

REPORT OF THE AD HOC MASSACHUSETTS UNIFORM TRUST CODE COMMITTEE

Introduction

In 2000, the Uniform Law Commission promulgated for consideration by the states a Uniform Trust Code (the “Uniform Code”) with the stated objective of providing states with precise, comprehensive and easily accessible guidance on trust law questions. This is the first attempt to achieve national codification of the law of trusts, and the Uniform Code has already been adopted in twenty-one states. According to the Uniform Law Commission, the increasing use of trusts, nationally and internationally, for family estate planning and commercial transactions has led to an increasing number of day-to-day questions involving trusts, and across a number of jurisdictions. The Uniform Code is an attempt to codify the common law rules comprehensively and uniformly, and in some cases to include innovative provisions thought to improve upon the common law. Most of the Uniform Trust Code consists of default rules. They apply only if the terms of the trust fail to address or insufficiently cover a particular issue (see Section 105). The exceptions that cannot be overridden are set forth in Section 105 (b).

Of course, there is no shortage of common law regarding trusts in Massachusetts. Massachusetts also has statutory law relating to trusts, though no comprehensive codification. Over the years, the Commonwealth also codified several laws that relate to trusts, including the Uniform Statutory Rule Against Perpetuities (enacted in 1989), the Massachusetts Prudent Investor Act in 1996, the Massachusetts Principal and Income Act in 2005, and the Massachusetts Uniform Probate Code in 2009. The drafters of those laws used Uniform acts as the starting point for their deliberations.

In 2005, discussion about the possible enactment of the Uniform Code in Massachusetts lead to formation of an ad hoc committee to review the Uniform Code. The Ad Hoc Massachusetts Trust Code Committee (the “Committee”) included representatives of the bar from private practice, financial institutions and private trustee offices, and met monthly from March 2005 through February 2008 to review the Uniform Code in detail. The Committee’s objectives were to review the Uniform Code and to determine if Massachusetts should adopt legislation to update trust law. The Committee understood that this review could lead to:

- Recommending adoption of the Uniform Code without changes;
- Revising provisions of the Uniform Code and recommending adoption of the Committee’s revised version;
- Recommending adoption of selected provisions of the Uniform Code which the Committee believed necessary to modernize Massachusetts trust law; or

- Recommending that no legislation was needed.

The Committee proceeded to review each section of the Uniform Code, comparing it to present Massachusetts law, considering its possible usefulness, and making changes to the Uniform Code provisions thought helpful in case of ultimate adoption, while all the time reserving until the end what its recommendation would be. In particular, the Committee (1) evaluated current Massachusetts law, preserving it where it was thought superior to the Uniform Code and (2), in some cases, rebalanced the power between the beneficiaries, the trustee and the settlor where the Committee disagreed with the balance the Uniform Code had achieved.

After the Committee concluded its review, the Committee unanimously recommended that Massachusetts adopt the Massachusetts Uniform Trust Code. The Committee felt that having all trust law in one place would be valuable. Since current law is scattered and subject to varying interpretation, a codification of law was favored. In addition, where there is some uncertainty as to the law or there has not been a case on point, trustees and beneficiaries will not have to wait for the legal process to finalize the law if a comprehensive code is enacted. Having a code also means that an encyclopedic knowledge of case law is less necessary to “know the law.”

Subsequent to the Committee’s recommendation, Massachusetts adopted the Massachusetts Uniform Probate Code, Chapter 521 of the Acts of 2008. Several provisions in Article VII of the new Probate Code overlap with provisions of the proposed Massachusetts Uniform Trust Code. Consistent with the recommendation of the Uniform Law Commission, the Committee recommends repealing most of Article VII of the Massachusetts Uniform Probate Code. In general, the Massachusetts Uniform Trust Code contains similar and in some cases more desirable provisions than those in Article VII. Certain provisions from Article VII of the Probate Code not already in the Massachusetts Uniform Trust Code have been incorporated so they will not be lost. The Committee believes it would be advantageous to have all the statutory trust law provisions in the same place in the new Massachusetts Uniform Trust Code.

Proposed Massachusetts Uniform Trust Code and Comments

What follows is the text of the proposed Massachusetts Uniform Trust Code (the “Code”) with the Committee’s comments on each section of the Code, including an explanation of how the Code differs from the Uniform Code. The Committee left the original section numbering in place from the Uniform Code, following the same practice the legislature did in adopting the Massachusetts Uniform Probate Code. Sections that were eliminated are now entitled “Reserved.” Although the official comments to the Uniform Code are helpful to understand its provisions, due to the changes made to the Uniform Code to create the Massachusetts Code and the commentary contained in this Report, the Committee specifically declined to adopt the official comments to the Uniform Code.

ARTICLE 1

GENERAL PROVISIONS AND DEFINITIONS

Section 101. [Short Title.] This chapter shall be known and may be cited as the Massachusetts Uniform Trust Code.

COMMENT

The Committee believes that the Code is sufficiently consistent with the Uniform Code that the title should include the word “Uniform.”

Section 102. [Scope.] This chapter applies to express trusts, charitable or non-charitable, of a donative nature and trusts created pursuant to a judgment or decree that requires the trust to be administered in the manner of said express trusts.

COMMENT

The Committee revised Section 102 to provide that the Code will apply only to trusts of a donative nature, making clear that the Code will not apply to business trusts or other non-donative trust arrangements.

Section 103. [Definitions.] In this chapter:

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

(2) “Ascertaining standard” means a standard relating to an individual’s health, education, support, or maintenance.

(3) “Beneficiary” means a person who has a present or future beneficial interest in a trust, vested or contingent.

(4) “Charitable trust” means a trust, or portion of a trust, created for a charitable purpose described in section 405(a).

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

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

(7) “Jurisdiction,” with respect to a geographic area, includes a state or country.

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

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

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

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

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

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

(12) “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 person is a settlor of the portion of the trust property attributable to that person’s contribution except to the extent another person has the power to revoke or withdraw that portion.

(13) “Spendthrift provision” means a term of a trust which restrains transfer of a beneficiary’s interest.

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

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

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

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

COMMENT

The Committee modified and deleted certain definitions:

“Ascertainable standard” has been defined without reference to specific Internal Revenue Code provisions including subsequent amendments, to conform with Massachusetts legislative practice.

“Beneficiary” has been modified to exclude holders of powers of appointment.

Definitions of conservator and guardian were eliminated to avoid conflicts with definitions elsewhere in Massachusetts law.

The definition of “power of withdrawal” is eliminated as unclear and unnecessary.

“Qualified beneficiary,” an important definition in the Code determining those beneficiaries entitled to notice, is limited to those currently eligible to receive distributions of income or principal, and to those who would be entitled to receive income and principal if the trust then terminated. This rewriting eliminated from the definition of “qualified beneficiaries” entitled to notice any intermediate tier of successive income or principal beneficiaries who would be eligible to receive distributions if the prior income interests terminated but the trust did not terminate.

The definition of “spendthrift restriction” is modified to remove from the definition the concept that such a restriction must address both voluntary and involuntary alienation. This change is necessary because existing spendthrift restrictions under Massachusetts may limit just involuntary alienation. Under the Code, however, a spendthrift restriction in any instrument executed after its effective date must restrain both voluntary and involuntary alienation.

The definition of “trust instrument” was rewritten to eliminate its restriction to an instrument executed by the settlor.

Section 104. [Knowledge.]

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

(1) has actual knowledge of it;

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

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

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

COMMENT

This section, unchanged by the Committee, defines the requirements for imputation of knowledge to an organization. The section both binds and relieves large organizations from being imputed with knowledge. The organization is bound by notice when the information reaches an employee having responsibility to act for the trust, or when it would have reached the employee if the organization had exercised due diligence.

