers.

43
44 A power to direct must be distinguished from a veto power. A
45 power to direct involves action initiated and within the control
46 of a third party. The trustee usually has no responsibility other
47 than to carry out the direction when made. But if a third party
48 holds a veto power, the trustee is responsible for initiating the
49 decision, subject to the third party's approval. A trustee who
50

2 administers a trust subject to a veto power occupies a position
3 akin to that of a cotrustee and is responsible for taking
4 appropriate action if the third party's refusal to consent would
5 result in a serious breach of trust. See Restatement (Second) of
6 Trusts Section 185 cmt. g (1959); Section 703(g)(duties of
cotrustees).

8 Frequently, the person holding the power is directing the
9 investment of the holder's own beneficial interest. Such
10 self-directed accounts are particularly prevalent among trusts
11 holding interests in employee benefit plans or individual
12 retirement accounts. See ERISA Section 404(c) (29 U.S.C. Section
13 1104(c)). But for the type of donative trust which is the primary
14 focus of this Code, the holder of the power to direct is
15 frequently acting on behalf of others. In that event and as
16 provided in subsection (d), the holder is presumptively acting in
17 a fiduciary capacity with respect to the powers granted and can
18 be held liable if the holder's conduct constitutes a breach of
19 trust, whether through action or inaction. Like a trustee,
20 liability cannot be imposed if the holder has not accepted the
21 grant of the power either expressly or informally through
22 exercise of the power. See Section 701.

24 Powers to direct are most effective when the trustee is not
25 deterred from exercising the power by fear of possible liability.
26 On the other hand, the trustee does have overall responsibility
27 for seeing that the terms of the trust are honored. For this
28 reason, subsection (b) imposes only minimal oversight
29 responsibility on the trustee. A trustee must generally act in
30 accordance with the direction. A trustee may refuse the direction
31 only if the attempted exercise would be manifestly contrary to
32 the terms of the trust or the trustee knows the attempted
33 exercise would constitute a serious breach of a fiduciary duty
34 owed by the holder of the power to the beneficiaries of the trust.

36 The provisions of this section may be altered in the terms of the
37 trust. See Section 105. A settlor can provide that the trustee
38 must accept the decision of the power holder without question. Or
39 a settlor could provide that the holder of the power is not to be
40 held to the standards of a fiduciary. A common technique for
41 assuring that a settlor continues to be taxed on all of the
42 income of an irrevocable trust is for the settlor to retain a
43 nonfiduciary power of administration. See I.R.C. Section 675(4).
44

46 **§809. Control and protection of trust property**

48 A trustee shall take reasonable steps to take control of and
49 protect the trust property.
50

2

UNIFORM COMMENT

4 This section codifies the substance of Sections 175 and 176 of
6 the Restatement (Second) of Trusts (1959). The duty to take
8 control of and safeguard trust property is an aspect of the
10 trustee's duty of prudent administration as provided in Section
12 804. See also Sections 816(1) (power to collect trust property),
14 816(11) (power to insure trust property), and 816(12) (power to
16 abandon trust property). The duty to take control normally means
18 that the trustee must take physical possession of tangible
20 personal property and securities belonging to the trust, and must
secure payment of any choses in action. See Restatement (Second)
of Trusts Section 175 cmt. a, c & d (1959). This section, like
the other sections in this article, is subject to alteration by
the terms of the trust. See Section 105. For example, 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.

20

22 **§810. Record keeping and identification of trust property**

24 **1. Adequate records of administration.** A trustee shall
26 keep adequate records of the administration of the trust.

26

28 **2. Separation of property.** A trustee shall keep trust
property separate from the trustee's own property.

28

30 **3. Interest of trust, records.** Except as otherwise
32 provided in subsection 4, a trustee not subject to federal or
34 state banking regulation shall cause the trust property to be
36 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 to whom the trustee has delivered the
property.

36

38 **4. Two or more trusts.** If the trustee maintains records
40 clearly indicating the respective interests, a trustee may invest
as a whole the property of 2 or more separate trusts.

40

42

UNIFORM COMMENT

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46 The duty to keep adequate records stated in subsection (a) is
48 implicit in the duty to act with prudence (Section 804) and the
duty to report to beneficiaries (Section 813). For an
application, see Green v. Lombard, 343 A. 2d 905, 911 (Md. Ct.
Spec. App. 1975). See also Restatement (Second) of Trusts
Sections 172, 174 (1959).

50

2 The duty to earmark trust assets and the duty of a trustee not to
3 mingle the assets of the trust with the trustee's own are closely
4 related. Subsection (b), which addresses the duty not to mingle,
5 is derived from Section 179 of the Restatement (Second) of Trusts
6 (1959). Subsection (c) makes the requirement that assets be
7 earmarked more precise than that articulated in Restatement
8 (Second) Section 179 by requiring that the interest of the trust
9 must appear in the records of a third party, such as a bank,
10 brokerage firm, or transfer agent. Because of the serious risk of
11 mistake or misappropriation even if disclosure is made to the
12 beneficiaries, showing the interest of the trust solely in the
13 trustee's own internal records is insufficient. Section
14 816(7)(B), which allows a trustee to hold securities in nominee
15 form, is not inconsistent with this requirement. While securities
16 held in nominee form are not specifically registered in the name
17 of the trustee, they are properly earmarked because the trustee's
18 holdings are indicated in the records maintained by an
19 independent party, such as in an account at a brokerage firm.

20 Earmarking is not practical for all types of assets. With respect
21 to assets not subject to registration, such as tangible personal
22 property and bearer bonds, arranging for the trust's ownership
23 interest to be reflected on the records of a third-party
24 custodian would not be feasible. For this reason, subsection (c)
25 waives separate recordkeeping for these types of assets. Under
26 subsection (b), however, the duty of the trustee not to mingle
27 these or any other trust assets with the trustee's own remains
28 absolute.

29 Subsection (d), following the lead of a number of state statutes,
30 allows a trustee to use the property of two or more trusts to
31 make joint investments, even though under traditional principles
32 a joint investment would violate the duty to earmark. A joint
33 investment frequently is more economical than attempting to
34 invest the funds of each trust separately. Also, the risk of
35 misappropriation or mistake is less when the trust property is
36 invested jointly with the property of another trust than when
37 pooled with the property of the trustee or other person.

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42 **MAINE COMMENT**

43 Section 810, subsection 3 of the Uniform Trust Code was amended
44 to insert the clause "not subject to federal or state banking
45 regulation." The Uniform Comment on subsection (c) is too broad.
46 A bank trustee that registers securities in the name of a nominee
47 will not cause any particular fiduciary relationship to be
48 reflected in the records of a 3rd party. If an individual
49 trustee trades through a broker/dealer, the name on the
50

broker/dealer account will ordinarily not be the trust's name, as the Uniform Comment contemplates. The absence of 3rd-party designation in corporate trustee situations has not historically caused problems, and subsection 3 should not require it.

The clause "to whom the trustee has delivered the property" was added at the end of 3 to provide clarity.

§811. Enforcement and defense of claims

A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.

UNIFORM COMMENT

This section 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 Section 816(14) (power to pay, contest, settle, or release claims).

§812. Collecting trust property

A trustee shall take reasonable steps:

1. Compel delivery. To compel a former trustee or other person to deliver trust property to the trustee; and

2. Redress breach. To redress a breach of trust known to the trustee to have been committed by a former trustee.

UNIFORM COMMENT

This section is a specific application of Section 811 on 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 Section 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 Section 104. Limiting the successor's obligation to known

breaches is a common feature of state trust statutes. See, e.g.,
Mo. Rev. Stat. Section 456.187.2.

As authorized by Section 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 the terms of the trust. See Section 105.

MAINE COMMENT

Section 812 was divided into subsections to clarify the substance of the section.

§813. Duty to inform and report

1. Inform beneficiaries. A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless a request is unreasonable under the circumstances, a trustee shall promptly respond to a qualified beneficiary's request for trustee's reports and other information reasonably related to the administration of the trust.

2. Information. A trustee:

A. Upon request of a beneficiary, shall promptly furnish to the beneficiary a copy of the trust instrument;

B. Within 60 days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance and of the trustee's name, address and telephone number;

C. Within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument and of the right to a trustee's report as provided in subsection 3; and

D. Shall notify the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation.

2 circumstances may require that the trustee provide additional
3 information. For example, if the trustee is dealing with the
4 beneficiary on the trustee's own account, the trustee must
5 communicate material facts relating to the transaction that the
6 trustee knows or should know. See Restatement (Second) of Trusts
7 Section 173 cmt. d (1959). Furthermore, to enable the
8 beneficiaries to take action to protect their interests, the
9 trustee may be required to provide advance notice of transactions
10 involving real estate, closely-held business interests, and other
11 assets that are difficult to value or to replace. See *In re Green*
12 *Charitable Trust*, 431 N.W. 2d 492 (Mich. Ct. App. 1988); *Allard*
13 *v. Pacific National Bank*, 663 P.2d 104 (Wash. 1983). The trustee
14 is justified in not providing such advance disclosure if
15 disclosure is forbidden by other law, as under federal securities
16 laws, or if disclosure would be seriously detrimental to the
17 interests of the beneficiaries, for example, when disclosure
18 would cause the loss of the only serious buyer.

19 Subsection (a) provides a different standard if a beneficiary,
20 whether qualified or not, makes a request for information. In
21 that event, the trustee must promptly comply with the
22 beneficiary's request unless unreasonable under the
23 circumstances. Further supporting the principle that a
24 beneficiary should be allowed to make an independent assessment
25 of what information is relevant to protecting the beneficiary's
26 interest, subsection (b)(1) requires the trustee on request to
27 furnish a beneficiary with a complete copy of the trust
28 instrument and not merely with those portions the trustee deems
29 relevant to the beneficiary's interest. For a case reaching the
30 same result, see *Fletcher v. Fletcher*, 480 S.E. 2d 488 (Va. Ct.
31 App. 1997). Subsection (b)(1) is contrary to Section 7-303(b) of
32 the Uniform Probate Code, which provides that "[u]pon reasonable
33 request, the trustee shall provide the beneficiary with a copy of
34 the terms of the trust which describe or affect his interest. .
35 . . ."

36 The drafters of this Code decided to leave open for further
37 consideration by the courts the extent to which a trustee may
38 claim attorney-client privilege against a beneficiary seeking
39 discovery of attorney-client communications between the trustee
40 and the trustee's attorney. The courts are split because of the
41 important values that are in tension on this question. "The
42 [attorney-client] privilege recognizes that sound legal advice or
43 advocacy serves public ends and that such advice or advocacy
44 depends upon the lawyer's being fully informed by the client."
45 *Upjohn Co. v. United States*, 449 U.S. 383 (1981). On the other
46 hand, subsection (a) of this section requires that a trustee keep
47 the qualified beneficiaries reasonably informed about the
48 administration of the trust and of the material facts necessary
49 for them to protect their interests, which could include facts
50

2 that the trustee has revealed only to the trustee's attorney.
3 There is authority for the view that the trustee is estopped from
4 pleading attorney-client privilege in such circumstances. In the
5 leading case, Riggs National Bank v. Zimmer, 355 A.2d 709, 713
6 (Del. Ch. 1976), the court reasoned that the beneficiary, not the
7 trustee, is the attorney's client: "As a representative for the
8 beneficiaries of the trust which he is administering, the trustee
9 is not the real client" This beneficiary-as-client
10 theory has been criticized on the ground that it conflicts with
11 the trustee's fiduciary duty to implement the intentions of the
12 settlor, which are sometimes in tension with the wishes of one or
13 more beneficiaries. See Louis H. Hamel, Jr., Trustee's Privileged
14 Counsel: A Rebuttal, 21 ACTEC Notes 156 (1995); Charles F. Gibbs
15 & Cindy D. Hanson, The Fiduciary Exception to a Trustee's
16 Attorney/Client Privilege, 21 ACTEC Notes 236 (1995). Prominent
17 decisions in California and Texas have refused to follow Delaware
18 in recognizing an exception for the beneficiary against the
19 trustee's attorney-client privilege. Wells Fargo Bank v. Superior
20 Court (Boltwood), 990 P.2d 591 (Cal. 2000); Huie v. De Shazo, 922
21 S.W. 2d 920 (Tex. 1996). The beneficiary-as-client theory
22 continues to be applied to ERISA trusts. See, e.g., United States
23 v. Mett, 178 F.3d 1058, 1062-64 (9th Cir. 1999). However, in a
24 pension trust the beneficiaries are the settlors of their own
25 trust because the trust is funded with their own earnings.
26 Accordingly, in ERISA attorney-client cases "[t]here are no
27 competing interests such as other stockholders or the intentions
28 of the Settlor." Gibbs & Hanson, 21 ACTEC Notes at 238. For
29 further discussion of the attorney-client privilege and whether
30 there is a duty to disclose to the beneficiaries, see ACTEC
31 commentaries on the Model Rules of Professional Conduct,
32 commentary on MRPC 1.2 (3d ed. 1999); Rust E. Reid et al.,
33 Privilege and Confidentiality Issues When a Lawyer Represents a
34 Fiduciary, 30 Real Prop. Prob. & Tr. J. 541 (1996).

35 To enable beneficiaries to protect their interests effectively,
36 it is essential that they know the identity of the trustee.
37 Subsection (b)(2) requires that a trustee inform the qualified
38 beneficiaries within 60 days of the trustee's acceptance of
39 office and of the trustee's name, address and telephone number.
40 Similar to the obligation imposed on a personal representative
41 following admission of the will to probate, subsection (b)(3)
42 requires the trustee of a revocable trust to inform the qualified
43 beneficiaries of the trust's existence within 60 days after the
44 settlor's death. These two duties can overlap. If the death of
45 the settlor happens also to be the occasion for the appointment
46 of a successor trustee, the new trustee of the formerly revocable
47 trust would need to inform the qualified beneficiaries both of
48 the trustee's acceptance and of the trust's existence.

2 Subsection (b)(4) deals with the sensitive issue of changes,
usually increases, in trustee compensation. Changes can include
4 changes in a periodic base fee, rate of percentage compensation,
hourly rate, termination fee, or transaction charge. Regarding
6 the standard for setting trustee compensation, see Section 708
and comment.

8 Subsection (c) requires the trustee to furnish the current
beneficiaries and other beneficiaries who request it with a copy
10 of a trustee's report at least annually and upon termination of
the trust. Unless a cotrustee remains in office, the former
12 trustee also must provide a report to all of the qualified
beneficiaries upon the trustee's resignation or removal. If the
14 vacancy occurred because of the former trustee's death or
adjudication of incapacity, a report may, but need not be
16 provided by the former trustee's personal representative,
conservator, or guardian.

18 The Uniform Trust Code employs the term "report" instead of
20 "accounting" in order to negate any inference that the report
must be prepared in any particular format or with a high degree
22 of formality. The reporting requirement might even be satisfied
by providing the beneficiaries with copies of the trust's income
24 tax returns and monthly brokerage account statements if the
information on those returns and statements is complete and
26 sufficiently clear. The key factor is not the format chosen but
whether the report provides the beneficiaries with the
28 information necessary to protect their interests. For model
account forms, together with practical advice on how to prepare
30 reports, see Robert Whitman, Fiduciary Accounting Guide (2d ed.
1998).

32 Subsection (d) allows trustee reports and other required
34 information to be waived by a beneficiary. A beneficiary may also
withdraw a consent. However, a waiver of a trustee's report or
36 other information does not relieve the trustee from
accountability and potential liability for matters that the
38 report or other information would have disclosed.