Section 105. [Default And Mandatory Rules.]

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

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

- (1) the requirements for creating a trust;
- (2) the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries;
- (3) the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful and not contrary to public policy;
- (4) the power of the court to modify or terminate a trust under sections 410 through 416;
- (5) the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in article 5;
- (6) the power of the court under section 702 to require, dispense with, or modify or terminate a bond;
- (7) the power of the court under section 708(b) to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;
- (8) the effect of an exculpatory term under section 1008;
- (9) the rights under sections 1010 through 1013 of a person other than a trustee or beneficiary; and
- (10) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice.

COMMENT

In general, the rules of the Code are default rules, subject to modification by the settlor in the instrument. However, this section identifies certain provisions of the Code that are mandatory. The Committee deleted from this section subsections (8) and (9) which would have prevented a settlor from relieving a Trustee of notice and information requirements found in Section 813. The Committee also deleted references to limitations periods and subject matter jurisdiction of the court.

Section 106. [Common Law of Trusts; Principles of Equity.] The common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or another statute of the commonwealth.

COMMENT

This section clarifies that the Code is not intended to replace the common law of trusts in Massachusetts except where the Code modifies it.

Section 107. [Reserved.]

COMMENT

The Committee deleted Section 107 which defined the governing law for interpreting the meaning and effect of the terms of a trust, preferring current Massachusetts law as interpreted by the courts.

Section 108. [Principal Place of Administration.]

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

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

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

(b) Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee, may, but has no affirmative duty to, transfer the trust's principal place of administration to another state or to a jurisdiction outside of the United States.

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

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

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

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

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

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

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

COMMENT

The Committee modified this section. The Committee specifically removed the duty of a trustee to evaluate if the trust was being administered in an appropriate place by deleting subsection (b) and made the decision of a trustee whether to transfer of the place of trust administration permissive, not mandatory. A trustee may still petition the courts with respect to this decision.

Section 109. [Methods and Waiver of Notice.]

(a) Notice to a person under this chapter or the sending of a document to a person under this chapter must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document include first-class mail, personal delivery, or delivery to the person's last known place of residence or place of business.

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

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

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

COMMENT

The Committee eliminated an electronic message as a permissible means of notice.

Section 110. [Others Treated as Qualified Beneficiaries.]

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

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

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

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

(c) A person appointed to enforce a trust created for the care of an animal or another non-charitable purpose as provided in section 408 or 409 has the rights of a qualified beneficiary under this chapter.

COMMENT

The Committee modified the provisions of this section so that a charitable beneficiary that would take only after the termination of a prior interest would not be treated as a “qualified beneficiary” until it had a current right to distributions. The Committee deleted a provision that would have given the Attorney General the rights of a qualified beneficiary. The Committee declined to change current Massachusetts law regarding the role and rights of the Attorney General with respect to charitable trusts.

Section 111. [Non-judicial Settlement Agreements.]

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

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

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

(d) Matters that may be resolved by a non-judicial settlement agreement include:

- (1) the interpretation or construction of the terms of the trust;**
- (2) the approval of a trustee’s report or accounting;**
- (3) direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;**
- (4) the resignation or appointment of a trustee and the determination of a trustee’s compensation;**
- (5) transfer of a trust’s principal place of administration; and**
- (6) liability of a trustee for an action relating to the trust.**

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

COMMENT

This section of the Code encourages the non-judicial resolution of disputes. Such a resolution, however, may only include terms and conditions that a court could approve. For example, a nonjudicial settlement may not be used for an action otherwise illegal, or to terminate a trust in a manner not authorized by the Code. If there are minors and

others who cannot participate, it will be possible to use the virtual representation procedures of Article 3 to achieve the Agreement. Subsection (d) is a non-exclusive list of matters which may be agreed to in a non-judicial settlement agreement. The section does not precisely define the “interested persons” whose consent is required to achieve a binding agreement, but the trustee’s consent would ordinarily be required.

Section 112. [Rules of Construction.]

The rules of construction that apply in the commonwealth to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a revocable trust and the disposition of the trust property. A “revocable trust”, for purposes of this section, means a trust that was (1) revocable by the settlor until the time of his or her death, (2) created or amended by the settlor after the effective date of this Act, and (3) was intended to dispose of the settlor’s property at death (whether under will or otherwise and whether the trust was funded at the time of the settlor’s death or not).

COMMENT

In the Uniform Code this section made applicable to all trusts the rules of construction applicable to wills. The Committee revised this section to provide that such rules of construction should apply only to “revocable trusts”, defined as trusts intended to be will substitutes. Enactment of the Massachusetts Uniform Probate Code has made most rules of construction applicable to wills, trusts and other governing instruments alike, although there are still a handful of rules applicable only to wills. This section will apply those rules to revocable trusts as well, so long as the revocable trusts were executed or amended after the effective date of the Code.

Section 113. [Qualification of Foreign Trustee.]

A foreign corporate trustee is required to qualify as a foreign corporation doing business in the commonwealth if it maintains the principal place of administration of any trust within the commonwealth. A foreign co-trustee is not required to qualify in the commonwealth solely because its co-trustee maintains the principal place of administration in the commonwealth. Unless otherwise doing business in the commonwealth, local qualification by a foreign trustee, corporate or individual, is not required in order for the trustee to receive distribution from a local estate, to hold, invest in, manage or acquire property located in the commonwealth, or to maintain litigation. Nothing in this section affects a determination of what other acts require qualification as doing business in the commonwealth.

COMMENT

This provision comes from Article VII of the Massachusetts Uniform Probate Code; it is included here to preserve it, because the current provision will be repealed upon enactment of the Code.

ARTICLE 2

JUDICIAL PROCEEDINGS

Section 201. [Role of Court in Administration of Trust.]

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

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

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

COMMENT

This section provides the court has no continuing supervision of a trust unless its jurisdiction is invoked by an interested person or as provided by law. This section is consistent with the jurisdictional provisions of the Article VII of Massachusetts Uniform Probate Code, which it will replace and was a new provision to Massachusetts law when the Probate Code was enacted, freeing testamentary trusts from court supervision..

Section 202. [Jurisdiction Over Trustee and Beneficiary.]

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

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

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

COMMENT

This section provides personal jurisdiction over the trustee and jurisdiction over beneficiaries with respect to trust matters. Other methods of obtaining jurisdiction are not eliminated by this section. This provision is similar to the provisions of Article VII of the Massachusetts Uniform Probate Code, which it will replace.

Section 203. [Trust Proceedings; Dismissal of Matters Relating to Foreign Trusts.]

The court will not, over the objection of a party, entertain proceedings under section 201 involving a trust registered or having its principal place of administration in another state, unless (1) when all appropriate parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration or (2) when the interests of justice otherwise would seriously be impaired. The court may condition a stay or dismissal of a proceeding under this section on the consent of any party to jurisdiction of the state in which the trust is registered or has its principal place of administration, or the court may grant a continuance or enter any other appropriate order.

COMMENT

Section 203 of the Uniform Code (relating to subject matter jurisdiction) was deleted by the Committee. This provision comes from Article VII of the Massachusetts Uniform Probate Code; it is included here to preserve it, because the current provision will be repealed upon enactment of the Code.

Section 204. [Venue.]

A trust shall be subject to the jurisdiction of the probate and family court department of the trial court of the commonwealth for the county in which is located its principal place of administration. The principal place of administration of a testamentary trust shall be deemed to be the location of the court of the commonwealth in which the will creating the trust was granted informal or formal probate. Unless otherwise designated in the trust instrument, the principal place of administration of an inter vivos trust is the trustee's usual place of business where the records pertaining to the trust are kept, or at the trustee's residence if the trustee has no such place of business. In the case of co-trustees, the principal place of administration, if not otherwise designated in the trust instrument, is (1) the usual place of business of the corporate trustee if there is but one corporate co-trustee, or (2) the usual place of business or residence of the individual trustee who is a professional fiduciary if there is but one such person and no corporate co-trustee, and otherwise (3) the usual place of business or residence of any of the co-trustees as agreed upon by them.

COMMENT

The Committee replaced Section 204 of the Uniform Code (regarding venue) with this provision from Article VII of the Massachusetts Uniform Probate Code, which covers the same subject and is more complete. This section is not intended to eliminate concurrent jurisdiction of other courts that exists under current Massachusetts law.

Section 205. [Petition for Transfers of Trust Property Whose Disposition Depends upon the Death of an Absentee.]

(a) If a trustee holds trust property the disposition of which depends upon the death of an absentee whose death has not otherwise

been determined, on or after the day five years after the date of the absentee's disappearance the trustee, or any person who would be interested in the trust property were the absentee dead, may petition the court having jurisdiction of the trust for an order that the trust property be disposed of to the persons to whom and in the shares or proportions in which it would be distributed under the provisions of the trust if the absentee had died on that day.

(b) The court may direct the petitioner to report the results of, or make and report back concerning, a reasonably diligent search for the absentee in any manner that may seem advisable, including any or all of the following methods:

(1) by inserting in one or more suitable periodicals a notice requesting information from any person having knowledge of the whereabouts of the absentee;

(2) by notifying law enforcement officials, public welfare agencies and registers of deaths in appropriate locations of the disappearance of the absentee;

(3) by engaging the services of an investigator.

The costs of any search so directed shall be paid from the trust property.

(c) After any such report directed by the court under paragraph (b) above has been completed to the satisfaction of the court, notice of the hearing on the petition shall be given.

(d) If after the hearing the court finds that the facts warrant a presumption of death, it shall enter an appropriate order of disposition of the trust property and any undistributed net income.

COMMENT

This provision comes from Article VII of the Massachusetts Uniform Probate Code; it is included here to preserve it, because the current provision will be repealed upon enactment of the Code.

ARTICLE 3

REPRESENTATION

Section 301. [Representation: Basic Effect.]

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

(b) The consent of a person who may represent and bind another person under this article is binding on the person represented unless the

person represented objects to the representation before the consent would otherwise have become effective.

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

(d) A settlor may not represent and bind a beneficiary under this article with respect to the termination or modification of a trust under section 411(a).

COMMENT

This section and the ones that follow provide virtual representation for notice and consent for both nonjudicial settlements and judicial proceedings. Virtual representation was a change in Massachusetts law brought with the Massachusetts Uniform Probate Code. These provisions are consistent with the laws of many other states and with the Massachusetts Uniform Probate Code. In many instances the need for guardians ad litem will be eliminated.

Section 302. [Representation by Holder of General Testamentary Power of Appointment.] To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.

COMMENT

This section deals with the power of a holder of a general testamentary power of appointment to bind permissible appointees and takers in default, absent a conflict of interest. Revocable trusts and presently exercisable general powers of appointment are covered by Section 603.

Section 303. [Representation by Fiduciaries and Parents.] To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

(1) a conservator may represent and bind the estate that the conservator controls;

(2) a guardian may represent and bind the ward or protected person if a conservator has not been appointed;

(3) an agent having authority to act with respect to the particular question or dispute may represent and bind the principal;

(4) a trustee may represent and bind the beneficiaries of the trust;

(5) a personal representative of a decedent's estate may represent and bind persons interested in the estate; and

(6) a parent may represent and bind the parent's minor or unborn child if a conservator or guardian for the child has not been appointed.

COMMENT

The Committee believes that subsections (2) and (6) create powers that are new to Massachusetts law. Conservators may represent and bind minor wards (or guardians of minor wards if no conservator has been appointed), agents with authority may bind their principal, trustees may represent and bind the beneficiaries of the trust, personal representatives may represent and bind persons interested in the estate, and a parent may represent and bind the parent's minor or unborn child if no conservator has been appointed.

Section 304. [Representation by Person Having Substantially Identical Interest.] Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.

COMMENT

The Committee believes that Section 304 creates concepts that were new to Massachusetts law prior to the adoption of the Massachusetts Uniform Probate Code. This section provides for virtual representation of substantially identical interests. An older sibling can sign for minor siblings, for instance, or for a sibling whose identity or location is unknown. Once again, the conflict of interest limitation is an important safeguard.

Section 305. [Appointment of Guardian ad Litem.]

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

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

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

COMMENT

Section 305 sets forth situations where the court may appoint a guardian ad litem. The court can facilitate the use of virtual representation by appointing a representative to act for and bind the interests of unrepresented persons or those for whom the court

concludes the other available representation might be inadequate. Subsection (c) provides an important change to current Massachusetts law by providing that the representative may decide not to advocate zealously solely for the person he or she represents, but may consider general family benefit as well. The Committee replaced the term “representative” from the Uniform Code with the term “guardian ad litem” because that term is well understood under Massachusetts law.

ARTICLE 4

CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

Section 401. [Methods Of Creating Trust.] A trust may be created by:

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

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

(3) exercise of a power of appointment in favor of a trustee.

COMMENT

This section states familiar ways of creating a trust, but is not an exclusive list of methods.

Section 402. [Requirements For Creation.]

(a) A trust is created only if:

(1) the settlor has capacity to create a trust;

(2) the settlor indicates an intention to create the trust;

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

(A) a charitable trust;

(B) a trust for the care of an animal, as provided in section 408; or

(C) a trust for a non-charitable purpose, as provided in section 409;

(4) the trustee has duties to perform; and

(5) the same person is not the sole trustee and sole beneficiary.

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

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

COMMENT

The requirements for creation of a Trust are on the whole standard. The section makes reference to trusts for animals, specially provided for in Section 408, and trusts for noncharitable purposes provided for in Section 409. The Committee noted that the same person can be both sole trustee and present beneficiary of a valid trust, as long as there are successive beneficial interests.

Section 403. [Trusts Created in Other Jurisdictions.] A trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation:

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

COMMENT

Trusts that are created elsewhere will be respected as validly created by Massachusetts, parallel to the considerations respecting validity of foreign wills.

Section 404. [Trust Purposes.] A trust may be created only to the extent its purposes are lawful and not contrary to public policy.

COMMENT

The Committee has eliminated from this section the requirement that the trust purposes must be “possible to achieve,” and also eliminated a sentence that “a trust and its terms must be for the benefit of its beneficiaries” as trusts are an interrelationship between the settlor, the beneficiaries and the trustee.

Section 405. [Charitable Purposes; Enforcement.]

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

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

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

COMMENT

This section gives the settlor of a charitable trust the right to bring a proceeding to enforce the trust, a right not available under present Massachusetts law.

The Committee broadened subsection (b) to provide that as long as the instrument provides a method of selecting a charitable beneficiary, selection of a beneficiary or beneficiaries does not default to the court.

Section 406. [Creation of Trust Induced By Fraud, Duress, or Undue Influence.] A trust is void to the extent its creation was induced by fraud, duress, or undue influence.

COMMENT

The Committee notes that this section continues present Massachusetts law, in that it voids the trust only to the extent its creation was induced by fraud, duress, or under influence. Only the provisions brought about by the wrongful conduct are invalidated, not the entire document.

Section 407. [Evidence of Oral Trust.] Except as required by a statute other than this chapter, a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence.