40
42 **MAINE COMMENT**

44 Section 813 was changed to require that, except for providing a
copy of the trust to a beneficiary who requests it, the trustee
is required to send reports and information only to qualified
46 beneficiaries. The settlor may further restrict the information
provided to qualified beneficiaries who are 25 years of age or
48 older. See section 105.

2 Section 813, subsection 3 was amended to require that the
trustee's report include information on the tax basis of the
trust's assets. This information is commonly provided and should
4 be required.

6 It is to be noted that, while there is an official Maine Probate
Court form for estate accountings, Form DE-406, this section
8 specifically contemplates that there will be no official form for
trust accountings. In addition, while estate accountings only
10 report personal property, this section makes no distinction
between real estate and other kinds of property held in trust.
12 Trust reports should reflect all property, whether real or
personal.

14
16 **§814. Discretionary powers; tax savings**

18 **1. Discretionary power; interests of beneficiaries.**
19 Notwithstanding the breadth of discretion granted to a trustee in
20 the terms of the trust, including the use of such terms as
21 "absolute," "sole" or "uncontrolled," the trustee shall exercise
22 a discretionary power in good faith and in accordance with the
23 terms and purposes of the trust and the interests of the
24 beneficiaries. A trustee's power to make distributions is
25 discretionary notwithstanding terms of the trust providing that
26 the trustee "shall" make distributions exercising a discretionary
27 power, with or without standards.

28 **2. Discretionary distributions. Subject to subsection 4,**
29 and unless the terms of the trust expressly indicate that a rule
30 in this subsection does not apply:

31 **A. A person other than a settlor who is a beneficiary and**
32 trustee of a trust that confers on the trustee a power to
33 make discretionary distributions to or for the trustee's
34 personal benefit may exercise the power only in accordance
35 with an ascertainable standard relating to the trustee's
36 individual health, education, support or maintenance within
37 the meaning of the federal Internal Revenue Code of 1986,
38 Section 2041(b)(1)(A) or 2514(c)(1), as in effect on July 1,
39 2005, or as later amended; and

40 **B. A trustee may not exercise a power to make discretionary**
41 distributions to satisfy a legal obligation of support that
42 the trustee personally owes another person.

43 **3. Cotrustees; special fiduciary. A power whose exercise**
44 is limited or prohibited by subsection 2 may be exercised by a
45 majority of the remaining trustees whose exercise of the power is
46 not so limited or prohibited. If the power of all trustees is so
47 limited or prohibited, the power may be exercised by a
48 majority of the trustees whose exercise of the power is
49 not so limited or prohibited.
50

2 limited or prohibited, the court may appoint a special fiduciary
3 with authority to exercise the power.

4 **4. Exceptions. Subsection 2 does not apply to:**

6 A. A power held by the settlor's spouse who is the trustee
7 of a trust for which a marital deduction, as defined in the
8 federal Internal Revenue Code of 1986, Section 2056(b)(5) or
9 2523(e), as in effect on July 1, 2005, or as later amended,
10 was previously allowed;

12 B. Any trust during any period that the trust may be
13 revoked or amended by its settlor; or

14 C. A trust if contributions to the trust qualify for the
15 annual exclusion under the federal Internal Revenue Code of
16 1986, Section 2503(c) as in effect on July 1, 2005, or as
17 later amended.

20 **UNIFORM COMMENT**

22
23 Despite the breadth of discretion purportedly granted by the
24 wording of a trust, no grant of discretion to a trustee, whether
25 with respect to management or distribution, is ever absolute. A
26 grant of discretion establishes a range within which the trustee
27 may act. The greater the grant of discretion, the broader the
28 range. Pursuant to subsection (a), a trustee's action must always
29 be in good faith, with regard to the purposes of the trust, and
30 in accordance with the trustee's other duties, including the
31 obligation to exercise reasonable skill, care and caution. See
32 Sections 801 (duty to administer trust) and 804 (duty to act with
33 prudence). The standard stated in subsection (a) applies only to
34 powers which are to be exercised in a fiduciary as opposed to a
35 nonfiduciary capacity. Regarding the standards for exercising
36 discretion and construing particular language of discretion, see
37 Restatement (Third) of Trusts Section 50 (Tentative Draft No. 2,
38 approved 1999); Restatement (Second) of Trusts Section 187
39 (1959). See also Edward C. Halbach, Jr., Problems of Discretion
40 in Discretionary Trusts, 61 Colum. L. Rev. 1425 (1961). An abuse
41 by the trustee of the discretion granted in the terms of the
42 trust is a breach of trust that can result in surcharge. See
43 Section 1001(b) (remedies for breach of trust).

44
45 Subsections (b) through (d) rewrite the terms of a trust that
46 might otherwise result in adverse estate and gift tax
47 consequences to a beneficiary-trustee. This Code does not
48 generally address the subject of tax curative provisions. These
49 are provisions that automatically rewrite the terms of trusts
50 that might otherwise fail to qualify for probable intended tax

benefits. Such provisions, because they apply to all trusts using
2 or failing to use specified language, are often overbroad,
3 applying not only to trusts intended to qualify for tax benefits
4 but also to smaller trust situations where taxes are not a
5 concern. Enacting tax-curative provisions also requires special
6 diligence by state legislatures to make certain that these
7 provisions are periodically amended to account for the frequent
8 changes in federal tax law. Furthermore, many failures to draft
9 with sufficient care may be correctable by including a tax
10 savings clause in the terms of the trust or by seeking
11 modification of the trust using one or more of the methods
12 authorized by Sections 411-417. Notwithstanding these reasons,
13 the unintended inclusion of the trust in the
14 beneficiary-trustee's gross estate is a frequent enough
15 occurrence that the drafters concluded that it is a topic that
16 this Code should address. It is also a topic on which numerous
17 States have enacted corrective statutes.

18
19 A tax curative provision differs from a statute such as Section
20 416 of this Code, which allows a court to modify a trust to
21 achieve an intended tax benefit. Absent Congressional or
22 regulatory authority authorizing the specific modification, a
23 lower court decree in state court modifying a trust is
24 controlling for federal estate tax purposes only if the decree
25 was issued before the taxing event, which in the case of the
26 estate tax would be the decedent's death. See Rev. Rul. 73-142,
27 1973-1 C.B. 405. There is specific federal authority authorizing
28 modification of trusts for a number of reasons (see comment to
29 Section 416) but not on the specific issues addressed in this
30 section. Subsections (b) through (d), by interpreting the
31 original language of the trust instrument in a way that qualifies
32 for intended tax benefits, obviates the need to seek a later
33 modification of the trust.

34
35 Subsection (b)(1) states the main rule. Unless the terms of the
36 trust expressly indicate that the rule in this subsection is not
37 to apply, the power to make discretionary distributions to a
38 beneficiary-trustee is automatically limited by the requisite
39 ascertainable standard necessary to avoid inclusion of the trust
40 in the trustee's gross estate or result in a taxable gift upon
41 the trustee's release or exercise of the power. Trusts of which
42 the trustee-beneficiary is also a settlor are not subject to this
43 subsection. In such a case, limiting the discretion of a
44 settlor-trustee to an ascertainable standard would not be
45 sufficient to avoid inclusion of the trust in the settlor's gross
46 estate. See generally John J. Regan, Rebecca C. Morgan & David M.
47 English, Tax, Estate and Financial Planning for the Elderly
48 Section 17.07[2][h]. Furthermore, the inadvertent inclusion of a
49 trust in a settlor-trustee's gross estate is a far less frequent
50 and better understood occurrence than is the inadvertent

2 inclusion of the trust in the estate of a nonsettlor trustee-beneficiary.

4 Subsection (b)(2) addresses a common trap, the trustee who is not
6 a beneficiary but who has power to make discretionary
8 distributions to those to whom the trustee owes a legal
10 obligation of support. Discretion to make distributions to those
12 to whom the trustee owes a legal obligation of support, such as
14 to the trustee's minor children, results in inclusion of the
16 trust in the trustee's gross estate even if the power is limited
18 by an ascertainable standard. The applicable regulation provides
20 that the ascertainable standard exception applies only to
22 distributions for the benefit of the decedent, not to
24 distributions to those to whom the decedent owes a legal
obligation of support. See Treas. Reg. Section 20.2041-1(c)(2).

16 Subsection (c) deals with cotrustees and adopts the common
18 planning technique of granting the broader discretion only to the
20 independent trustee. Cotrustees who are beneficiaries of the
22 trust or who have a legal obligation to support a beneficiary may
24 exercise the power only as limited by subsection (b). 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.

26 Subsection (d) excludes certain trusts from the operation of this
28 section. Trusts qualifying for the marital deduction will be
30 includable in the surviving spouse's gross estate regardless of
32 whether this section applies. Consequently, if the spouse is
34 acting as trustee, there is no need to limit the power of the
spouse-trustee 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.

36 QTIP marital trusts are subject to this section, however. QTIP
38 trusts qualify for the marital deduction only if so elected on
40 the federal estate tax return. Excluding a QTIP for which an
42 election has been made from the operation of this section would
44 allow the terms of the trust to be modified after the settlor's
46 death. By not making the QTIP election, an otherwise
48 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.

2 The exclusion of the Section 2503(c) minors trust is necessary to
3 avoid loss of gift tax benefits. While preventing a trustee from
4 distributing trust funds in discharge of a legal obligation of
5 support would keep the trust out of the trustee's gross estate,
6 such a restriction might result in loss of the gift tax annual
7 exclusion for contributions to the trust, even if the trustee
8 were otherwise granted unlimited discretion. See Rev. Rul.
69-345, 1969-1 C.B. 226.

10
11
12 **MAINE COMMENT**

13 The 2nd sentence of section 814, subsection 1 has been added to
14 confirm that a trust, the terms of which provide that a trustee
15 "shall" make distributions in the exercise of the trustee's
16 discretion, as opposed to "may," is nonetheless a discretionary
17 trust. Whether the trustee has properly exercised its discretion
18 will depend upon a range of factors, including, as mentioned in
19 the first sentence of subsection 1, the terms and purposes of the
20 trust and the interests of the beneficiaries. See Restatement
21 (Second) of Trusts Section 155(1) (1959), and Restatement (Third)
22 of Trusts Section 50(2) (2003).

23
24 **§815. General powers of trustee**

25
26 **1. General powers.** A trustee, without authorization by the
27 court, may exercise:

28
29 **A. Powers conferred by the terms of the trust; and**

30
31 **B. Except as limited by the terms of the trust:**

32
33 **(1) All powers over the trust property that an**
34 **unmarried competent owner has over individually owned**
35 **property;**

36
37 **(2) Any other powers appropriate to achieve the proper**
38 **investment, management and distribution of the trust**
39 **property; and**

40
41 **(3) Any other powers conferred by this Code.**

42
43 **2. Subject to fiduciary duties.** The exercise of a power is
44 **subject to the fiduciary duties prescribed by this chapter.**

45
46
47
48 **UNIFORM COMMENT**

2 This section is intended to grant trustees the broadest possible
3 powers, but to be exercised always in accordance with the duties
4 of the trustee and any limitations stated in the terms of the
5 trust. This broad authority is denoted by granting the trustee
6 the powers of an unmarried competent owner of individually owned
7 property, unlimited by restrictions that might be placed on it by
8 marriage, disability, or cotenancy.

9 The powers conferred elsewhere in this Code that are subsumed
10 under this section include all of the specific powers listed in
11 Section 816 as well as other powers described elsewhere in this
12 Code. See Sections 108(c) (transfer of principal place of
13 administration), 414(a) (termination of uneconomic trust with
14 value less than \$50,000), 417 (combination and division of
15 trusts), 703(e) (delegation to cotrustee), 802(h) (exception to
16 duty of loyalty), 807 (delegation to agent of powers and duties),
17 810(d) (joint investments), and Article 9 (Uniform Prudent
18 Investor Act). The powers conferred by this Code may be exercised
19 without court approval. If court approval of the exercise of a
20 power is desired, a petition for court approval should be filed.

21 A power differs from a duty. A duty imposes an obligation or a
22 mandatory prohibition. A power, on the other hand, is a
23 discretion, the exercise of which is not obligatory. The
24 existence of a power, however created or granted, does not speak
25 to the question of whether it is prudent under the circumstances
26 to exercise the power.
27

28
29
30 **MAINE COMMENT**

31 The value of a trust that might be terminated under section 414,
32 subsection 1 is increased to \$100,000 in the Maine Uniform Trust
33 Code.
34

35
36 **§816. Specific powers of trustee**

37
38 Without limiting the authority conferred by section 815, a
39 trustee may:

40
41 1. Collect trust property. Collect trust property and
42 accept or reject additions to the trust property from a settlor
43 or any other person;

44
45 2. Acquire or sell property. Acquire or sell property, for
46 cash or on credit, at public or private sale;

47
48 3. Change character of trust property. Exchange, partition
49 or otherwise change the character of trust property;

2 4. Deposit trust money. Deposit trust money in an account
4 in a regulated financial service institution;

6 5. Borrow money; pledge trust property. Borrow money, with
8 or without security, and mortgage or pledge trust property for a
10 period within or extending beyond the duration of the trust;

12 6. Continue business or enterprise. With respect to an
14 interest in a proprietorship, partnership, limited liability
16 company, business trust, corporation or other form of business or
18 enterprise, continue the business or other enterprise and take
20 any action that may be taken by shareholders, members or property
22 owners, including merging, dissolving or otherwise changing the
24 form of business organization or contributing additional capital;

26 7. Exercise rights of owner. With respect to stocks or
28 other securities, exercise the rights of an absolute owner,
30 including the right to:

32 A. Vote, or give proxies to vote, with or without power of
34 substitution, or enter into or continue a voting trust
36 agreement;

38 B. Hold a security in the name of a nominee or in other
40 form without disclosure of the trust so that title may pass
42 by delivery;

44 C. Pay calls, assessments and other sums chargeable or
46 accruing against the securities, and sell or exercise stock
48 subscription or conversion rights; and

D. Deposit the securities with a depository or other
 regulated financial service institution;

36 8. Improvements. With respect to an interest in real
38 property, construct or make ordinary or extraordinary repairs to,
40 alterations to or improvements in buildings or other structures,
42 demolish improvements, raze existing or erect new party walls or
44 buildings, subdivide or develop land, dedicate land to public use
46 or grant public or private easements and make or vacate plats and
48 adjust boundaries;

9. Enter into lease. 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;

2 10. Grant or acquire option. Grant an option involving a
3 sale, lease or other disposition of trust property or acquire an
4 option for the acquisition of property, including an option
5 exercisable beyond the duration of the trust, and exercise an
6 option so acquired;

7 11. Insure. Insure the property of the trust against
8 damage or loss and insure the trustee, the trustee's agents and
9 beneficiaries against liability arising from the administration
10 of the trust;

11 12. Abandon or decline administration. Abandon or decline
12 to administer property of no value or of insufficient value to
13 justify its collection or continued administration;

14 13. Liability for violation of environmental law. With
15 respect to possible liability for violation of environmental law:

16 A. Inspect or investigate property the trustee holds or has
17 been asked to hold, or property owned or operated by an
18 organization in which the trustee holds or has been asked to
19 hold an interest, for the purpose of determining the
20 application of environmental law with respect to the
21 property;