COMMENT

This section generally states present Massachusetts law. The Committee notes that at one time stock in the Boston Braves was held in an oral trust, as the Supreme Judicial Court recognized in *Rugo v. Rugo*, 325 Mass. 612 (1950). The Committee approves the requirement of the heightened standard of clear and convincing evidence for the establishment of an oral trust and its terms.

Section 408. [Trust for Care of Animal.]

(a) A trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor's lifetime, upon the death of the last surviving animal.

(b) 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. A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.

(c) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the

value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest.

COMMENT

This section authorizes the creation of trusts for animals. To avoid the common law conclusion that such trusts were invalid because there was no person capable of enforcement, the settlor in the terms of the trust, otherwise the court, is authorized to appoint a person to enforce the trust. Because trusts for animals are sometimes overfunded, provision is made for distributing any excess.

Section 409. [Non-charitable Trust Without Ascertainable Beneficiary.] Except as otherwise provided in section 408 or by another statute, the following rules apply:

(1) A trust may be created for a non-charitable purpose without a definite or definitely ascertainable beneficiary or for a non-charitable but otherwise valid purpose to be selected by the trustee.

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

COMMENT

This section authorizes so-called "purpose trusts" which are noncharitable trusts without an identifiable beneficiary. This is a change of Massachusetts law. The Committee deleted a term limit of twenty-one (21) years from subsection (1) of the Uniform Code. The Committee expressly decided not to adopt perpetual trusts. The common law rule against perpetuities will apply to trusts authorized under Section 409 (trusts with stated or reasonably inferred measuring lives will be governed by the common law rule, and trusts without such measuring lives will be limited by the ninety year statutory rule against perpetuities with "wait and see," or a termination provision included in the trust).

Section 410. [Modification or Termination of Trust; Proceedings for Approval or Disapproval.]

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

(b) A proceeding to approve or disapprove a proposed modification or termination under sections 411 through 416, or trust combination or division under section 417, may be commenced by a trustee or beneficiary, and a proceeding to approve or disapprove a proposed modification or termination under section 411 may be commenced by the settlor.

COMMENT

This section lists the circumstances where termination of the trust is automatic. The following Sections 411 through 415 list situations where termination requires some action, either by the court, the trustee, or the beneficiaries. Subsection (b) of this section provides that court action to approve or disapprove a proposed modification or termination under Sections 411 through 415 may be commenced by a trustee or a beneficiary, and a proceeding to approve or disapprove modification or termination of a non-charitable trust by consent under Section 411 may be brought by the settlor. The Committee eliminated from this section a provision in the Uniform Code giving the settlor of a charitable trust the power to maintain a proceeding to modify the trust under Section 413.

Section 411. [Modification or Termination of Non-charitable Irrevocable Trust by Consent.]

(a) If, upon petition, the court finds that the settlor and all beneficiaries consent to the modification or termination of a non-charitable irrevocable trust, the court may approve the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust.

(b) A non-charitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A non-charitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.

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

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

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

COMMENT

Section 411 attempts to broaden and clarify the opportunities for trust modification or termination where certain parties consent to the modification or termination. The Committee rejected the Uniform Code's attempt to broaden modification or termination of a trust without court approval where all beneficiaries and the settlor consented even if the modification or termination was inconsistent with a

material purpose of the trust.

As modified by the Committee, a trust may be modified or terminated even if the modification or termination is inconsistent with a material purpose of the trust with court consent if the beneficiaries and the settlor consent. This is a broadening of prior Massachusetts law. Consistent with current Massachusetts law, a noncharitable irrevocable trust may be terminated or modified upon consent of all the beneficiaries if not inconsistent with a material purpose of the trust. *See Claflin v. Claflin*, 149 Mass. 19 (1889).

The Committee changed the Uniform Code section to retain current Massachusetts law that a spendthrift provision is a material purpose of a trust. The Committee also deleted a provision in the Uniform Code that would have allowed trust distribution upon termination to be based upon beneficiary agreement.

The Committee made two other changes in subsection (a), deleting a provision which would have allowed agent assent for incompetent settlors, and deleting a provision that application of the section would be limited to trusts created after the enactment of the Code.

Finally, subsection (e) provides that if all beneficiaries do not consent, the court may still approve the proposed modification or termination if the court is satisfied that the interests of nonconsenting beneficiaries are adequately protected.

Section 412. [Modification or Termination Because of Unanticipated Circumstances or Inability to Administer Trust Effectively.]

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

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

COMMENT

Subsection (a) is a change in Massachusetts law. This provision authorizes the court to modify even the dispositive provisions of a trust on account of unanticipated circumstances or impracticability. This clearly extends to all trusts by statute the concept of substantive deviation that has long been the law with regard to charitable trusts in Massachusetts, and that has started to gain acceptance in the courts. Subsection (b) relating to modification of administrative terms restates current Massachusetts law. The Committee deleted subsection (c) that would have allowed the trustee of such a terminated trust to distribute the trust property "in a manner consistent with the purposes of the trust". Presumably in connection with the decision, the court will determine how the property should be distributed if the Trust is unclear.

Section 413. [Reserved.]

COMMENT

The Committee deleted Section 413 of the Uniform Code relating to the doctrine of cy pres, leaving existing law in place.

Section 414. [Modification or Termination of Uneconomic Trust.]

(a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value less than \$200,000 may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.

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

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

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

(e) Action may be taken under this section regardless of any spendthrift or similar protective provision.

COMMENT

The Committee increased the maximum market value for application of this termination provision for small trusts from \$50,000 to \$200,000, and added a provision (subsection (e)) that action may be taken under this section notwithstanding any spendthrift or similar protective provision. The court is given authority in its discretion to terminate trusts over the \$200,000 figure if it determines trust administration is uneconomic. This provision enhances present law by permitting a trustee to terminate an uneconomic trust without a court proceeding. It should be noted that a trustee must exercise this authority in good faith in the best interests of the beneficiaries and not solely to rid itself of small trusts.

Section 415. [Reformation to Correct Mistakes.] The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

COMMENT

This Section permits modification even if there is no ambiguity. Action requires the heightened standard of clear and convincing evidence of a mistake. This section applies the doctrine to testamentary trusts as well as inter vivos trusts, following Restatement of Property (Third) § 12.1. This provision is consistent with present

Massachusetts practice and removes any ambiguity as to Massachusetts black letter law.

Section 416. [Reserved.]

COMMENT

The Committee deleted Section 416 of the Uniform Code, which specifically authorizes a court to modify a trust to achieve the settlor's tax objectives, even if the reformation is retroactive. Aside from retroactive reformation, it was not clear to the Committee that this provision permits any relief in addition to that permitted under Section 415. As to retroactive reformation, it is not clear that a modification made after a taxable event, even if retroactive, would avoid adverse tax consequences.

Section 417. [Combination and Division of Trusts.] After notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trust.

COMMENT

This is an important change to Massachusetts law given the common need to divide trusts for tax reasons as well as reasons of administrative convenience.

ARTICLE 5

**CREDITOR'S CLAIMS;
SPENDTHRIFT AND DISCRETIONARY TRUSTS**

Section 501. [Rights of Beneficiary's Creditor or Assignee.] To the extent a beneficiary's interest is not subject to a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to such relief as is appropriate under the circumstances.

COMMENT

This section only applies where there is no spendthrift provision. The first sentence restates current Massachusetts law. The second sentence authorizes the court to limit the award to the creditor based upon equitable principles, for example, consideration of the needs of the beneficiary.

Section 502. [Spendthrift Provision.]

(a) A spendthrift provision in any instrument executed after the effective date of this chapter is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.

(b) A term of a trust providing that the interest of a beneficiary is held subject to a "spendthrift trust," or words of similar import, is sufficient

to restrain both voluntary and involuntary transfer of the beneficiary's interest.