22 B. Take action to prevent, abate or otherwise remedy any
23 actual or potential violation of any environmental law
24 affecting property held directly or indirectly by the
25 trustee, whether taken before or after the assertion of a
26 claim or the initiation of governmental enforcement;

27 C. Decline to accept property into trust or disclaim any
28 power with respect to property that is or may be burdened
29 with liability for violation of environmental law;

30 D. Compromise claims against the trust that may be asserted
31 for an alleged violation of environmental law; and

32 E. Pay the expense of any inspection, review, abatement or
33 remedial action to comply with environmental law;

34 14. Claims against trust. Pay or contest any claim, settle
35 a claim by or against the trust and release, in whole or in part,
36 a claim belonging to the trust;

37 15. Pay expenses of administration. Pay taxes,
38 assessments, compensation of the trustee and of employees and
39 agents of the trust and other expenses incurred in the
40 administration of the trust;

2 16. Taxes. Exercise elections with respect to federal,
3 state and local taxes;

4 17. Trustee compensation and benefits. Select a mode of
5 payment under any employee benefit or retirement plan, annuity or
6 life insurance payable to the trustee; exercise rights under
7 those instruments, including exercise of the right to
8 indemnification for expenses and against liabilities; and take
9 appropriate action to collect the proceeds;

10 18. Loans. Make loans out of trust property, including
11 loans to a beneficiary on terms and conditions the trustee
12 considers to be fair and reasonable under the circumstances; the
13 trustee has a lien on future distributions for repayment of those
14 loans;

15 19. Guarantee loans. Pledge trust property to guarantee
16 loans made by others to the beneficiary;

17 20. Appoint trustee in another jurisdiction. Appoint a
18 trustee to act in another jurisdiction with respect to trust
19 property located in the other jurisdiction, confer upon the
20 appointed trustee all of the powers and duties of the appointing
21 trustee, require that the appointed trustee furnish security and
22 remove any trustee so appointed;

23 21. Beneficiary under legal disability or incapacitated.
24 Pay an amount distributable to a beneficiary who is under a legal
25 disability or who the trustee reasonably believes is
26 incapacitated, by paying it directly to the beneficiary or
27 applying it for the beneficiary's benefit, or by:

28 A. Paying it to the beneficiary's conservator or, if the
29 beneficiary does not have a conservator, the beneficiary's
30 guardian;

31 B. Paying it to the beneficiary's custodian under Title 33,
32 chapter 32, which is the Maine Uniform Transfers to Minors
33 Act, or to a custodial trustee under the laws of another
34 state, and, for that purpose, creating a custodianship or
35 custodial trust;

36 C. If the trustee does not know of a conservator, guardian,
37 custodian or custodial trustee, paying it to an adult
38 relative or other person having legal or physical care or
39 custody of the beneficiary, to be expended on the
40 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. Distribution, division or termination. 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;

23. Resolution of dispute. 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. 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. Contracts and other instruments. Sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's powers; and

26. Wind up administration and distribute. 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.

UNIFORM COMMENT

This section enumerates specific powers commonly included in trust instruments and in trustee powers legislation. All the powers listed are subject to alteration in the terms of the trust. See Section 105. The powers listed are also subsumed under the general authority granted in Section 815(a)(2) 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. The powers listed add little of substance not already granted by Section 815 and powers conferred elsewhere in the Code, which are listed in the comment to Section 815. While the Committee drafting this Code discussed dropping the list of specific powers, it concluded that the demand of third parties to see language expressly authorizing specific transactions justified retention of a detailed list.

2 As provided in Section 815(b), the exercise of a power is subject
to fiduciary duties except as modified in the terms of the trust.
4 The fact that the trustee has a power does not imply a duty that
the power must be exercised.

6 Many of the powers listed in this section are similar to the
powers listed in Section 3 of the Uniform Trustees' Powers Act
8 (1964). Several are new, however, and other powers drawn from
that Act have been updated. The powers enumerated in this section
10 may be divided into categories. Certain powers, such as the
powers to acquire or sell property, borrow money, and deal with
12 real estate, securities, and business interests, are powers that
any individual can exercise. Other powers, such as the power to
14 collect trust property, are by their very nature only applicable
to trustees. Other specific powers, particularly those listed in
16 other sections of the Uniform Trust Code, modify a trustee duty
that would otherwise apply. See, e.g., Sections 802(h)
18 (exceptions to duty of loyalty) and 810(d) (joint investments as
exception to earmarking requirement).

20 Paragraph (1) authorizes a trustee to collect trust property and
22 collect or decline additions to the trust property. The power to
collect trust property is an incident of the trustee's duty to
24 administer the trust as provided in Section 801. The trustee has
a duty to enforce claims as provided in Section 811, the
26 successful prosecution of which can result in collection of trust
property. Pursuant to Section 812, the trustee also has a duty to
28 collect trust property from a former trustee or other person
holding trust property. For an application of the power to reject
30 additions to the trust property, see Section 816(13) (power to
decline property with possible environmental liability).

32 Paragraph (2) authorizes a trustee to sell trust property, for
34 cash or on credit, at public or private sale. Under the
Restatement, a power of sale is implied unless limited in the
36 terms of the trust. Restatement (Third) of Trusts: Prudent
Investor Rule Section 190 (1992). In arranging a sale, a trustee
38 must comply with the duty to act prudently as provided in Section
804. This duty may dictate that the sale be made with security.

40 Paragraph (4) authorizes a trustee to deposit funds in an account
42 in a regulated financial-service institution. This includes the
right of a financial institution trustee to deposit funds in its
44 own banking department as authorized by Section 802(h)(4).

46 Paragraph (5) authorizes a trustee to borrow money. Under the
Restatement, the sole limitation on such borrowing is the general
48 obligation to invest prudently. See Restatement (Third) of
Trusts: Prudent Investor Rule Section 191 (1992). Language
50 clarifying that the loan may extend beyond the duration of the

2 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.

4 Paragraph (6) authorizes the trustee to continue, contribute
6 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
8 prudent investment stated in Article 9.

10 Paragraph (7), regarding powers with respect to securities,
codifies and amplifies the principles of Restatement (Second) of
12 Trusts Section 193 (1959).

14 Paragraph (9), authorizing the leasing of property, negates the
older view, reflected in Restatement (Second) of Trusts Section
16 189 cmt. c (1959), that a trustee could not lease property beyond
the duration of the trust. Whether a longer term lease is
18 appropriate is judged by the standards of prudence applicable to
all investments.

20 Paragraph (10), authorizing a trustee to grant options with
22 respect to sales, leases or other dispositions of property,
negates the older view, reflected in Restatement (Second) of
24 Trusts Section 190 cmt. k (1959), that a trustee could not grant
another person an option to purchase trust property. Like any
26 other investment decision, whether the granting of an option is
appropriate is a question of prudence under the standards of
28 Article 9.

30 Paragraph (11), authorizing a trustee to purchase insurance,
empowers a trustee to implement the duty to protect trust
32 property. See Section 809. The trustee may also insure
beneficiaries, agents, and the trustee against liability,
34 including liability for breach of trust.

36 Paragraph (13) is one of several provisions in the Uniform Trust
Code designed to address trustee concerns about possible
38 liability for violations of environmental law. This paragraph
collects all the powers relating to environmental concerns in one
40 place even though some of the powers, such as the powers to pay
expenses, compromise claims, and decline property, overlap with
42 other paragraphs of this section (decline property, paragraph
(1); compromise claims, paragraph (14); pay expenses, paragraph
44 (15)). Numerous States have legislated on the subject of
environmental liability of fiduciaries. For a representative
46 state statute, see Tex. Prop. Code Ann. Section 113.025. See also
Sections 701(c)(2) (designated trustee may inspect property to
48 determine potential violation of environmental or other law or
for any purpose) and 1010(b) (trustee not personally liable for

2 violation of environmental law arising from ownership or control
of trust property).

4 Paragraph (14) authorizes a trustee to pay, contest, settle, or
6 release claims. Section 811 requires that a trustee need take
only "reasonable" steps to enforce claims, meaning that a trustee
8 may release a claim not only when it is uncollectible, but also
when collection would be uneconomic. See Restatement (Second) of
10 Trusts Section 192 (1959) (power to compromise, arbitrate and
abandon claims).

12 Paragraph (15), among other things, authorizes a trustee to pay
14 compensation to the trustee and agents without prior approval of
court. Regarding the standard for setting trustee compensation,
16 see Section 708. See also Section 709 (repayment of trustee
expenditures). While prior court approval is not required,
18 Section 813(b)(4) requires the trustee to inform the qualified
beneficiaries in advance of a change in the method or rate of
20 compensation.

22 Paragraph (16) authorizes a trustee to make elections with
respect to taxes. The Uniform Trust Code leaves to other law the
24 issue of whether the trustee, in making such elections, must make
compensating adjustments in the beneficiaries' interests.

26 Paragraph (17) authorizes a trustee to take action with respect
to employee benefit or retirement plans, or annuities or life
28 insurance payable to the trustee. Typically, these will be
beneficiary designations which the settlor has made payable to
30 the trustee, but this Code also allows the trustee to acquire
ownership of annuities or life insurance.

32 Paragraphs (18) and (19) allow a trustee to make loans to a
34 beneficiary or to guarantee loans of a beneficiary upon such
terms and conditions as the trustee considers fair and
36 reasonable. The determination of what is fair and reasonable must
be made in light of the fiduciary duties of the trustee and the
38 purposes of the trust. Frequently, a trustee will make loans to a
beneficiary which might be considered less than prudent in an
40 ordinary commercial sense although of great benefit to the
beneficiary and which help carry out the trust purposes. If the
42 trustee requires security for the loan to the beneficiary,
adequate security under this paragraph may consist of a charge on
44 the beneficiary's interest in the trust. See Restatement (Second)
of Trusts Section 255 (1959). However, the interest of a
46 beneficiary subject to a spendthrift restraint may not be pledged
as security for a loan. See Section 502.

48 Paragraph (20) authorizes the appointment of ancillary trustees
50 in jurisdictions in which the regularly appointed trustee is

2 unable or unwilling to act. Normally, an ancillary trustee will
3 be appointed only when there is a need to manage real estate
4 located in another jurisdiction. This paragraph allows the
5 regularly appointed trustee to select the ancillary trustee and
6 to confer on the ancillary trustee such powers and duties as may
7 be necessary. The appointment of ancillary trustees is a topic
8 which a settlor may wish to address in the terms of the trust.

10 Paragraph (21) authorizes a trustee to make payments to another
11 person for the use or benefit of a beneficiary who is under a
12 legal disability or who the trustee reasonably believes is
13 incapacitated. Although an adult relative or other person
14 receiving funds is required to spend it on the beneficiary's
15 behalf, it is preferable that the trustee make the distribution
16 to a person having more formal fiduciary responsibilities. For
17 this reason, payment may be made to an adult relative only if the
18 trustee does not know of a conservator, guardian, custodian, or
19 custodial trustee capable of acting for the beneficiary.

20 Paragraph (22) authorizes a trustee to make non-pro-rata
21 distributions and allocate particular assets in proportionate or
22 disproportionate shares. This power provides needed flexibility
23 and lessens the risk that a non-pro-rata distribution will be
24 treated as a taxable sale.

26 Paragraph (23) authorizes a trustee to resolve disputes through
27 mediation or arbitration. The drafters of this Code encourage the
28 use of such alternate methods for resolving disputes. Arbitration
29 is a form of nonjudicial settlement agreement authorized by
30 Section 111. In representing beneficiaries and others in
31 connection with arbitration or mediation, the representation
32 principles of Article 3 may be applied. Settlers wishing to
33 encourage use of alternate dispute resolution may draft to
34 provide it. For sample language, see American Arbitration
35 Association, Arbitration Rules for Wills and Trusts (1995).

36 Paragraph (24) authorizes a trustee to prosecute or defend an
37 action. As to the propriety of reimbursement for attorney's fees
38 and other expenses of an action or judicial proceeding, see
39 Section 709 and comment. See also Section 811 (duty to defend
40 actions).

42 Paragraph (26), which is similar to Section 344 of the
43 Restatement (Second) of Trusts (1959), clarifies that even though
44 the trust has terminated, the trustee retains the powers needed
45 to wind up the administration of the trust and distribute the
46 remaining trust property.

48
49
50 **MAINE COMMENT**

2 Section 816 replaces former Probate Code, section 7-402, repealed
in conjunction with the adoption of this Code.

4
6 Section 816, subsection 13 is consistent with the Probate Code,
section 1-111.

8
10 **§817. Distribution upon termination**

12 1. Proposed distribution. Upon termination or partial
14 termination of a trust, the trustee may send to the beneficiaries
16 a proposal for distribution. The right of any beneficiary to
18 object to the proposed distribution terminates if the beneficiary
does not notify the trustee of an objection within 30 days after
the proposal was sent but only if the proposal informed the
beneficiary of the right to object and of the time allowed for
objection.

20 2. Distribution; reasonable reserve. Upon the occurrence
22 of an event terminating or partially terminating a trust, the
24 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.

26
28 3. Release from liability invalid. A release by a
beneficiary of a trustee from liability for breach of trust is
invalid to the extent:

30 A. It was induced by improper conduct of the trustee; or

32 B. The beneficiary, at the time of the release, did not
34 know of the beneficiary's rights or of the material facts
36 relating to the breach.

38 **UNIFORM COMMENT**

40 This section contains several provisions governing distribution
42 upon termination. Other provisions of the Uniform Trust Code
44 relevant to distribution upon termination include Section 816(26)
(powers upon termination to windup administration and
distribution), and 1005 (limitation of action against trustee).

46 Subsection (a) is based on Section 3-906(b) of the Uniform
48 Probate Code. It addresses the dilemma that sometimes arises when
50 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

2 subsection (a) facilitates the making of non-pro-rata
distributions. However, whenever practicable it is normally
4 better practice to obtain the advance written consent of the
beneficiaries to a proposed plan of distribution.

6 Subsection (b) recognizes that upon an event terminating or
partially terminating a trust, expeditious distribution should be
8 encouraged to the extent reasonable under the circumstances.
However, a trustee is entitled to retain a reasonable reserve for
10 payment of debts, expenses, and taxes. Sometimes these reserves
must be quite large, for example, upon the death of the
12 beneficiary of a QTIP trust that is subject to federal estate tax
in the beneficiary's estate. Not infrequently, a substantial
14 reserve must be retained until the estate tax audit is concluded
several years after the beneficiary's death.

16 Subsection (c) is an application of Section 1009. Section 1009
18 addresses the validity of any type of release that a beneficiary
might give. Subsection (c) is more limited, dealing only with
20 releases given upon termination of the trust. Factors affecting
the validity of a release include adequacy of disclosure, whether
22 the beneficiary had a legal incapacity, and whether the trustee
engaged in any improper conduct. See Restatement (Second) of
24 Trusts Section 216 (1959).

26
28 **CHAPTER 9**

30 **MAINE UNIFORM PRUDENT INVESTOR ACT**

32 **PREFATORY NOTE**

34 Over the quarter century from the late 1960's the investment
practices of fiduciaries experienced significant change. The
36 Uniform Prudent Investor Act (UPIA) undertakes to update trust
investment law in recognition of the alterations that have
occurred in investment practice. These changes have occurred
38 under the influence of a large and broadly accepted body of
empirical and theoretical knowledge about the behavior of capital
40 markets, often described as "modern portfolio theory."

42 This Act draws upon the revised standards for prudent trust
investment promulgated by the American Law Institute in its
44 Restatement (Third) of Trusts: Prudent Investor Rule (1992)
[hereinafter Restatement of Trusts 3d: Prudent Investor Rule;
46 also referred to as 1992 Restatement].

48 **Objectives of the Act.** UPIA makes five fundamental alterations in
the former criteria for prudent investing. All are to be found in
50 the Restatement of Trusts 3d: Prudent Investor Rule.

2 (1) The standard of prudence is applied to any investment as part
of the total portfolio, rather than to individual investments. In
4 the trust setting the term "portfolio" embraces all the trust's
assets. UPIA § 2(b).

6 (2) The tradeoff in all investing between risk and return is
8 identified as the fiduciary's central consideration. UPIA § 2(b).

10 (3) All categoric restrictions on types of investments have been
abrogated; the trustee can invest in anything that plays an
12 appropriate role in achieving the risk/return objectives of the
trust and that meets the other requirements of prudent investing.
14 UPIA § 2(e).

16 (4) The long familiar requirement that fiduciaries diversify
their investments has been integrated into the definition of
18 prudent investing. UPIA § 3.

20 (5) The much criticized former rule of trust law forbidding the
trustee to delegate investment and management functions has been
22 reversed. Delegation is now permitted, subject to safeguards.
UPIA § 9.

24 **Literature.** These changes in trust investment law have been
26 presaged in an extensive body of practical and scholarly writing.
See especially the discussion and reporter's notes by Edward C.
28 Halbach, Jr., in Restatement of Trusts 3d: Prudent Investor Rule
(1992); see also Edward C. Halbach, Jr., Trust Investment Law in
30 the Third Restatement, 27 Real Property, Probate & Trust J. 407
(1992); Bevis Longstreth, Modern Investment Management and the
32 Prudent Man Rule (1986); Jeffrey N. Gordon, The Puzzling
Persistence of the Constrained Prudent Man Rule, 62 N.Y.U.L. Rev.
34 52 (1987); John H. Langbein & Richard A. Posner, The Revolution
in Trust Investment Law, 62 A.B.A.J. 887 (1976); Note, The
36 Regulation of Risky Investments, 83 Harvard L. Rev. 603 (1970). A
succinct account of the main findings of modern portfolio theory,
38 written for lawyers, is Jonathan R. Macey, An Introduction to
Modern Financial Theory (1991) (American College of Trust &
40 Estate Counsel Foundation). A leading introductory text on modern
portfolio theory is R.A. Brealey, An Introduction to Risk and
42 Return from Common Stocks (2d ed. 1983).

44 **Legislation.** Most states have legislation governing
trust-investment law. This Act promotes uniformity of state law
46 on the basis of the new consensus reflected in the Restatement of
Trusts 3d: Prudent Investor Rule. Some states have already acted.
48 California, Delaware, Georgia, Minnesota, Tennessee, and
Washington revised their prudent investor legislation to
50 emphasize the total-portfolio standard of care in advance of the

1992 Restatement. These statutes are extracted and discussed in Restatement of Trusts 3d: Prudent Investor Rule § 227, reporter's note, at 60-66 (1992).

Drafters in Illinois in 1991 worked from the April 1990 "Proposed Final Draft" of the Restatement of Trusts 3d: Prudent Investor Rule and enacted legislation that is closely modeled on the new Restatement. 760 ILCS § 5/5 (prudent investing); and § 5/5.1 (delegation) (1992). As the Comments to this Uniform Prudent Investor Act reflect, the Act draws upon the Illinois statute in several sections. Virginia revised its prudent investor act in a similar vein in 1992. Virginia Code § 26-45.1 (prudent investing) (1992). Florida revised its statute in 1993. Florida Laws, ch. 93-257, amending Florida Statutes § 518.11 (prudent investing) and creating § 518.112 (delegation). New York legislation drawing on the new Restatement and on a preliminary version of this Uniform Prudent Investor Act was enacted in 1994. N.Y. Assembly Bill 11683-B, Ch. 609 (1994), adding Estates, Powers and Trusts Law § 11-2.3 (Prudent Investor Act).

Remedies. This Act does not undertake to address issues of remedy law or the computation of damages in trust matters. Remedies are the subject of a reasonably distinct body of doctrine. See generally Restatement (Second) of Trusts §§ 197-226A (1959) [hereinafter cited as Restatement of Trusts 2d; also referred to as 1959 Restatement].

Implications for charitable and pension trusts. This Act is centrally concerned with the investment responsibilities arising under the private gratuitous trust, which is the common vehicle for conditioned wealth transfer within the family. Nevertheless, the prudent investor rule also bears on charitable and pension trusts, among others. "In making investments of trust funds the trustee of a charitable trust is under a duty similar to that of the trustee of a private trust." Restatement of Trusts 2d § 389 (1959). The Employee Retirement Income Security Act (ERISA), the federal regulatory scheme for pension trusts enacted in 1974, absorbs trust-investment law through the prudence standard of ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a). The Supreme Court has said: "ERISA's legislative history confirms that the Act's fiduciary responsibility provisions 'codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.'" Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110-11 (1989) (footnote omitted).

Other fiduciary relationships. The Uniform Prudent Investor Act regulates the investment responsibilities of trustees. Other fiduciaries - such as executors, conservators, and guardians of the property - sometimes have responsibilities over assets that are governed by the standards of prudent investment. It will

2 often be appropriate for states to adapt the law governing
investment by trustees under this Act to these other fiduciary
3 regimes, taking account of such changed circumstances as the
4 relatively short duration of most executorships and the intensity
of court supervision of conservators and guardians in some
5 jurisdictions. The present Act does not undertake to adjust
6 trust-investment law to the special circumstances of the state
7 schemes for administering decedents' estates or conducting the
8 affairs of protected persons.

10 Although the Uniform Prudent Investor Act by its terms applies to
11 trusts and not to charitable corporations, the standards of the
12 Act can be expected to inform the investment responsibilities of
13 directors and officers of charitable corporations. As the 1992
14 Restatement observes, "the duties of the members of the governing
15 board of a charitable corporation are generally similar to the
16 duties of the trustee of a charitable trust." Restatement of
17 Trusts 3d: Prudent Investor Rule § 379, Comment b, at 190 (1992).
18 See also id. § 389, Comment b, at 190-91 (absent contrary statute
19 or other provision, prudent investor rule applies to investment
20 of funds held for charitable corporations).

22
24 **MAINE COMMENT**

26 The Uniform Trust Code was drafted to incorporate the Uniform
Prudent Investor Act, the provisions of which were formerly
27 codified as Probate Code, section 7-302, now repealed. No change
28 in the prior Maine law is intended; the former law is recodified
29 here to integrate the body of statutory law of trusts and
30 trustees and avoid overlapping provisions that are intended to
31 lead to the same results.

34 Those subsections of former Probate Code, section 7-302 that do
not appear in chapter 9 are still the law of Maine, each having
35 been replaced with a Uniform Trust Code section appearing in
chapter 8.

38 Former Probate Code, section 7-302, subsection (b), paragraph (6)
39 is replaced by Maine Uniform Trust Code, section 806, which is
40 nearly identical. The words of the section have been changed
41 slightly to remain consistent with the use of language in the
42 Uniform Trust Code.

44 Former Probate Code, section 7-302, subsection (e) is replaced by
45 Maine Uniform Trust Code, section 802, which provides detailed
guidance about what it means for a trustee to manage the trust
46 assets solely in the interests of the beneficiaries. All of the
47 provisions of section 802 seem to be fairly included within the

2 broad language of former Probate Code, section 7-302, subsection (e).

4 Former Probate Code, section 7-302, subsection (f) is replaced by
6 Maine Uniform Trust Code, section 803, which is nearly identical.

8 Former Probate Code, section 7-302, subsection (g) is replaced by
10 Maine Uniform Trust Code, section 805, which is nearly
12 identical. The words of the section have been changed slightly
14 to remain consistent with the use of language in the Uniform
16 Trust Code.

18 Former Probate Code, section 7-302, subsection (i) is replaced by
20 Maine Uniform Trust Code, section 807, subsections 1 to 4, which
22 are nearly identical. The words of the section have been changed
24 slightly to remain consistent with the use of language in the
26 Uniform Trust Code.

28 **§901. Prudent investor rule**

30 **1. Duty to comply.** Except as otherwise provided in section
32 902, a trustee who invests and manages trust assets owes a duty
34 to the beneficiaries of the trust to comply with the prudent
36 investor rule set forth in this chapter.

38 **2. Altered by provisions of trust.** The prudent investor
40 rule may be expanded, restricted, eliminated or otherwise altered
42 by the provisions of a trust. A trustee is not liable to a
44 beneficiary to the extent that the trustee acted in reasonable
46 reliance on the provisions of the trust.

48 **UNIFORM COMMENT**

50 This section imposes the obligation of prudence in the conduct of
investment functions and identifies further sections of the Act
that specify the attributes of prudent conduct.

Origins. The prudence standard for trust investing traces back to
Harvard College v. Amory, 26 Mass. (9 Pick.) 446 (1830). Trustees
should "observe how men of prudence, discretion and intelligence
manage their own affairs, not in regard to speculation, but in
regard to the permanent disposition of their funds, considering
the probable income, as well as the probable safety of the
capital to be invested." Id. at 461.

Prior legislation. The Model Prudent Man Rule Statute (1942),
sponsored by the American Bankers Association, undertook to
codify the language of the Amory case. See Mayo A. Shattuck, The

2 Development of the Prudent Man Rule for Fiduciary Investment in
3 the United States in the Twentieth Century, 12 Ohio State L.J.
4 491, at 501 (1951); for the text of the model act, which inspired
5 many state statutes, see *id.* at 508-09. Another prominent
6 codification of the Amory standard is Uniform Probate Code §
7 7-302 (1969), which provides that "the trustee shall observe the
8 standards in dealing with the trust assets that would be observed
9 by a prudent man dealing with the property of another"

10 Congress has imposed a comparable prudence standard for the
11 administration of pension and employee benefit trusts in the
12 Employee Retirement Income Security Act (ERISA), enacted in 1974.
13 ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a), provides that "a
14 fiduciary shall discharge his duties with respect to a plan
15 solely in the interest of the participants and beneficiaries and
16 ... with the care, skill, prudence, and diligence under the
17 circumstances then prevailing that a prudent man acting in a like
18 capacity and familiar with such matters would use in the conduct
19 of an enterprise of like character and with like aims"

20 **Prior Restatement.** The Restatement of Trusts 2d (1959) also
21 tracked the language of the Amory case: "In making investments of
22 trust funds the trustee is under a duty to the beneficiary ... to
23 make such investments and only such investments as a prudent man
24 would make of his own property having in view the preservation of
25 the estate and the amount and regularity of the income to be
26 derived" Restatement of Trusts 2d § 227 (1959).

28 **Objective standard.** The concept of prudence in the judicial
29 opinions and legislation is essentially relational or
30 comparative. It resembles in this respect the "reasonable person"
31 rule of tort law. A prudent trustee behaves as other trustees
32 similarly situated would behave. The standard is, therefore,
33 objective rather than subjective. Sections 2 through 9 of this
34 Act identify the main factors that bear on prudent investment
35 behavior.

38 **Variation.** Almost all of the rules of trust law are default
39 rules, that is, rules that the settlor may alter or abrogate.
40 Subsection (b) carries forward this traditional attribute of
41 trust law. Traditional trust law also allows the beneficiaries of
42 the trust to excuse its performance, when they are all capable
43 and not misinformed. Restatement of Trusts 2d § 216 (1959).

44
46 **§902. Standard of care; portfolio strategy; risk and return**
47 **objectives**

48
49 **1. Consideration of purposes, terms, distribution**
50 **requirements and other circumstances.** A trustee shall invest and

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

6 2. Overall investment strategy. A trustee's investment and
7 management decisions respecting individual assets must be
8 evaluated not in isolation but in the context of the trust
9 portfolio as a whole and as a part of an overall investment
10 strategy having risk and return objectives reasonably suited to
11 the trust.

12 3. Relevant circumstances to consider. Among circumstances
13 that a trustee shall consider in investing and managing trust
14 assets are all of the following that are relevant to the trust or
15 its beneficiaries:

16 A. General economic conditions;

17 B. The possible effect of inflation or deflation;

18 C. The expected tax consequences of investment decisions or
19 strategies;

20 D. The role that each investment or course of action plays
21 within the overall trust portfolio, which may include
22 financial assets, interests in closely held enterprises,
23 tangible and intangible personal property and real property;

24 E. The expected total return from income and the
25 appreciation of capital;

26 F. Other resources of the beneficiaries, to the extent the
27 other resources are known to the trustee;

28 G. Needs for liquidity, regularity of income and
29 preservation or appreciation of capital; and

30 H. An asset's special relationship or special value, if
31 any, to the purposes of the trust or to one or more of the
32 beneficiaries.

33 4. Reasonable effort to verify facts. A trustee shall make
34 a reasonable effort to verify facts relevant to the investment
35 and management of trust assets.

36 5. Kind of property; type of investment. A trustee may
37 invest in any kind of property or type of investment consistent
38 with the standards of this chapter.

2

UNIFORM COMMENT

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Section 2 is the heart of the Act. Subsections (a), (b), and (c) are patterned loosely on the language of the Restatement of Trusts 3d: Prudent Investor Rule § 227 (1992), and on the 1991 Illinois statute, 760 § ILCS 5/5a (1992). Subsection (f) is derived from Uniform Probate Code § 7-302 (1969).

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Objective standard. Subsection (a) of this Act carries forward the relational and objective standard made familiar in the Amory case, in earlier prudent investor legislation, and in the Restatements. Early formulations of the prudent person rule were sometimes troubled by the effort to distinguish between the standard of a prudent person investing for another and investing on his or her own account. The language of subsection (a), by relating the trustee's duty to "the purposes, terms, distribution requirements, and other circumstances of the trust," should put such questions to rest. The standard is the standard of the prudent investor similarly situated.

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Portfolio standard. Subsection (b) emphasizes the consolidated portfolio standard for evaluating investment decisions. An investment that might be imprudent standing alone can become prudent if undertaken in sensible relation to other trust assets, or to other nontrust assets. In the trust setting the term "portfolio" embraces the entire trust estate.

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Risk and return. Subsection (b) also sounds the main theme of modern investment practice, sensitivity to the risk/return curve. See generally the works cited in the Prefatory Note to this Act, under "Literature." Returns correlate strongly with risk, but tolerance for risk varies greatly with the financial and other circumstances of the investor, or in the case of a trust, with the purposes of the trust and the relevant circumstances of the beneficiaries. A trust whose main purpose is to support an elderly widow of modest means will have a lower risk tolerance than a trust to accumulate for a young scion of great wealth.

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Subsection (b) of this Act follows Restatement of Trusts 3d: Prudent Investor Rule § 227(a), which provides that the standard of prudent investing "requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust."

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Factors affecting investment. Subsection (c) points to certain of the factors that commonly bear on risk/return preferences in fiduciary investing. This listing is nonexclusive. Tax

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2 considerations, such as preserving the stepped up basis on death
3 under Internal Revenue Code § 1014 for low-basis assets, have
4 traditionally been exceptionally important in estate planning for
5 affluent persons. Under the present recognition rules of the
6 federal income tax, taxable investors, including trust
7 beneficiaries, are in general best served by an investment
8 strategy that minimizes the taxation incident to portfolio
9 turnover. See generally Robert H. Jeffrey & Robert D. Arnott, Is
10 Your Alpha Big Enough to Cover Its Taxes?, Journal of Portfolio
11 Management 15 (Spring 1993).