(c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this article, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

COMMENT

This section changes current Massachusetts law. To be a valid spendthrift clause under this provision, it must prohibit both voluntary and involuntary transfers. Current Massachusetts law permits a settlor to prohibit involuntary transfers while permitting voluntary ones. The Committee felt Massachusetts should conform to the more common rule reflected in the Uniform Code. The new rule will be effective only with respect to instruments executed after the effective date of the Code.

Section 503. [Reserved.]

COMMENT

The Committee deleted Section 503, which would have changed Massachusetts law by creating spendthrift exceptions for certain preferred creditors, including children, spouses and former spouses with court orders against the beneficiary for support. The section would have also continued prior Massachusetts law creating an exception for a judgment creditor who had provided services for the protection of a beneficiary's interest in the trust.

Section 504. [Reserved.]

COMMENT

The Committee deleted Section 504, which, according to the official comments to the Uniform Code would have changed Massachusetts law relating to the "ability of a beneficiary's creditor to reach the beneficiary's discretionary trust interest, whether or not the trustee's discretion is subject to a standard."

Section 505. [Creditor's Claim Against Settlor.]

(a) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

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

(2) 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 and, 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. Trust property shall not be considered distributable to or for

the settlor's benefit solely because the trustee is authorized by the terms of the trust to reimburse the settlor for any tax on trust income or capital gain that is payable by the settlor under the law imposing such tax; no creditor or assignee of the settlor of an irrevocable trust shall be entitled to reach any trust property based on the discretionary authority described in this sentence.

(3) 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, 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 inadequate to satisfy those claims, expenses, and allowances.

COMMENT

Subsection (a)(1) sets out the traditional rule that the assets of a revocable trust are subject to the claims of the settlor's creditors during the settlor's lifetime. Subsection (a)(2) provides that , the settlor's creditors may reach the maximum amount that may be distributed to or for the settlor's benefit from an irrevocable trust.. The Committee added a provision that trust property should not be considered distributable to the settlor solely because of authorization to reimburse the settlor for any tax paid on ordinary income or capital gain earned by a grantor trust. This addition, based on N.Y. E.P.T.L. § 7-3.1, is intended to ensure that a discretionary right of reimbursement does not cause a grantor trust to be subject to the claims of the settlor's creditors, which would cause estate inclusion under the rationale announced in Rev. Rul. 2004-64.

Subsection (a)(3) applies after the settlor's death, subject to the settlor's right to direct the source from which liabilities will be paid, to authorize recovery from the assets of a trust revocable at the date of the settlor's death for claims of the settlor's creditors, funeral expenses of the settlor and statutory allowances to the extent the probate estate is inadequate. Many trusts already contain provisions on this subject. The Committee eliminated costs of administration of the settlor's estate from the scope of this provision.

The Committee deleted subsection (b), which would have changed current Massachusetts law relating to creditor rights against property subject to powers of withdrawal and with respect to lapsing, released or waived powers of withdrawal.

Section 506. [Overdue Distribution.]

(a) In this section, "mandatory distribution" means a distribution of income or principal which the trustee is required to make to a beneficiary under the terms of the trust, including a distribution upon termination of the trust. The term does not include a distribution subject to the exercise of the trustee's discretion even if (1) the discretion is expressed in the form of a standard of distribution, or (2) the terms of the trust authorizing a distribution couple language of discretion with language of direction.

(b) Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if

the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.

COMMENT

This section prevents a trustee from defeating a beneficiary's creditors by delaying required distributions beyond a reasonable administrative period.

Section 507. [Personal Obligations of Trustee.] Trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.

COMMENT

This section makes clear that trust property is protected against claims of the trustee's personal creditors. This is consistent with current Massachusetts law.

ARTICLE 6

REVOCABLE TRUSTS

Section 601. [Reserved.]

COMMENT

The Committee deleted Section 601 of the Uniform Act. The Committee thought it would be better not to make any change to current Massachusetts law as to a person's capacity to create, amend or revoke a revocable trust. The eliminated section would have provided that the standard should be the same as that used to determine capacity to make a will.

Section 602. [Revocation or Amendment of Revocable Trust.]

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

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

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

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

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

(c) The settlor may revoke or amend a revocable trust:

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

(2) if the terms of the trust do not provide a method, by any method manifesting clear and convincing evidence of the settlor's intent.

(d) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.

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

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

COMMENT

This section changes current Massachusetts law. Section 602 reverses the present Massachusetts presumption as to the revocability of a trust. Under this new provision, a trust is revocable unless the instrument specifically provides otherwise. This change is applicable only to instruments executed after the effective date of the Code.

Committee modified the Uniform Code to limit amendment or revocation by complying with the terms of the instrument (rather than by "substantial" compliance as provided for in the Uniform Code) or, if the terms of the trust do not provide a method, by any other method manifesting clear and convincing evidence of the settlor's intent. The Committee deleted a provision that would have allowed modification or termination of a revocable trust by a settlor's later executed will.

The Committee revised subsection (3)(e) to provide that a revocation or amendment executed by an agent acting under a durable power of attorney is effective only if the action is authorized under the terms of both the trust instrument and the power of attorney.

The Committee deleted Uniform Code subsection (3)(f) relating to guardians and conservators exercising settlor powers, preserving current Massachusetts law.

Section 603. [Settlor's Powers; Powers of Withdrawal.]

(a) While a trust is revocable and the settlor has capacity to revoke the trust, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

(b) During the period the power may be exercised, the holder of a non-lapsing power of withdrawal shall be treated for purposes of this section as if he or she were the settlor of a revocable trust to the extent of the property subject to the power.

COMMENT

The Committee adopted subsection (a) with the Uniform Code's optional language limiting the subsection's applicability to situations where the settlor has capacity to revoke the trust. This is current Massachusetts law. The Committee revised the Uniform Code's subsection (b) to only treat as a settlor of a revocable trust for the purposes the section the holder of a non-lapsing withdrawal power (as opposed to any withdrawal power during the time that the power was outstanding).

Section 604. [Limitation on Action Contesting Validity of Revocable Trust; Distribution of Trust Property.]

(a) A person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of:

(1) one year after the settlor's death; or

(2) 60 days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding.

(b) Upon the death of the settlor of a trust that was revocable at the settlor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. The trustee is not subject to liability for doing so unless:

(1) the trustee knows of a pending judicial proceeding contesting the validity of the trust; or

(2) a potential contestant has notified the trustee of a possible judicial proceeding to contest the trust and a judicial proceeding is commenced within 60 days after the contestant sent the notification.

(c) A beneficiary of a trust that is determined to have been invalid is liable to return any distribution received.

COMMENT

This section provides a time limit for contesting the validity of a revocable trust after the settlor's death. The Committee thought this an important provision. The

Committee shortened the limitation periods from three years to one year from the settlor's death if no notice is given. The Committee also shortened the limitation period where notice is given as provided in subsection (a)(2) 120 days to 60 days following notice.

These periods do not need to cause any delay in distribution of the trust. Under subsection (b) the trustee may distribute trust property after the settlor's death in accordance with the terms of the trust, and is protected in doing so, unless the trustee knows of a pending lawsuit challenging the validity of the trust or has been notified of a potential judicial challenge (which is actually brought within 60 days of the notice).

Note that under subsection (c), a beneficiary of what turns out to be an invalid trust is required to return any distribution received. The question of whether interest or income restitution is required is not addressed by the Code.

ARTICLE 7

OFFICE OF TRUSTEE

Section 701. [Accepting or Declining Trusteeship.]