12 Another familiar example of how tax considerations bear upon
13 trust investing: In a regime of pass-through taxation, it may be
14 prudent for the trust to buy lower yielding tax-exempt securities
15 for high-bracket taxpayers, whereas it would ordinarily be
16 imprudent for the trustees of a charitable trust, whose income is
17 tax exempt, to accept the lowered yields associated with
18 tax-exempt securities.

19 When tax considerations affect beneficiaries differently, the
20 trustee's duty of impartiality requires attention to the
21 competing interests of each of them.

22 Subsection (c)(8), allowing the trustee to take into account any
23 preferences of the beneficiaries respecting heirlooms or other
24 prized assets, derives from the Illinois act, 760 ILCS §
25 5/5(a)(4) (1992).

26 **Duty to monitor.** Subsections (a) through (d) apply both to
27 investing and managing trust assets. "Managing" embraces
28 monitoring, that is, the trustee's continuing responsibility for
29 oversight of the suitability of investments already made as well
30 as the trustee's decisions respecting new investments.

31 **Duty to investigate.** Subsection (d) carries forward the
32 traditional responsibility of the fiduciary investor to examine
33 information likely to bear importantly on the value or the
34 security of an investment - for example, audit reports or records
35 of title. E.g., Estate of Collins, 72 Cal. App. 3d 663, 139 Cal.
36 Rptr. 644 (1977) (trustees lent on a junior mortgage on
37 unimproved real estate, failed to have land appraised, and
38 accepted an unaudited financial statement; held liable for
39 losses).

40 **Abrogating categoric restrictions.** Subsection 2(e) clarifies that
41 no particular kind of property or type of investment is
42 inherently imprudent. Traditional trust law was encumbered with a
43 variety of categoric exclusions, such as prohibitions on junior
44 mortgages or new ventures. In some states legislation created
45 so-called "legal lists" of approved trust investments. The

2 universe of investment products changes incessantly. Investments
3 that were at one time thought too risky, such as equities, or
4 more recently, futures, are now used in fiduciary portfolios. By
5 contrast, the investment that was at one time thought ideal for
6 trusts, the long-term bond, has been discovered to import a level
7 of risk and volatility - in this case, inflation risk - that had
8 not been anticipated. Accordingly, section 2(e) of this Act
9 follows Restatement of Trusts 3d: Prudent Investor Rule in
10 abrogating categoric restrictions. The Restatement says:
11 "Specific investments or techniques are not per se prudent or
12 imprudent. The riskiness of a specific property, and thus the
13 propriety of its inclusion in the trust estate, is not judged in
14 the abstract but in terms of its anticipated effect on the
15 particular trust's portfolio." Restatement of Trusts 3d: Prudent
16 Investor Rule § 227, Comment f, at 24 (1992). The premise of
17 subsection 2(e) is that trust beneficiaries are better protected
18 by the Act's emphasis on close attention to risk/return
19 objectives as prescribed in subsection 2(b) than in attempts to
20 identify categories of investment that are per se prudent or
imprudent.

22 The Act impliedly disavows the emphasis in older law on avoiding
23 "speculative" or "risky" investments. Low levels of risk may be
24 appropriate in some trust settings but inappropriate in others.
25 It is the trustee's task to invest at a risk level that is
26 suitable to the purposes of the trust.

28 The abolition of categoric restrictions against types of
29 investment in no way alters the trustee's conventional duty of
30 loyalty, which is reiterated for the purposes of this Act in
31 Section 5. For example, were the trustee to invest in a second
32 mortgage on a piece of real property owned by the trustee, the
33 investment would be wrongful on account of the trustee's breach
34 of the duty to abstain from self-dealing, even though the
35 investment would no longer automatically offend the former
36 categoric restriction against fiduciary investments in junior
mortgages.

38 **Professional fiduciaries.** The distinction taken in subsection (f)
39 between amateur and professional trustees is familiar law. The
40 prudent investor standard applies to a range of fiduciaries, from
41 the most sophisticated professional investment management firms
42 and corporate fiduciaries, to family members of minimal
43 experience. Because the standard of prudence is relational, it
44 follows that the standard for professional trustees is the
45 standard of prudent professionals; for amateurs, it is the
46 standard of prudent amateurs. Restatement of Trusts 2d § 174
47 (1959) provides: "The trustee is under a duty to the beneficiary
48 in administering the trust to exercise such care and skill as a
49 man of ordinary prudence would exercise in dealing with his own
50

property; and if the trustee has or procures his appointment as trustee by representing that he has greater skill than that of a man of ordinary prudence, he is under a duty to exercise such skill." Case law strongly supports the concept of the higher standard of care for the trustee representing itself to be expert or professional. See Annot., Standard of Care Required of Trustee Representing Itself to Have Expert Knowledge or Skill, 91 A.L.R. 3d 904 (1979) & 1992 Supp. at 48-49.

The Drafting Committee declined the suggestion that the Act should create an exception to the prudent investor rule (or to the diversification requirement of Section 3) in the case of smaller trusts. The Committee believes that subsections (b) and (c) of the Act emphasize factors that are sensitive to the traits of small trusts; and that subsection (f) adjusts helpfully for the distinction between professional and amateur trusteeship. Furthermore, it is always open to the settlor of a trust under Section 1(b) of the Act to reduce the trustee's standard of care if the settlor deems such a step appropriate. The official comments to the 1992 Restatement observe that pooled investments, such as mutual funds and bank common trust funds, are especially suitable for small trusts. Restatement of Trusts 3d: Prudent Investor Rule § 227, Comments h, m, at 28, 51; reporter's note to Comment g, id. at 83.

Matters of proof. Although virtually all express trusts are created by written instrument, oral trusts are known, and accordingly, this Act presupposes no formal requirement that trust terms be in writing. When there is a written trust instrument, modern authority strongly favors allowing evidence extrinsic to the instrument to be consulted for the purpose of ascertaining the settlor's intent. See Uniform Probate Code § 2-601 (1990), Comment; Restatement (Third) of Property: Donative Transfers (Preliminary Draft No. 2, ch. 11, Sept. 11, 1992).

§903. Diversification

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

UNIFORM COMMENT

The language of this section derives from Restatement of Trusts 2d § 228 (1959). ERISA insists upon a comparable rule for pension trusts. ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C). Case law overwhelmingly supports the duty to diversify. See Annot., Duty

of Trustee to Diversify Investments, and Liability for Failure to Do So, 24 A.L.R. 3d 730 (1969) & 1992 Supp. at 78-79.

The 1992 Restatement of Trusts takes the significant step of integrating the diversification requirement into the concept of prudent investing. Section 227(b) of the 1992 Restatement treats diversification as one of the fundamental elements of prudent investing, replacing the separate section 228 of the Restatement of Trusts 2d. The message of the 1992 Restatement, carried forward in Section 3 of this Act, is that prudent investing ordinarily requires diversification.

Circumstances can, however, overcome the duty to diversify. For example, if a tax-sensitive trust owns an underdiversified block of low-basis securities, the tax costs of recognizing the gain may outweigh the advantages of diversifying the holding. The wish to retain a family business is another situation in which the purposes of the trust sometimes override the conventional duty to diversify.

Rationale for diversification. "Diversification reduces risk ... [because] stock price movements are not uniform. They are imperfectly correlated. This means that if one holds a well diversified portfolio, the gains in one investment will cancel out the losses in another." Jonathan R. Macey, *An Introduction to Modern Financial Theory* 20 (American College of Trust and Estate Counsel Foundation, 1991). For example, during the Arab oil embargo of 1973, international oil stocks suffered declines, but the shares of domestic oil producers and coal companies benefitted. Holding a broad enough portfolio allowed the investor to set off, to some extent, the losses associated with the embargo.

Modern portfolio theory divides risk into the categories of "compensated" and "uncompensated" risk. The risk of owning shares in a mature and well-managed company in a settled industry is less than the risk of owning shares in a start-up high-technology venture. The investor requires a higher expected return to induce the investor to bear the greater risk of disappointment associated with the start-up firm. This is compensated risk - the firm pays the investor for bearing the risk. By contrast, nobody pays the investor for owning too few stocks. The investor who owned only international oils in 1973 was running a risk that could have been reduced by having configured the portfolio differently - to include investments in different industries. This is uncompensated risk - nobody pays the investor for owning shares in too few industries and too few companies. Risk that can be eliminated by adding different stocks (or bonds) is uncompensated risk. The object of diversification is to minimize this uncompensated risk of having too few investments. "As long

2 as stock prices do not move exactly together, the risk of a
3 diversified portfolio will be less than the average risk of the
4 separate holdings." R.A. Brealey, *An Introduction to Risk and
Return from Common Stocks* 103 (2d ed. 1983).

6 There is no automatic rule for identifying how much
7 diversification is enough. The 1992 Restatement says:
8 "Significant diversification advantages can be achieved with a
9 small number of well-selected securities representing different
10 industries Broader diversification is usually to be
11 preferred in trust investing," and pooled investment vehicles
12 "make thorough diversification practical for most trustees."
13 Restatement of Trusts 3d: Prudent Investor Rule § 227, General
14 Note on Comments e-h, at 77 (1992). See also Macey, *supra*, at
15 23-24; Brealey, *supra*, at 111-13.

16 **Diversifying by pooling.** It is difficult for a small trust fund
17 to diversify thoroughly by constructing its own portfolio of
18 individually selected investments. Transaction costs such as the
19 round-lot (100 share) trading economies make it relatively
20 expensive for a small investor to assemble a broad enough
21 portfolio to minimize uncompensated risk. For this reason, pooled
22 investment vehicles have become the main mechanism for
23 facilitating diversification for the investment needs of smaller
24 trusts.

26 Most states have legislation authorizing common trust funds; see
27 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* §
28 227.9, at 463-65 n.26 (4th ed. 1988) (collecting citations to
29 state statutes). As of 1992, 35 states and the District of
30 Columbia had enacted the Uniform Common Trust Fund Act (UCTFA)
31 (1938), overcoming the rule against commingling trust assets and
32 expressly enabling banks and trust companies to establish common
33 trust funds. 7 Uniform Laws Ann. 1992 Supp. at 130 (schedule of
34 adopting states). The Prefatory Note to the UCTFA explains: "The
35 purposes of such a common or joint investment fund are to
36 diversify the investment of the several trusts and thus spread
37 the risk of loss, and to make it easy to invest any amount of
38 trust funds quickly and with a small amount of trouble." 7
39 Uniform Laws Ann. 402 (1985).

42 **Fiduciary investing in mutual funds.** Trusts can also achieve
43 diversification by investing in mutual funds. See Restatement of
44 Trusts 3d: Prudent Investor Rule, § 227, Comment m, at 99-100
45 (1992) (endorsing trust investment in mutual funds). ERISA §
46 401(b)(1), 29 U.S.C. § 1101(b)(1), expressly authorizes pension
47 trusts to invest in mutual funds, identified as securities
48 "issued by an investment company registered under the Investment
49 Company Act of 1940"

50

2 **§904. Duties at inception of trusteeship**

4 Within a reasonable time after accepting a trusteeship or
6 receiving trust assets, a trustee shall review the trust assets
8 and make and implement decisions concerning the retention and
10 disposition of assets in order to bring the trust portfolio into
12 compliance with the purposes, terms, distribution requirements
14 and other circumstances of the trust and with the requirements of
16 this chapter.

12 **UNIFORM COMMENT**

14 Section 4, requiring the trustee to dispose of unsuitable assets
16 within a reasonable time, is old law, codified in Restatement of
18 Trusts 3d: Prudent Investor Rule § 229 (1992), lightly revising
20 Restatement of Trusts 2d § 230 (1959). The duty extends as well
22 to investments that were proper when purchased but subsequently
become improper. Restatement of Trusts 2d § 231 (1959). The same
standards apply to successor trustees, see Restatement of Trusts
2d § 196 (1959).

24 The question of what period of time is reasonable turns on the
26 totality of factors affecting the asset and the trust. The 1959
Restatement took the view that "[o]rdinarily any time within a
28 year is reasonable, but under some circumstances a year may be
too long a time and under other circumstances a trustee is not
liable although he fails to effect the conversion for more than a
30 year." Restatement of Trusts 2d § 230, comment b (1959). The 1992
Restatement retreated from this rule of thumb, saying, "No
32 positive rule can be stated with respect to what constitutes a
reasonable time for the sale or exchange of securities."
34 Restatement of Trusts 3d: Prudent Investor Rule § 229, comment b
(1992).

36 The criteria and circumstances identified in Section 2 of this
38 Act as bearing upon the prudence of decisions to invest and
40 manage trust assets also pertain to the prudence of decisions to
retain or dispose of inception assets under this section.

42 **§905. Investment costs**

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

50 **UNIFORM COMMENT**

2 (This is §8 of the Uniform Prudent Investor Act.)

4 This section derives from the 1991 Illinois act, 760 ILCS
5/5(a)(2) (1992), which draws upon Restatement of Trusts 3d:
6 Prudent Investor Rule § 227, comment b, at 11 (1992). Trustees
are not insurers. Not every investment or management decision
8 will turn out in the light of hindsight to have been successful.
Hindsight is not the relevant standard. In the language of law
10 and economics, the standard is ex ante, not ex post.

12

§906. Language invoking standard of chapter

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The following terms or comparable language in the provisions
16 of a trust, unless otherwise limited or modified, authorizes any
investment or strategy permitted under this chapter:
18 "investments permissible by law for investment of trust funds";
"legal investments"; "authorized investments"; "using the
20 judgment and care under the circumstances then prevailing that
persons of prudence, discretion and intelligence exercise in the
22 management of their own affairs, not in regard to speculation but
in regard to the permanent disposition of their funds,
24 considering the probable income as well as the probable safety of
their capital"; "prudent man rule"; "prudent trustee rule";
26 "prudent person rule"; or "prudent investor rule."

28

UNIFORM COMMENT

30

(This is §10 of the Uniform Prudent Investor Act.)

32

This provision is taken from the Illinois act, 760 ILCS § 5/5(d)
34 (1992), and is meant to facilitate incorporation of the Act by
means of the formulaic language commonly used in trust
36 instruments.

§907. Uniformity of application and construction

40

This chapter must be applied and construed to effectuate its
42 general purposes to make uniform the law with respect to the
subject of the Uniform Prudent Investor Act among the states
enacting it.

44

46

COMMENT

48

(This is §12 of the Uniform Prudent Investor Act.)

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§908. Short title

2 into by partnerships in which the trustee is a general partner as
3 long as the fiduciary capacity was disclosed in the contract or
4 partnership certificate. Section 1012 protects persons other than
5 beneficiaries who deal with a trustee in good faith and without
6 knowledge that the trustee is exceeding or improperly exercising
7 a power. Section 1013 permits a third party to rely on a
8 certification of trust, thereby reducing the need for a third
9 party to request a copy of the complete trust instrument.

10 Much of this article is not subject to override in the terms of
11 the trust. The settlor may not limit the rights of persons other
12 than beneficiaries as provided in Sections 1010 through 1013, nor
13 interfere with the court's ability to take such action to remedy
14 a breach of trust as may be necessary in the interests of justice.
15 See Section 105.

16

18 **§1001. Remedies for breach of trust**

20 **1. Violation of duty.** A violation by a trustee of a duty
21 the trustee owes to a beneficiary is a breach of trust.

22

23 **2. Remedies.** To remedy a breach of trust that has occurred
24 or may occur, the court may:

26

A. Compel the trustee to perform the trustee's duties;

28

B. Enjoin the trustee from committing a breach of trust;

30

**C. Compel the trustee to redress a breach of trust by
31 paying money, restoring property or other means;**

32

D. Order a trustee to account;

34

**E. Appoint a special fiduciary to take possession of the
35 trust property and administer the trust;**

36

38

F. Suspend the trustee;

40

G. Remove the trustee as provided in section 706;

42

H. Reduce or deny compensation to the trustee;

44

**I. Subject to section 1012, void an act of the trustee,
45 impose a lien or a constructive trust on trust property or
46 trace trust property wrongfully disposed of and recover the
47 property or its proceeds; or**

48

J. Order any other appropriate relief.

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UNIFORM COMMENT

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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 trust might breach include those contained in Article 8 in addition to those specified elsewhere in the Code.

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This section identifies the available remedies but 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 this Code but also by the common law of trusts and principles of equity. See Section 106.

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Beneficiaries and cotrustees have standing to bring a petition to remedy a breach of trust. Following a successor trustee's acceptance of office, a successor trustee has standing to sue a predecessor for breach of trust. See Restatement (Second) of Trusts Section 200 (1959). A person who may represent a beneficiary's interest under Article 3 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, a charitable organization expressly designated to receive distributions under the terms of the trust, and other persons with a special interest. See Section 110 & Restatement (Second) of Trusts Section 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 Sections 110(b), 408, 409.

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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 Section 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 Section 197 (1959). The Uniform Trust Code does not preclude the possibility that a particular enacting jurisdiction might not follow these norms.

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The remedies identified in this section are derived from Restatement (Second) of Trusts Section 199 (1959). The reference to payment of money in subsection (b)(3) includes liability that might be characterized as damages, restitution, or surcharge. For the measure of liability, see Section 1002. Subsection (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 Section 199(d) (1959). The authority of the court to appoint a special fiduciary is not

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2 limited to actions alleging breach of trust but is available
3 whenever the court, exercising its equitable jurisdiction,
4 concludes that an appointment would promote administration of the
5 trust. See Section 704(d) (special fiduciary may be appointed
6 whenever court considers such appointment necessary for
7 administration).

8 Subsection (b)(8), which allows the court to reduce or deny
9 compensation, is in accord with Restatement (Second) of Trusts
10 Section 243 (1959). For the factors to consider in setting a
11 trustee's compensation absent breach of trust, see Section 708
12 and comment. In deciding whether to reduce or deny a trustee
13 compensation, the court may wish to consider (1) whether the
14 trustee acted in good faith; (2) whether the breach of trust was
15 intentional; (3) the nature of the breach and the extent of the
16 loss; (4) whether the trustee has restored the loss; and (5) the
17 value of the trustee's services to the trust. See Restatement
18 (Second) of Trusts Section 243 cmt. c (1959).

19 The authority under subsection (b)(9) to set aside wrongful acts
20 of the trustee is a corollary of the power to enjoin a threatened
21 breach as provided in subsection (b)(2). However, in setting
22 aside the wrongful acts of the trustee the court may not impair
23 the rights of bona fide purchasers protected under Section 1012.
24 See Restatement (Second) of Trusts Section 284 (1959).
25

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28 **MAINE COMMENT**

29 This section appears to be declarative of existing Maine law or
30 of the likely decisions of the courts in Maine. See Louisa T.
31 York Orphan Asylum V. Erwin, 281 A.2d 453 (Me. 1971) (remedy for
32 breach of a charitable trust is enforcement of the purposes of
33 the trust not reverter).
34

35 **§1002. Damages for breach of trust**

36
37 **1. Damages.** A trustee who commits a breach of trust is
38 liable to the beneficiaries affected for the greater of:

39 **A.** The amount required to restore the value of the trust
40 property and trust distributions to what they would have
41 been had the breach not occurred; and

42 **B.** The profit the trustee made by reason of the breach.

43 **2. Contribution from other trustees.** Except as otherwise
44 provided in this subsection, if more than one trustee is liable
45 to the beneficiaries for a breach of trust, a trustee is entitled
46

2 to contribution from the other trustee or trustees. A trustee is
3 not entitled to contribution if the trustee was substantially
4 more at fault than another trustee or if the trustee committed
5 the breach of trust in bad faith or with reckless indifference to
6 the purposes of the trust or the interests of the beneficiaries.
7 A trustee who received a benefit from the breach of trust is not
8 entitled to contribution from another trustee to the extent of
9 the benefit received.

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UNIFORM COMMENT

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13 Subsection (a) is based on Restatement (Third) of Trusts: Prudent
14 Investor Rule Section 205 (1992). If a trustee commits a breach
15 of trust, the beneficiaries may either affirm the transaction or,
16 if a loss has occurred, hold the trustee liable for the amount
17 necessary to compensate fully for the consequences of the breach.
18 This may include recovery of lost income, capital gain, or
19 appreciation that would have resulted from proper administration.
20 Even if a loss has not occurred, the trustee may not benefit from
21 the improper action and is accountable for any profit the trustee
22 made by reason of the breach.

24

25 For extensive commentary on the determination of damages,
26 traditionally known as trustee surcharge, with numerous specific
27 applications, see Restatement (Third) of Trusts: Prudent Investor
28 Rule Sections 205-213 (1992). For the use of benchmark portfolios
29 to determine damages, see Restatement (Third) of Trusts: Prudent
30 Investor Rule Reporter's Notes to Sections 205 and 208-211
31 (1992). On the authority of a court of equity to reduce or excuse
32 damages for breach of trust, see Restatement (Second) of Trusts
33 Section 205 cmt. g (1959).

34

35 For purposes of this section and Section 1003, "profit" does not
36 include the trustee's compensation. A trustee who has committed a
37 breach of trust is entitled to reasonable compensation for
38 administering the trust unless the court reduces or denies the
39 trustee compensation pursuant to Section 1001(b)(8).

40

41 Subsection (b) is based on Restatement (Second) of Trusts Section
42 258 (1959). Cotrustees are jointly and severally liable for a
43 breach of trust if there was joint participation in the breach.
44 Joint and several liability also is imposed on a nonparticipating
45 cotrustee who, as provided in Section 703(g), failed to exercise
46 reasonable care (1) to prevent a cotrustee from committing a
47 serious breach of trust, or (2) to compel a cotrustee to redress
48 a serious breach of trust. Joint and several liability normally
49 carries with it a right in any trustee to seek contribution from
50 a cotrustee to the extent the trustee has paid more than the
51 trustee's proportionate share of the liability. Subsection (b),

2 consistent with Restatement (Second) of Trusts Section 258
4 (1959), creates an exception. A trustee who was substantially
6 more at fault or committed the breach of trust in bad faith 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.

8 Determining degrees of comparative fault is a question of fact.
10 The fact that one trustee was more culpable or more active than
12 another does not necessarily establish that this trustee was
14 substantially more at fault. Nor is a trustee substantially less
16 at fault because the trustee did not actively participate in the
18 breach. See Restatement (Second) of Trusts Section 258 cmt. e
20 (195). Among the factors to consider: (1) Did the trustee
22 fraudulently induce the other trustee to join in the breach? (2)
24 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 Section 258
cmt. d (1959).

26 **MAINE COMMENT**

28 This section appears to be declarative of existing Maine law.
30 See Estate of Wilde, 1998 ME 55, 708 A.2d 273. See also Estate of
32 Baldwin, 442 A.2d 529, 536 & n. 23 (Me. 1982); In re Estate of
34 Stowell, 595 A.2d 1022 (Me. 1991) (Stowell I); In re Estate of
36 Stowell, 636 A.2d 440 (Me. 1994) (Stowell II); Estate of
Whitlock, 615 A.2d 1173, 1178-79 (Me. 1992). Probate Code,
section 7-405 is repealed as part of the enactment of the Uniform
Trust Code.

38 **§1003. Damages in absence of breach**

40 **1. Accountable for profit.** A trustee is accountable to an
42 affected beneficiary for any profit made by the trustee arising
44 from the administration of the trust, even absent a breach of
trust. Nothing in this section limits a trustee's right to
reasonable compensation under section 708.

46 **2. Not accountable for loss, depreciation or no profit.**
48 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.

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UNIFORM COMMENT

4 The principle on which a trustee's duty of loyalty is premised is
6 that a trustee should not be allowed to use the trust as a means
8 for personal profit other than for routine compensation earned.
10 While most instances of personal profit involve situations where
12 the trustee has breached the duty of loyalty, not all cases of
14 personal profit involve a breach of trust. Subsection (a), which
16 holds a trustee accountable for any profit made, even absent a
18 breach of trust, is based on Restatement (Second) of Trusts
20 Section 203 (1959). A typical example of a profit is receipt by
22 the trustee of a commission or bonus from a third party for
24 actions relating to the trust's administration. See Restatement
(Second) of Trusts Section 203 cmt. a (1959).

16 A trustee is not an insurer. Similar to Restatement (Second) of
18 Trusts Section 204 (1959), subsection (b) provides that absent a
20 breach of trust a trustee is not liable for a loss or
22 depreciation in the value of the trust property or for failure to
24 make a profit.

24

MAINE COMMENT

26 The final sentence in section 1003, subsection 1 was added to
28 make it clear that this section is not intended to limit a
30 trustee's right to receive reasonable compensation, as permitted
and within the standards set forth in section 708, even though
the trustee by collecting such compensation realizes a profit.

32 Otherwise, there is apparently no material difference between
34 this section and the likely result in litigation in Maine and it
is adopted without further changes. See Estate of Voignier, 609
A.2d 704 (Me. 1992); Stowell I implies a similar result.

36

§1004. Attorney's fees and costs

40 In a judicial proceeding involving the administration of a
42 trust, the court, as justice and equity may require, may award
44 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.

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UNIFORM COMMENT

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50 This section, which is based on Massachusetts General Laws
chapter 215, Section 45, codifies the court's historic authority

2 to award costs and fees, including reasonable attorney's fees, in
judicial proceedings grounded in equity. The court may award a
4 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
6 litigation. Generally, litigation expenses were at common law
chargeable against another party only in the case of egregious
8 conduct such as bad faith or fraud. With respect to a party's own
fees, Section 709 authorizes a trustee to recover expenditures
10 properly incurred in the administration of the trust. The court
may award a beneficiary litigation costs if the litigation is
12 deemed beneficial to the trust. Sometimes, litigation brought by
a beneficiary involves an allegation that the trustee has
14 committed a breach of trust. On other occasions, the suit by the
beneficiary is brought because of the trustee's failure to take
16 action against a third party, such as to recover property
properly belonging to the trust. For the authority of a
18 beneficiary to bring an action when the trustee fails to take
action against a third party, see Restatement (Second) of Trusts
20 Sections 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 Sections 188.4 (4th ed.
22 1988).

24
26 **MAINE COMMENT**

There is apparently no material difference between this section
28 and existing Probate Code, section 1-601 and this section is
adopted without change. For example, the "costs and expenses"
30 the court can award under this section may include, without
limitation, reasonable witness fees, costs of depositions,
32 hospital records or medical reports.

34 See also In re Estate of Stowell, 636 A.2d 440 (Me. 1994)
(Stowell II); Estate of Whitlock, 615 A.2d 1173, 1178-79 (Me.
36 1992); Estate of Voignier, 609 A.2d 704 (Me. 1992); Estate of
Brideau, 458 A.2d 745, 748 (Me. 1983).

38
40 **§1005. Limitation of action against trustee**

42 **1. Report; one-year limitation.** A beneficiary may not
commence a proceeding against a trustee for breach of trust more
44 than one year after the date the beneficiary or a representative
of the beneficiary was sent a report that adequately disclosed
46 the existence of a potential claim for breach of trust and
informed the beneficiary of the time allowed for commencing a
48 proceeding.

2 also applies to beneficiaries who did not receive notice of the
report, whether personally or through representation. While the
4 five-year limitations period will normally begin to run on
termination of the trust, it can also begin earlier. If a trustee
6 leaves office prior to the termination of the trust, the
limitations period for actions against that particular trustee
8 begins to run on the date the trustee leaves office. If a
beneficiary receives a final distribution prior to the date the
10 trust terminates, the limitations period for actions by that
particular beneficiary begins to run on the date of final
distribution.

12
14 If a trusteeship terminates by reason of death, a claim against
the trustee's estate for breach of fiduciary duty would, like
16 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.

18
20 This section does not specifically provide that the statutes of
limitations under this section are tolled for fraud or other
22 misdeeds, the drafters preferring to leave the resolution of this
question to other law of the State.

24
26 **MAINE COMMENT**

28 Section 1005, subsection 3 was amended to change the limitation
period from 5 years to 6 years, to be consistent with the general
30 statute of limitations under Maine law. Nothing in section 1005
affects or limits the right to bring claims for fraud, but only
32 claims for breach of trust. Fraud claims would be independent
claims governed by the statute of limitations generally
34 applicable to them. This section replaces the limitations
formerly contained in Probate Code, section 7-307, repealed as
36 part of the enactment of the Uniform Trust Code. In essence, the
Probate Code limitations periods were 6 months or 3 years for
breach of trust and 6 years for other causes of action. The
38 Uniform Trust Code extends the period after disclosure of the
facts to 1 year or, in the absence of full disclosure, 6 years.
40 The Uniform Trust Code periods give greater protection to
beneficiaries, though they increase the period of risk for
42 trustees.

44 **§1006. Reliance on trust instrument**

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48 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
50 resulted from the reliance.

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UNIFORM COMMENT

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 Section 103(17) (definition of "terms of a trust"). Furthermore, if a trust is reformed on account of mistake of fact or law, as authorized by Section 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 this 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 Section 1(b) of the 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.

MAINE COMMENT

This section replaces Probate Code, section 7-302, subsection (a), which was repealed as part of the adoption of the Uniform Trust Code, which has been interpreted similarly. See Lichtenstein v. Consolidated Services Group, Inc., 173 F.3d 17 (1st Cir. 1999).

§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.

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UNIFORM COMMENT

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This section, which is based on Washington Revised Code Section 11.98.100, 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 Section 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.

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MAINE COMMENT

20

This section replaces Probate Code, section 7-301, which was repealed as part of the adoption of the Uniform Trust Code.

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§1008. Exculpation of trustee

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1. Exculpation unenforceable. A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:

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A. 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

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B. Was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

38

2. Invalid; proof otherwise. 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.

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UNIFORM COMMENT

2 Even if the terms of the trust attempt to completely exculpate a
trustee for the trustee's acts, the trustee must always comply
4 with a certain minimum standard. As provided in subsection (a), a
trustee must always act in good faith with regard to the purposes
6 of the trust and the interests of the beneficiaries. Subsection
(a) is consistent with the standards expressed in Sections 105
and 814(a), which, similar to this section, place limits on the
8 power of a settlor to negate trustee duties. This section is also
similar to Section 222 of the Restatement (Second) of Trusts
10 (1959), except that this Code, unlike the Restatement, allows a
settlor to exculpate a trustee for a profit that the trustee made
12 from the trust.