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

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

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

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

(c) A person designated as trustee, without accepting the trusteeship, may, but need not:

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

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

COMMENT

Subsection (a) restates current Massachusetts law. Subsection (b) was adopted without change from the Uniform Code. The Committee modified subsection (c) to protect the "good Samaritan" potential trustee. Subsection (c) permits preliminary action

by a trustee without that act constituting acceptance to (1) preserve trust property (if sending thereafter a rejection of trusteeship within a reasonable time), or (2) inspect or investigate trust property to consider potential liability under environmental law or other purposes. The Committee added to the word “may” the words “but need not” to make clear that this was not a mandatory obligation and that no liability should attach to the decision to preserve or investigate or not to pursue those actions.

Section 702. [Duty to Provide Bond.]

In the case of a testamentary trust, a trustee shall furnish a bond for the performance of the trustee’s fiduciary duties and a surety shall be required unless waived by the terms of the trust, or found by the court to be not necessary to protect the interests of the beneficiaries. On petition of the trustee or other interested person the court may excuse a requirement of bond, reduce the amount of the bond, release the surety, or permit the substitution of another bond with the same or different sureties. When the instrument creating the trust exempts the trustee from furnishing a bond or limits the amount thereof, or the court determines that the bond is insufficient, the court may if it concludes that a bond be necessary or that a bond of a larger amount is necessary, require the furnishing of such bond.

COMMENT

The Committee initially deleted Section 702 of the Uniform Code because Massachusetts law adequately addressed bonds. However, the Massachusetts Uniform Probate Code revised the rules for bonds in Article VII, and because those provisions will be repealed upon adoption of the Code, the bond provisions of the Massachusetts Uniform Probate Code have been moved to Section 702 to preserve them.

Section 703. [Co-Trustees.]

(a) Co-trustees who are unable to reach a unanimous decision may act by majority decision.

(b) If a vacancy occurs in a co-trusteeship, the remaining co-trustees may act for the trust.

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

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

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

(f) Each trustee shall exercise reasonable care to:

- (1) prevent a co-trustee from committing a breach of trust; and**
- (2) compel a co-trustee to redress a breach of trust.**

COMMENT

This section is a change to current Massachusetts law with respect to private trusts. It reverses the presumption that trustees must act unanimously unless otherwise provided in the instrument. This presumption has always been the law in Massachusetts with respect to charitable trusts, and now applies to all trusts unless otherwise directed in the instrument. This section will apply to all trusts, not just those created after the effective date of the Code. The rule applies where co-trustees are unable to reach a unanimous decision, implying that the trustees must confer and attempt to reach a conclusion, and that two trustees cannot simply act alone without the third trustee.

Subsection (c) restates the general rule that a co-trustee must participate in the trustee function. The Committee deleted subsection (e) from the Uniform Code which would have prevented delegation under some circumstances. Subsection (f) provides that a trustee should use reasonable care to prevent a co-trustee from committing a breach of trust, and to compel a co-trustee to redress a breach of trust. The Committee removed the word “serious” before “breach of trust” in subsections (f) and (g) because the Committee felt the “serious breach of trust” standard was too lenient. Having declined to include the “serious” standard in subsection (g), it was deleted as being meaningless. Thus, there is no protection for a dissenting trustee where the majority acts in breach of trust.

Section 704. [Vacancy in Trusteeship; Appointment of Successor.]

(a) A vacancy in a trusteeship occurs if:

- (1) a person designated as trustee rejects the trusteeship;**
- (2) a person designated as trustee cannot be identified or does not exist;**
- (3) a trustee resigns;**
- (4) a trustee is disqualified or removed;**
- (5) a trustee dies; or**
- (6) a guardian or conservator is appointed for an individual serving as trustee.**

(b) If one or more co-trustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustees.

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

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

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

(3) by a person appointed by the court.

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

COMMENT

The Committee initially deleted Section 704 of the Uniform Trust Code relating to successor trustee provisions to preserve current Massachusetts law. Current Massachusetts law is now found in the Massachusetts Uniform Probate Code, in Article VII of that statute. Because the successor trustee provisions in Article VII will be repealed upon enactment of this Code, the provisions have now been inserted here.

Section 705. [Resignation of Trustee.]

(a) A trustee may resign:

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

(2) with the approval of the court.

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

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

COMMENT

Under current Massachusetts law, a trustee may not resign from a trust without an affirmative power in the trustee to resign unless a court approves the resignation. Most trust instruments permit trustees to resign without judicial approval. The Committee wanted to make it easier for trustees to resign in the absence of specific authorization, particularly for trustees of revocable trusts. The Committee modified subparagraph (a)(1) as to who must receive notice of a resignation

Section 706. [Removal of Trustee.]

(a) The settlor, a co-trustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.

(b) The court may remove a trustee if:

- (1) the trustee has committed a serious breach of trust;**
 - (2) lack of cooperation among co-trustees substantially impairs the administration of the trust;**
 - (3) because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or**
 - (4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable co-trustee or successor trustee is available.**
- (c) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under section 1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries.**

COMMENT

The Committee favored the ability to remove trustees where the qualified beneficiaries were in unanimous agreement. Many trusts, particularly older trusts, do not contain removal powers. Subsection (b)(4) is a change of Massachusetts law. A corporate reorganization or merger of an institutional trustee is not itself a material change of circumstances if it does not affect the service provided to the individual trust account.

Section 707. [Delivery of Property by Former Trustee.]

A trustee who has resigned or been removed shall proceed expeditiously to deliver the trust property within the trustee's possession to the co-trustee, successor trustee, or other person entitled to it.

COMMENT

Section 707 restates current Massachusetts law. The Committee deleted subsection (a) of the Uniform Code, not wanting to create an affirmative duty while handing off the trusteeship. A trustee has powers necessary to protect the property when leaving office in order to deliver it to a successor.

Section 708. [Compensation of Trustee.]

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

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

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

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

COMMENT

This provision is consistent with present Massachusetts law. Note that the beneficiaries may set trustee compensation under a non-judicial agreement under Section 111(d)(4).

Section 709. [Reimbursement of Expenses.]

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

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

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

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

COMMENT

This provision is consistent with present Massachusetts law.

ARTICLE 8

DUTIES AND POWERS OF TRUSTEE

Section 801. [Duty to Administer Trust.] Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this chapter.

COMMENT

This Section restates current Massachusetts law.

Section 802. [Duty of Loyalty.]

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

(b) Subject to the rights of persons dealing with or assisting the trustee as provided in section 1012, a sale, encumbrance, or other transaction involving the investment or management of trust property

entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:

- (1) the transaction was authorized by the terms of the trust;
- (2) the transaction was approved by the court;
- (3) the beneficiary did not commence a judicial proceeding within the time allowed by section 1005;
- (4) the beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with section 1009; or
- (5) the transaction involves a contract entered into or claim acquired by the trustee before the person became a trustee.

(c) A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:

- (1) the trustee's spouse; or
 - (2) the trustee's descendants, siblings, parents, or their spouses.
- (d) A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.

(e) An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the prudent investor rule of chapter 203C. In addition to its compensation for acting as trustee, the trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust. If the trustee receives compensation from the investment company or investment trust for providing investment advisory or investment management services, the trustee must at least annually notify the persons entitled under section 813 to receive a copy of the trustee's annual report of the rate and method by which that compensation was determined.

(f) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries.

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

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

- (2) payment of reasonable compensation to the trustee;
- (3) a transaction between a trust and another trust, decedent's estate, or conservatorship of which the trustee is a fiduciary or in which a beneficiary has an interest;
- (4) a deposit of trust money in a regulated financial-service institution operated by the trustee; or
- (5) an advance or loan by the trustee of money to the trust for a proper trust purpose.

COMMENT

The duty of loyalty to the interests of the beneficiaries is among the most fundamental and important of the duties of the trustees. This section sets forth rules of voidability of transactions involving conflict of interest. The Committee deleted from subsection (b)(5) as reference to a person "contemplating" becoming a trustee. The Committee deleted from the list of transactions presumed to be affected by a conflict those with an agent or attorney of the trustee, or a corporation or other entity in which the trustee had an interest that might affect the trustee's best judgment. The Committee also deleted subsection (d) from the Uniform Code provision, relating to transactions between trustee and beneficiary not concerning trust property.

Subsection (e) provides an exception to the duty of loyalty for investment in a corporate trustee's proprietary investment vehicles organized as investment companies or investment trusts, in accordance with widespread statutory enactments. Note that this exception is only with respect to the duty of loyalty and leaves open the question whether such an investment complies with prudent investor responsibilities. The second sentence of subsection (f) of the Uniform Code was deleted as it limited its applicability to corporations where the trust was the sole shareholder. The Committee deleted subsection (i) of the Uniform Code as potentially dangerous and unlikely to be used.

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

COMMENT

This section restates current Massachusetts law.

Section 804. [Prudent Administration.] A trustee shall administer the trust as a prudent person would, considering the purposes, terms, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

COMMENT

The Committee conformed this section to the terms of the Massachusetts Prudent Investor Act, deleting "distributional requirements" from the trustee's required considerations.

Section 805. [Costs of Administration.] In administering a trust, the trustee may incur only costs that are appropriate and reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.

COMMENT

The Committee conformed this section to the terms of the Massachusetts Prudent Investor Act, adding the qualification “appropriate” to the requirement for costs in administering a trust.

Section 806. [Trustee’s Skills.] A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee’s representation that the trustee has such special skills or expertise, shall have a duty to use such special skills or expertise.

COMMENT

The Committee conformed this section to the terms of the Massachusetts Prudent Investor Act by adding that a trustee claiming special skills shall have a duty to use those skills.

Section 807. [Delegation by Trustee.]

(a) A trustee may delegate duties and powers if it is prudent to do so. The trustee shall exercise reasonable care, skill, and caution in:

(1) selecting an agent;

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

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

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

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

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

COMMENT

The Committee conformed this section to the terms of the Massachusetts Prudent Investor Act, by changing the Code provision “that a prudent trustee of comparable skills could properly delegate under the circumstances” to “if it is prudent to do so.”

Section 808. [Powers to Direct.]

(a) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.

(b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

(c) A person who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.

COMMENT

This section protects a trustee in certain circumstances when following the direction of a non-trustee and imposes a fiduciary duty upon that non-trustee..

The Committee deleted the Uniform Act's subsection (c), providing that the terms of the trust might authorize the trustee or some other person to direct modification or termination of the trust.

Section 809. [Control and Protection of Trust Property.] A trustee shall take reasonable steps to take control of and protect the trust property.

COMMENT

This provision is consistent with present Massachusetts law.

Section 810. [Recordkeeping and Identification of Trust Property.]

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

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

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

COMMENT

The Committee deleted the Uniform Code's subsection (c), which required a trustee to designate trust property on records maintained by a third party as trust property, as impractical.

Section 811. [Enforcement and Defense of Claims.] A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.

COMMENT

This provision is consistent with present Massachusetts law.

Section 812. [Collecting Trust Property.] A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee, and to redress a breach of trust known to the trustee to have been committed by a former trustee.

COMMENT

This provision is consistent with present Massachusetts law. The Committee believes that the “reasonable” standard allows a trustee not to pursue an uneconomic claim.

Section 813. [Duty to Inform and Report.]

(a) A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust. Unless unreasonable under the circumstances, a trustee shall promptly respond to a qualified beneficiary’s request for information related to the administration of the trust.

(b) Within 30 days after acceptance of the trust or the trust becomes irrevocable, whichever is later, the trustee shall inform in writing the qualified beneficiaries of the trustee’s name and address. The information shall be delivered or sent by ordinary first class mail.

(c) A trustee shall send an account to the distributees and permissible distributees of trust income or principal, and to other qualified beneficiaries who request it, at least annually and at the termination of the trust. The account may be formal or informal, but shall include information relating to the trust property, liabilities, receipts, and disbursements, including the amount of the trustee’s compensation, a listing of the trust assets and, if feasible, their respective market values.

(d) A beneficiary may waive the right to a trustee’s account or other information otherwise required to be furnished under this section. A beneficiary, with respect to future accounts and other information, may withdraw a waiver previously given. A waiver of a trustee’s account or other information does not relieve the trustee from accountability and potential liability for matters that the account or other information would have disclosed.

COMMENT

The Committee substantially pared down the notice and information provisions of this section, and initially deleted the requirements that a trustee (1) notify qualified beneficiaries within 30 days of appointment and (2) furnish a copy of the trust instrument

on request. However, because the Massachusetts Uniform Probate Code was subsequently enacted and contained provisions similar to those the Committee deleted from Section 813, the Committee reconsidered its position and chose to add paragraph (b) (as modified) to the section. That paragraph requires notice to qualified beneficiaries within 30 days of appointment (or when the trust becomes irrevocable), but the notice need contain only the name and address of the trustee. Although the Committee did not restore the requirement that the trustee furnish a copy of the trust instrument upon request, the Committee recognizes that such a requirement is implicit in the language of paragraph (a) absent unusual circumstances or a prohibition in the trust instrument itself.

Subsection (d) permits a beneficiary to waive the right to an account, and a waiver previously given may be withdrawn. The Committee added a provision to clarify that a waiver does not relieve the trustee from accountability and potential liability for matters the account or other information would have disclosed.

Section 814. [Discretionary Powers; Tax Savings.]

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

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

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

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

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

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

(1) a power held by the settlor’s spouse who is the trustee of a trust for which a marital deduction was previously allowed; or

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

COMMENT

This section states the Massachusetts rule that no matter how broad the discretion, it is never absolute and be exercised in a fiduciary manner in good faith and with regard to the purposes of the trust and the interest of the beneficiaries.

Subsection (b) reinforces Massachusetts case law to provide a savings clause, to prevent inadvertent violation of tax rules by creating an ascertainable standard for trustee distribution to the trustee personally, and a prohibition of trustee discretionary distributions to satisfy an obligation of support. The statute goes on to provide that the prohibited exercise could be determined by a majority of the remaining trustees, or by a special fiduciary appointed by the court.

Subsection (d) provides that the savings clauses do not apply to the settlor's spouse where a marital deduction was allowed for the trust or to any trust that may be revoked or amended by its settlor. The Committee deleted from subsection (d)(1) references to specific Internal Revenue Code provisions to conform to Massachusetts legislative practice. The Committee deleted from subsection (d) a third exception, for trusts to which annual exclusion gifts could be made pursuant to I.R.C. § 2503(c). The Uniform Code included that third exception out of concern that the savings clause could constitute a substantial restriction on the use of the trust property, which could disqualify the trust for the annual exclusion under § 2503(c). The Committee is not convinced that the savings clause would disqualify a gift for the annual exclusion, and thought it more important that the savings clause apply to a minority trust to avoid unintended estate inclusion.

Section 815. [General Powers of Trustee.]

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

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

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

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

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

(C) any other powers conferred by this chapter.

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

COMMENT

This section grants trustees the broadest possible powers consistent with their duties under law and under the trust instrument.