14 Subsection (b) disapproves of cases such as *Marsman v. Nasca*, 573
N.E.2d 1025 (Mass. App. Ct. 1991), which held that an exculpatory
16 clause in a trust instrument drafted by the trustee was valid
because the beneficiary could not prove that the clause was
18 inserted as a result of an abuse of a fiduciary relationship. For
a later case where sufficient proof of abuse was present, see
20 *Rutan v. Ballard*, 678 N.E.2d 133 (Mass. 1997). Subsection (b)
responds to the danger that the insertion of such a clause by the
22 fiduciary or its agent may have been undisclosed or inadequately
understood by the settlor. To overcome the presumption of abuse
24 in subsection (b), the trustee must establish that the clause was
fair and that its existence and contents were adequately
26 communicated to the settlor. In determining whether the clause
was fair, the court may wish to examine: (1) the extent of the
28 prior relationship between the settlor and trustee; (2) whether
the settlor received independent advice; (3) the sophistication
30 of the settlor with respect to business and fiduciary matters;
(4) the trustee's reasons for inserting the clause; and (5) the
32 scope of the particular provision inserted. See Restatement
(Second) of Trusts Section 222 cmt. d (1959).

34 The requirements of subsection (b) are satisfied if the settlor
36 was represented by independent counsel. If the settlor was
represented by independent counsel, the settlor's attorney is
38 considered the drafter of the instrument even if the attorney
used the trustee's form. Because the settlor's attorney is an
40 agent of the settlor, disclosure of an exculpatory term to the
settlor's attorney is disclosure to the settlor.

42

44 **MAINE COMMENT**

46 This section presents no apparent differences from existing Maine
law and adds clarity. See *Bay of Naples Condominium Association*
48 *v. Lewis*, 582 A.2d 1210 (Me. 1990).

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§1009. Beneficiary's consent, release or ratification

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

1. Induced by improper conduct. The consent, release or ratification of the beneficiary was induced by improper conduct of the trustee; or

2. Beneficiary did not know rights. 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.

UNIFORM COMMENT

This section is based on Sections 216 through 218 of the Restatement (Second) of Trusts (1959). A consent, release, or affirmance under this section may occur either before or after the approved conduct. This section requires an affirmative act by the beneficiary. A failure to object is not sufficient. See Restatement (Second) of Trusts Section 216 cmt. a (1959). A consent is binding on a consenting beneficiary although other beneficiaries have not consented. See Restatement (Second) of Trusts Section 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 Section 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 Sections 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 Section 603. A beneficiary is also bound to the extent an approval is given by a person authorized to represent the beneficiary as provided in Article 3.

2001 Amendment. By a 2001 amendment, the limitation of this section to beneficiaries "having capacity" was deleted. This limitation was included by mistake. As indicated in the second paragraph of the comment, the drafting committee did not intend to prohibit the use of the representation provisions of Article 3, several of which address representation of and the giving of a binding consent on behalf of an incapacitated beneficiary.

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MAINE COMMENT

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This section is declarative of existing Maine law. See In re Marble et al., 136 Me. 52, 1 A.2d 355 (1938).

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§1010. Limitation on personal liability of trustee

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1. Not personally liable on contract; exception. 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.

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

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3. Claim against trustee in fiduciary capacity. 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.

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UNIFORM COMMENT

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

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Subsection (b) addresses trustee liability arising from ownership or control of trust property and for torts occurring incident to the administration of the trust. Liability in such situations is imposed on the trustee personally only if the trustee was personally at fault, either intentionally or negligently. This is contrary to Restatement (Second) of Trusts Section 264 (1959),

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which imposes liability on a trustee regardless of fault, including liability for acts of agents under respondeat superior. Responding to a particular concern of trustees, subsection (b) specifically protects a trustee from personal liability for violations of environmental law such as CERCLA (42 U.S.C. Section 9607) or its state law counterparts, unless the trustee was personally at fault. See also Sections 701(c)(2) (nominated trustee may investigate trust property to determine potential violation of environmental law without having accepted trusteeship) and 816(13) (trustee powers with respect to possible liability for violation of environmental law).

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

MAINE COMMENT

This section is identical to Probate Code, section 7-306, liability of trustee to 3rd persons. See also former Probate Code, section 7-405, liability of joint trustees. Both former Probate Code sections were repealed as part of the adoption of the Uniform Trust Code.

See Maine Shipyard & Marine Railway v. Lilley, 2000 ME 9, 743 A.2d 1264; Haley v. Palmer, 107 Me. 311, 315, 78 A. 368, 370 (1910); Bay of Naples Condominium Association v. Lewis, 582 A.2d 1210 (Me. 1990); In re Estate of Stowell, 595 A.2d 1022 (1991) (Stowell I).

§1011. Interest as general partner

1. Not personally liable on contract. Except as otherwise provided in subsection 3 or unless personal liability is imposed in the contract, a trustee who holds an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership after the trust's acquisition of the interest if the fiduciary capacity was disclosed in the contract or in a statement previously filed pursuant to the Uniform Partnership Act or the Maine Revised Uniform Limited Partnership Act.

2. Not personally liable for torts. Except as otherwise provided in subsection 3, 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.

2 3. Exceptions to immunity. The immunity provided by this
3 section does not apply if an interest in the partnership is held
4 by the trustee in a capacity other than that of trustee or is
5 held by the trustee's spouse or one or more of the trustee's
6 descendants, siblings or parents or the spouse of any of the
7 trustee's descendants, siblings or parents.

8 4. Liability of settlor. If the trustee of a revocable
9 trust holds an interest as a general partner, the settlor is
10 personally liable for contracts and other obligations of the
11 partnership as if the settlor were a general partner.
12

14 **UNIFORM COMMENT**

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

34
35 Special protection is not needed for other business interests
36 that the trustee may own, such as an interest as a limited
37 partner, a membership interest in an LLC, or an interest as a
38 corporate shareholder. In these cases the nature of the entity or
39 the interest owned by the trustee carries with it its own
40 limitation on liability.

42 Certain exceptions apply. The section is not intended to be used
43 as a device for individuals or their families to shield assets
44 from creditor claims. Consequently, subsection (c) excludes from
45 the protections provided by this section trustees who own an
46 interest in the partnership in another capacity or if an interest
47 is owned by the trustee's spouse or the trustee's descendants,
48 siblings, parents, or the spouse of any of them.

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

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

12
13 **MAINE COMMENT**

14 This section is new law. No prior Maine law could be found on
15 point.

16
17 **§1012. Protection of person dealing with trustee**

18
19 **1. Exceeding or improperly exercising powers.** A person
20 other than a beneficiary who in good faith assists a trustee, or
21 who in good faith and for value deals with a trustee, without
22 knowledge that the trustee is exceeding or improperly exercising
23 the trustee's powers is protected from liability as if the
24 trustee properly exercised those powers.
25

26
27 **2. No duty to inquire.** A person other than a beneficiary
28 who in good faith deals with a trustee is not required to inquire
29 into the extent of the trustee's powers or the propriety of their
30 exercise.
31

32
33 **3. In good faith delivery of assets.** A person who in good
34 faith delivers assets to a trustee need not ensure their proper
35 application.
36

37
38 **4. Former trustee.** A person other than a beneficiary who
39 in good faith assists a former trustee, or who in good faith and
40 for value deals with a former trustee, without knowledge that the
41 trusteeship has terminated is protected from liability as if the
42 former trustee were still a trustee.

43
44 **5. Other protections prevail.** Provisions of other laws
45 relating to commercial transactions or transfer of securities by
46 fiduciaries that are more protective prevail over the protection
47 provided by this section.

48
49 **UNIFORM COMMENT**

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

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

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

34 Subsection (c) protects any person, including a beneficiary, who
36 in good faith delivers property to a trustee. The standard of
protection in the Restatement is phrased differently although the
38 result is similar. Under Restatement (Second) of Trusts Section
40 321 (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.

42 Subsection (d) extends the protections afforded by the section to
44 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.

46 Subsection (e) clarifies that a statute relating to commercial
48 transactions controls whenever both it and this section could
50 apply to a transaction. Consequently, the protections provided by
this section are superseded by comparable protective provisions

of these other laws. The principal statutes in question are the various articles of the Uniform Commercial Code, including Article 8 on the transfer of securities, as well as the Uniform Simplification of Fiduciary Securities Transfer Act.

MAINE COMMENT

This section is substantially the same as Probate Code, section 7-406, which was repealed as part of the Adoption of the Uniform Trust Code. The Uniform Trust Code proposed section 1012 was adopted with only one change. The first word of subsection 5 was changed from "comparable" in the Uniform Trust Code to "more" to make it clear that, when there are other protective laws similar to this section in other Maine statutes, the other provisions control if, but only if, they are more protective of 3rd persons dealing with the trustee.

§1013. Certification of trust

1. Information. Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing some or all of the following information:

A. That the trust exists and the date the trust instrument was executed;

B. The identity of the settlor;

C. The identity and address of the currently acting trustee;

D. The powers of the trustee;

E. The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;

F. The authority of cotrustees to sign or otherwise authenticate and whether all or fewer than all are required in order to exercise powers of the trustee;

G. The trust's taxpayer identification number; and

H. The manner of taking title to trust property.

2. Authentication. A certification of trust may be signed or otherwise authenticated by any trustee.

2 3. Representations correct. A certification of trust must
state that the trust has not been revoked, modified or amended in
4 any manner that would cause the representations contained in the
certification of trust to be incorrect.

6 4. Dispositive terms. A certification of trust need not
contain the dispositive terms of a trust.

8
10 5. Excerpts from trust instrument. A recipient of a
certification of trust may require the trustee to furnish copies
12 of those excerpts from the original trust instrument and later
amendments that designate the trustee and confer upon the trustee
the power to act in the pending transaction.

14
16 6. Not liable for reliance on incorrect representations;
knowledge. A person who acts in reliance upon a certification of
18 trust without knowledge that the representations contained
therein are incorrect is not liable to any person for so acting
20 and may assume without inquiry the existence of the facts
contained in the certification. Knowledge of the terms of the
22 trust may not be inferred solely from the fact that a copy of all
or part of the trust instrument is held by the person relying
upon the certification.

24
26 7. Enforce transactions. A person who in good faith enters
into a transaction in reliance upon a certification of trust may
28 enforce the transaction against the trust property as if the
representations contained in the certification were correct.

30 8. Demand not in good faith; damages. A person making a
demand for the trust instrument in addition to a certification of
32 trust or excerpts is liable for damages if the court determines
that the person did not act in good faith in demanding the trust
34 instrument.

36 9. Copy in judicial proceeding. This section does not
38 limit the right of a person to obtain a copy of the trust
instrument in a judicial proceeding concerning the trust.

40
42 **UNIFORM COMMENT**

44 This section, derived from California Probate Code Section
18100.5, is designed to protect the privacy of a trust instrument
46 by discouraging requests from persons other than beneficiaries
for complete copies of the instrument in order to verify a
48 trustee's authority. Even absent this section, such requests are
usually unnecessary. Pursuant to Section 1012(b), a third person
proceeding in good faith is not required to inquire into the

2 extent of the trustee's powers or the propriety of their
exercise. This section adds another layer of protection.

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

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

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

50

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

6
8 **MAINE COMMENT**

10 This section is new law. No prior Maine law could be found on
point and the Uniform Trust Code section 1013 was adopted with
12 one change. Subsection 1 was changed to state that a
certification of trust may contain "some or all of" the
14 information listed in paragraphs A to H. It is up to the trustee
to include all that information or only some of it, depending on
16 the intended purpose and uses of the certification of trust and
appropriate considerations of privacy. The effect of subsection
18 6 is that, whatever information the trustee chooses to include in
the certification of trust may be relied upon by a person who
20 acts in reliance upon it without knowledge that the
representations contained therein are incorrect. Thus, as
22 amended, subsection 1 does not mandate the inclusion of
particular information that the trustee chooses not to include;
24 but see subsection 3, which does require a statement that the
trust has not been revoked, modified or amended in any manner
26 that would cause the representations contained in the
certification of trust to be incorrect. Subsection 6 also does
28 not require a party receiving the certification to rely upon it
without more, or to accept it with whatever limitations or
omissions the trustee has chosen.

30 This approach preserves the flexibility of the certification of
32 trust and the trustee's freedom to include as much or as little
information as the trustee deems appropriate, balancing the
34 legitimate need of a 3rd party for particular information against
the privacy interests of the beneficiaries and settlor of the
36 trust. Other jurisdictions, in adopting the Uniform Trust Code,
chose to delete or modify one or more of paragraphs A to H,
38 apparently for privacy reasons. Allowing the contents of a
particular certificate to vary according to the circumstances is
40 more flexible and should better accommodate the interests of
trustees, beneficiaries and 3rd parties.

42
44 **CHAPTER 11**

46 **MISCELLANEOUS PROVISIONS**

48 **§1101. Uniformity of application and construction**

In applying and construing this Code, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

§1102. Electronic records and signatures

The provisions of this Code 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 federal Electronic Signatures in Global and National Commerce Act, 15 United States Code, Section 7002, and supersede, modify and limit the requirements of the federal Electronic Signatures in Global and National Commerce Act.

UNIFORM COMMENT

This section, which is being inserted in all Uniform Acts approved in 2000 or later, preempts the federal Electronic Signatures in Global and National Commerce Act. Section 102(a)(2)(B) of that Act provides that the federal law can be preempted by a later statute of the State that specifically refers to the federal law. The effect of this section, when enacted as part of this Code, is to leave to state law the procedures for obtaining and validating an electronic signature. The Uniform Trust Code does not require that any document be in paper form, allowing all documents under this Code to be transmitted in electronic form. A properly directed electronic message is a valid method of notice under the Code as long as it is reasonably suitable under the circumstances and likely to result in receipt of the notice or document. See Section 109(a).

§1103. Effective date

This Code takes effect on July 1, 2005.

§1104. Application to existing relationships

1. Application. Except as otherwise provided in this Code, on July 1, 2005:

A. This Code applies to all trusts created before, on or after July 1, 2005;

B. This Code applies to all judicial proceedings concerning trusts commenced on or after July 1, 2005;

2 C. This Code applies to judicial proceedings concerning
3 trusts commenced before July 1, 2005 unless the court finds
4 that application of a particular provision of this Code
5 would substantially interfere with the effective conduct of
6 the judicial proceedings or prejudice the rights of the
7 parties, in which case the particular provision of this Code
8 does not apply and the superseded law applies;

9
10 D. Any rule of construction or presumption provided in this
11 Code applies to trust instruments executed before July 1,
12 2005 unless there is a clear indication of a contrary intent
13 in the terms of the trust; and

14 E. An act done before July 1, 2005 is not affected by this
15 Code.

16
17 2. Continued application of statute. If a right is
18 acquired, extinguished or barred upon the expiration of a
19 prescribed period that has commenced to run under any other
20 statute before July 1, 2005, that statute continues to apply to
21 the right even if it has been repealed or superseded.
22

23
24 **UNIFORM COMMENT**

25
26 The Uniform Trust Code is intended to have the widest possible
27 effect within constitutional limitations. Specifically, the Code
28 applies to all trusts whenever created, to judicial proceedings
29 concerning trusts commenced on or after its effective date, and
30 unless the court otherwise orders, to judicial proceedings in
31 progress on the effective date. In addition, any rules of
32 construction or presumption provided in the Code apply to
33 preexisting trusts unless there is a clear indication of a
34 contrary intent in the trust's terms. By applying the Code to
35 preexisting trusts, the need to know two bodies of law will
36 quickly lessen.

37
38 This Code cannot be fully retroactive, however. Constitutional
39 limitations preclude retroactive application of rules of
40 construction to alter property rights under trusts that became
41 irrevocable prior to the effective date. Also, rights already
42 barred by a statute of limitation or rule under former law are
43 not revived by a possibly longer statute or more liberal rule
44 under this Code. Nor is an act done before the effective date of
45 the Code affected by the Code's enactment.

46
47 The Uniform Trust Code contains an additional effective date
48 provision. Pursuant to Section 602(a), prior law will determine
49 whether a trust executed prior to the effective date of the Code
50 is presumed to be revocable or irrevocable.

2 For a comparable uniform law effective date provision, see
Uniform Probate Code Section 8-101.

4 **Sec. A-2. Effective date.** This Part takes effect July 1, 2005.
6

8 **PART B**

10 **Sec. B-1. 5 MRSA §17108, sub-§2, ¶A,** as enacted by PL 1985, c.
12 801, §§5 and 7, is amended to read:

14 A. The fiduciary or registered investment advisor shall
invest and reinvest the funds of the retirement system in
16 accordance with the standards defined in Title ~~18-A, section~~
~~7-302 18-B, sections 802 to 807 and chapter 9.~~ The
investment and reinvestment shall ~~be~~ are subject to periodic
18 review by the board.

20 **Sec. B-2. 5 MRSA §17153, sub-§3,** as enacted by PL 1985, c.
22 801, §§5 and 7, is amended to read:

24 **3. Investment of funds.** The board may cause the funds
created by this Part to be invested and reinvested in accordance
with the standards defined in Title ~~18-A, section~~ ~~7-302 18-B,~~
26 ~~sections 802 to 807 and chapter 9,~~ subject to periodic approval
of the investment program by the board.
28

30 **Sec. B-3. 13 MRSA §4106, last ¶,** as enacted by PL 2001, c. 550,
Pt. C, §5 and affected by §29, is amended to read:

32 In the administration of the powers to appropriate
appreciation, to make and retain investments and to delegate
34 investment management of institutional funds, trustees of
charitable trusts are governed by the standards set forth in
36 Title ~~18-A, section~~ ~~7-302 18-B, sections 802 to 807 and chapter 9.~~

38 **Sec. B-4. 18-A MRSA §1-302, sub-§(a),** as enacted by PL 1979, c.
40 540, §1, is amended to read:

42 (a) To the full extent provided in sections 3-105, 5-102,
and 5-402, ~~7-201 and 7-204,~~ the court has jurisdiction over all
44 subject matter relating to (1) estates of decedents, including
construction of wills and determination of heirs and successors
of decedents and estates of protected persons; (2) protection of
46 minors and incapacitated persons; and (3) trusts.

48 **Sec. B-5. 18-A MRSA §3-913, sub-§(a),** as enacted by PL 1979, c.
540, §1, is repealed.

2 **Sec. B-6. 18-A MRSA §3-913, sub-§(c)**, as enacted by PL 1979, c.
340, §1, is amended to read:

4
6 (c) No inference of negligence on the part of the personal
7 representative shall ~~may~~ be drawn from his the personal
8 representative's failure to exercise the authority conferred by
9 ~~subsections-(a)-and~~ subsection (b).

10 **Sec. B-7. 18-A MRSA §5-417**, as enacted by PL 1979, c. 540,
11 §1, is amended to read:

12 **§5-417. General duty of conservator**

13 In the exercise of his the conservator's powers, a
14 conservator is to act as a fiduciary and shall observe the
15 standards of care applicable to trustees as described by ~~section~~
16 7-302 Title 18-B, sections 802 to 807 and chapter 9.

17
18 **Sec. B-8. 18-A MRSA §5-508, sub-§§(a) and (d)**, as repealed and
19 replaced by PL 1997, c. 683, Pt. C, §6, are amended to read:

20 (a) A durable financial power of attorney is a durable
21 power of attorney by which a principal designates another as
22 attorney-in-fact to make decisions on the principal's behalf in
23 matters concerning the principal's finances, property or both.
24 In the exercise of the powers conferred under a durable financial
25 power of attorney, an attorney-in-fact shall act as a fiduciary
26 under the standards of care applicable to trustees as described
27 by ~~section-7-302~~ Title 18-B, sections 802 to 807 and chapter 9.

28 (d) A durable financial power of attorney must contain the
29 following language:

30
31 "Notice to the Principal: As the "Principal," you are using this
32 Durable Power of Attorney to grant power to another person
33 (called the "Agent" or "Attorney-in-fact") to make decisions
34 about your money, property or both and to use your money,
35 property or both on your behalf. If this written Durable Power
36 of Attorney does not limit the powers that you give your Agent,
37 your Agent will have broad and sweeping powers to sell or
38 otherwise dispose of your property and spend your money without
39 advance notice to you or approval by you. Under this document,
40 your Agent will continue to have these powers after you become
41 incapacitated, and you may also choose to authorize your Agent to
42 use these powers before you become incapacitated. The powers
43 that you give your Agent are explained more fully in the Maine
44 Revised Statutes, Title 18-A, sections 5-501 to 5-508 and in
45 Maine case law. You have the right to revoke or take back this
46 Durable Power of Attorney at any time as long as you are of sound
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48
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mind. If there is anything about this Durable Power of Attorney that you do not understand, you should ask a lawyer to explain it to you.

Notice to the Agent: As the "Agent" or "Attorney-in-fact," you are given power under this Durable Power of Attorney to make decisions about the money, property or both belonging to the Principal and to spend the Principal's money, property or both on that person's behalf in accordance with the terms of this Durable Power of Attorney. This Durable Power of Attorney is valid only if the Principal is of sound mind when the Principal signs it. As the Agent, you are under a duty (called a "fiduciary duty") to observe the standards observed by a prudent person dealing with the property of another. The duty is explained more fully in the Maine Revised Statutes, Title 18-A, sections 5-501 to 5-508 and 7-392 Title 18-B, sections 802 to 807 and chapter 9 and in Maine case law. As the Agent, you are not entitled to use the money or property for your own benefit or to make gifts to yourself or others unless the Durable Power of Attorney specifically gives you the authority to do so. As the Agent, your authority under this Durable Power of Attorney will end when the Principal dies and you will not have the authority to administer the estate unless you are authorized to do so in accordance with the Maine Probate Code. If you violate your fiduciary duty under this Durable Power of Attorney, you may be liable for damages and may be subject to criminal prosecution. If there is anything about this Durable Power of Attorney or your duties under it that you do not understand, you should ask a lawyer to explain it to you."

This language does not confer powers not otherwise contained in the durable financial power of attorney.

Sec. B-9. 18-A MRSA §§7-101 to 7-104, as enacted by PL 1979, c. 540, §1, are repealed.

Sec. B-10. 18-A MRSA Art. 7, Pt. 2, as amended, is repealed.

Sec. B-11. 18-A MRSA Art. 7, Pt. 3, as amended, is repealed.

Sec. B-12. 18-A MRSA §7-401, as enacted by PL 1979, c. 540, §1, is repealed.

Sec. B-13. 18-A MRSA §7-402, as amended by PL 2001, c. 544, §1, is repealed.

Sec. B-14. 18-A MRSA §§7-403 to 7-406, as enacted by PL 1979, c. 540, §1, are repealed.

Sec. B-15. 18-A MRSA §8-304, as enacted by PL 1979, c. 540, §1, is amended to read:

2 **§8-304. Approval of bond by judge**

4 Except as otherwise provided by ~~section~~ sections 3-603
6 through ~~to~~ 3-606, 4-204, 4-207, 5-411, 5-412, and 5-432 and 7-304
8 Title 18-B, section 702, no bond required to be given to the
10 judge of probate or to be filed in the probate office is
12 sufficient until it has been examined by the judge and his the
14 judge's approval has been written thereon.

16 **Sec. B-16. 18-A MRSA §8-313**, as enacted by PL 1979, c. 540,
18 §1, is amended to read:

20 **§8-313. Judicial authorization of actions**

22 The judge of probate may expressly authorize or instruct a
24 personal representative or other fiduciary, at the judge's
26 discretion or on the complaint of himself ~~or~~ any interested
28 person, to commence an action on the bond for the benefit of the
30 estate. Nothing herein shall may be deemed to limit the power or
32 duty of a successor fiduciary to bring such proceedings as they
34 are authorized to bring without express court authorization under
36 section 3-606, subsection (a), paragraph (4); section 5-412,
38 subsection (a), paragraph (3); Title 18-B, section 7-304 702; or
40 as otherwise provided by law.

42 **Sec. B-17. 30-A MRSA §5706, sub-§4**, as amended by PL 1995, c.
44 206, §1, is further amended to read:

46 **4. Safekeeping and investment management agreements.** The
48 municipal officers may enter into an agreement with any financial
50 institution with trust powers authorized to do business in the
State for the safekeeping of the reserve funds, as defined in
section 5801, or trust funds, as defined by section 5653, of the
municipality. Services must consist of the safekeeping of the
funds, collection of interest and dividends, and any other fiscal
service that is normally covered in a safekeeping agreement.
Investment of reserve funds or trust funds deposited under a
safekeeping agreement may be managed either by the financial
institution with which the funds are deposited or by an
investment advisor registered with the National Association of
Securities Dealers, federal Securities and Exchange Commission or
other governmental agency or instrumentality with jurisdiction
over investment advisors, to act in such capacity pursuant to an
investment advisory agreement providing for investment management
and periodic review of portfolio investments. Investment of
funds on behalf of the municipality under this section are is
governed by the rule of prudence, according to Title 18-A,
~~section 7-302~~ 18-B, sections 802 to 807 and chapter 9. The
contracting parties shall give assurance of proper safeguards

that are usual to these contracts and shall furnish insurance protection satisfactory to both parties.

Sec. B-18. 36 MRSA §5102, sub-§4, ¶¶B and C, as amended by PL 1991, c. 148, §1, are further amended to read:

B. A trust created by will of a decedent who at death was domiciled in this State; or

C. A trust created by, or consisting of property of, a person domiciled in this State; ~~or.~~

Sec. B-19. 36 MRSA §5102, sub-§4, ¶D, as enacted by PL 1991, c. 148, §2, is repealed.

Sec. B-20. Effective date. This Part takes effect July 1, 2005.

PART C

Sec. C-1. 18-A MRSA §5-506, sub-§(d) is enacted to read:

(d) An agent under a durable health care power of attorney has the power and authority to serve as the personal representative of the principal for all purposes of the federal Health Insurance Portability and Accountability Act of 1996, 42 United States Code, Section 1320d et seq. and its regulations, 45 Code of Federal Regulations 160-164. The agent has all the rights of the principal with respect to the use and disclosure of the individually identifiable health information and other medical records of the principal.

Sec. C-2. 18-A MRSA §5-802, sub-§(j) is enacted to read:

(j) A surrogate or an agent named in an advance health-care directive has the power and authority to serve as the personal representative of the patient who executed the health care directive for all purposes of the federal Health Insurance Portability and Accountability Act of 1996, 42 United States Code, Section 1320d et seq. and its regulations, 45 Code of Federal Regulations 160-164. The surrogate or agent has all the rights of the patient with respect to the use and disclosure of the individually identifiable health information and other medical records of the patient.

Sec. C-3. 18-A MRSA §5-804, Pt. 1, as enacted by PL 1995, c. 378, Pt. A, §1, is amended to read:

PART 1

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POWER OF ATTORNEY FOR HEALTH CARE

(1) DESIGNATION OF AGENT: I designate the following individual as my agent to make health-care decisions for me:

.....

(name of individual you choose as agent)

.....

(address) (city) (state) (zip code)

.....

(home phone) (work phone)

OPTIONAL: If I revoke my agent's authority or if my agent is not willing, able or reasonably available to make a health-care decision for me, I designate as my first alternate agent:

.....

(name of individual you choose as first alternate agent)

.....

(address) (city) (state) (zip code)

.....

(home phone) (work phone)

OPTIONAL: If I revoke the authority of my agent and first alternate agent or if neither is willing, able or reasonably available to make a health-care decision for me, I designate as my second alternate agent:

.....

(name of individual you choose as second alternate agent)

.....

(address) (city) (state) (zip code)

.....

(home phone) (work phone)

(2) AGENT'S AUTHORITY: My agent is authorized to make all health-care decisions for me, including decisions to provide, withhold or withdraw artificial nutrition and hydration and all other forms of health care to keep me alive, except as I state here:

.....

.....

.....

(Add additional sheets if needed.)

2 (3) WHEN AGENT'S AUTHORITY BECOMES EFFECTIVE: My agent's
3 authority becomes effective when my primary physician determines
4 that I am unable to make my own health-care decisions unless I
5 mark the following box. If I mark this box [], my agent's
6 authority to make health-care decisions for me takes effect
7 immediately.

8
9 (4) AGENT'S OBLIGATION: My agent shall make health-care
10 decisions for me in accordance with this power of attorney for
11 health care, any instructions I give in Part 2 of this form and
12 my other wishes to the extent known to my agent. To the extent
13 my wishes are unknown, my agent shall make health-care decisions
14 for me in accordance with what my agent determines to be in my
15 best interest. In determining my best interest, my agent shall
16 consider my personal values to the extent known to my agent.

17 (5) NOMINATION OF GUARDIAN: If a guardian of my person
18 needs to be appointed for me by a court, I nominate the agent
19 designated in this form. If that agent is not willing, able or
20 reasonably available to act as guardian, I nominate the alternate
21 agents whom I have named, in the order designated.

22
23 (6) HEALTH INFORMATION AND OTHER MEDICAL RECORDS: In
24 addition to the other powers granted by this document, I grant to
25 my agent the power and authority to serve as my personal
26 representative for all purposes of the federal Health Insurance
27 Portability and Accountability Act of 1996, 42 United States
28 Code, Section 1320d et seq., "HIPAA," and its regulations, 45
29 Code of Federal Regulations 160-164, during any time that my
30 agent is exercising authority under this document. I intend for
31 my agent to be treated as I would be with respect to my rights
32 regarding the use and disclosure of my individually identifiable
33 health information and other medical records. This release
34 authority applies to any information governed by HIPAA.

35
36 I authorize any physician, health-care professional, dentist,
37 health plan, hospital, clinic, laboratory, pharmacy or other
38 covered health-care provider, any insurance company and any
39 health-care clearinghouse that has provided treatment or services
40 to me or that has paid for, or is seeking reimbursement from me
41 for, such services to give, disclose and release to my agent,
42 without restriction, all of my individually identifiable health
43 information and medical records regarding any past, present or
44 future medical or mental health condition, to include all
45 information relating to the diagnosis and treatment of HIV/AIDS,
46 sexually transmitted diseases, mental illness and drug or alcohol
47 abuse.

2 The authority given to my agent supersedes any prior agreement
3 that I may have made with my health-care providers to restrict
4 access to or disclosure of my individually identifiable health
5 information. The authority given to my agent has no expiration
6 date and expires only in the event that I revoke the authority in
7 writing and deliver it to my health-care providers.

8
9
10 **SUMMARY**

11 This amendment replaces the bill.

12
13 Part A enacts the Maine Uniform Trust Code. Uniform
14 Comments and Maine Comments are included. Part A is effective
15 July 1, 2005.

16
17 Part B repeals superseded sections of the Probate Code and
18 updates cross-references. Part B is effective July 1, 2005.

19
20 Part C amends 3 sections of the Probate Code concerning
21 different forms of health care powers of attorney to ensure that
22 health care providers are not limited in the medical information
23 they provide to the agent by the federal Health Insurance
24 Portability and Accountability Act of 1996.