Section 816. [Specific Powers of Trustee.] Without limiting the authority conferred by section 815, a trustee may:

(1) collect trust property and accept or reject additions to the trust property from a settlor or any other person;

(2) acquire or sell property, for cash or on credit, at public or private sale;

(3) exchange, partition, or otherwise change the character of trust property;

(4) deposit trust money in an account in a regulated financial-service institution;

(5) borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;

(6) with respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, or other form of business or enterprise, continue the business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization or contributing additional capital;

(7) with respect to stocks or other securities, exercise the rights of an absolute owner, including the right to:

(A) vote, or give proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement;

(B) hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;

(C) pay calls, assessments, and other sums chargeable or accruing against the securities, and sell or exercise stock subscription or conversion rights; and

(D) deposit the securities with a depository or other regulated financial-service institution;

(8) with respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries;

(9) enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;

(10) grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;

(11) insure the property of the trust against damage or loss and insure the trustee, the trustee's agents, and beneficiaries against liability arising from the administration of the trust;

(12) abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration;

(13) with respect to possible liability for violation of environmental law:

(A) inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;

(B) take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of governmental enforcement;

(C) decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;

(D) compromise claims against the trust which may be asserted for an alleged violation of environmental law; and

(E) pay the expense of any inspection, review, abatement, or remedial action to comply with environmental law;

(14) pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust;

(15) pay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust;

(16) exercise elections with respect to federal, state, and local taxes;

(17) select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the trustee, exercise rights thereunder, including exercise of the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds;

(18) make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and

reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans;

(19) pledge trust property to guarantee loans made by others to the beneficiary;

(20) appoint a trustee to act in another jurisdiction with respect to trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, require that the appointed trustee furnish security, and remove any trustee so appointed;

(21) pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by:

(A) paying it to the beneficiary's conservator or, if the beneficiary does not have a conservator, the beneficiary's guardian;

(B) paying it to the beneficiary's custodian under chapter 201A or custodial trustee under part 5 of Article VII of chapter 190B, and, for that purpose, creating a custodianship or custodial trust;

(C) if the trustee does not know of a conservator, guardian, custodian, or custodial trustee, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf; or

(D) managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution;

(22) on distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation;

(23) resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution;

(24) prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;

(25) sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's powers;

(26) establish or continue title-holding entities, including so-called "nominee trusts" for the purposes of holding legal title to any portion or all of the trust property without the need to record or make public the terms of the trust; and

(27) 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.

COMMENT

This section enumerates specific powers commonly found in trust instruments. the Committee inserted one additional power, item (26), permitting a trustee to establish “nominee trusts” or other entities for the purpose of holding legal title to any portion or all of the trust property.

Section 817. [Distribution upon Termination.]

(a) Upon termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. The right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within 30 days after the proposal was sent but only if the proposal (i) informed the beneficiary of the right to object and of the time allowed for objection and (ii) provided the beneficiary with sufficient material facts to enable the beneficiary to evaluate the proposal.

(b) Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.

COMMENT

This Section allows a trustee to send a proposal for distribution, and if a beneficiary does not object, gives the trustee protection against a later challenge by the beneficiary. The Committee was concerned that the beneficiary have enough information to evaluate the proposal, and so added the language at the end of Subsection (a) requiring provision of sufficient material facts to evaluate the proposal. Subsection (c), dealing with releases, was deleted as redundant in view of Section 1009 of the Code.

ARTICLE 9

[RESERVED]

COMMENT

The Uniform Law Commission recommends states reenact their version of the Uniform Prudent Investor Act in Article 9. The Committee does not recommend reenactment of the Massachusetts Prudent Investor Act in this Article, and instead has reserved the Article for potential future use.

ARTICLE 10

LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH TRUSTEE

Section 1001. [Remedies for Breach of Trust.]

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

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

- (1) compel the trustee to perform the trustee's duties;
- (2) enjoin the trustee from committing a breach of trust;
- (3) compel the trustee to redress a breach of trust by paying money, restoring property, or other means;
- (4) order a trustee to account;
- (5) appoint a special fiduciary to take possession of the trust property and administer the trust;
- (6) suspend the trustee;
- (7) remove the trustee as provided in section 7-308 of chapter 190B;
- (8) reduce or deny compensation to the trustee;
- (9) subject to section 1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or
- (10) order any other appropriate relief.

COMMENT

The Committee believes this Section restates current Massachusetts law as these remedies are believed to be already held by Massachusetts probate judges.

Section 1002. [Reserved.]

COMMENT

The Committee deleted Section 1002 of the Uniform Code regarding provisions for damages for breach of trust, leaving present law unchanged.

Section 1003. [Reserved.]

COMMENT

The Committee deleted Section 1003 of the Uniform Code regarding provisions for damages in absence of breach of trust, leaving present law unchanged.

Section 1004. [Reserved.]

COMMENT

The Committee deleted Section 1004 of the Uniform Code regarding provisions for damages award of attorney fees in actions relating to administration of trusts, leaving present law unchanged.

Section 1005. [Limitation of Action Against Trustee.]

(a) Unless previously barred by adjudication, consent or limitation, any claim against a trustee for breach of trust is barred as to any beneficiary who has received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the claim is commenced within six months after receipt of the final account or statement. In any event and notwithstanding lack of full disclosure a trustee who has issued a final account or statement received by the beneficiary and has informed the beneficiary of the location and availability of records for examination by the beneficiary is protected after three years. A beneficiary is deemed to have received a final account or statement if, being an adult, it is received by the beneficiary personally or if, being a minor or disabled person, it is received by the beneficiary's representative as described in article 3.

(b) Where a claim is not barred by the provisions of subsection (a), a beneficiary may not commence a proceeding against a trustee for breach of trust more than three years after the date the beneficiary or a representative of the beneficiary knew or reasonably should have known of the existence of a potential claim for breach of trust.

(c) If subsections (a) and (b) do not apply, a judicial proceeding against a trustee for breach of trust must be commenced within five years after the first to occur of:

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

COMMENT

As revised by the Committee, the limitations period includes a provision that had been enacted in Article VII of the Massachusetts Uniform Probate Code—a beneficiary has six months to bring a claim as to any matter disclosed in an account. If there is no

such disclosure, the period is three years from the date the beneficiary knew or reasonably should have known of the potential claim. Otherwise a judicial proceeding against the trustee must be made within five years of the first to occur of (a) removal, resignation or death of the trustee, (b) termination of the beneficiary's interest in the trust, or (c) termination of the trust.

Section 1006. [Reliance on Trust Instrument.] A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

COMMENT

This Section restates current Massachusetts law.

Section 1007. [Event Affecting Administration or Distribution.] If the happening of an event or change of status, including, but not limited to: birth, adoption, 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 or change of status is not liable for a loss resulting from the trustee's lack of knowledge.

COMMENT

This Section is consistent with current Massachusetts law. The Committee made slight changes to the wording of the Uniform Code Section to make it clear that the list of events was not exclusive.

Section 1008. [Exculpation of Trustee.]

(a) A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:

(1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or

(2) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

(b) An exculpatory term drafted or caused to be drafted by the trustee may be invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that its existence and contents were adequately communicated to the settlor.

COMMENT

This provision is generally consistent with present Massachusetts law. The Committee substantially changed the wording of subsection (b) of the Uniform Code. As under present law, an exculpatory clause inserted by the draftsman trustee is valid only

if the draftsman informs the settlor of the clause and its meaning. *See Rutanen v. Ballard*, 424 Mass. 723 (1997).

Section 1009. [Beneficiary's Consent, Release, or Ratification.] A trustee is not liable to a beneficiary for breach of trust if the beneficiary, while having capacity, in writing, consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:

(1) the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or

(2) at the time of the consent, release, or ratification, the beneficiary did not know of the material facts relating to the breach.

COMMENT

The Committee required that any waiver be in writing. It deleted a requirement that the beneficiary know of the beneficiary's rights at the time of the waiver, leaving in the requirement that the beneficiary know of the material facts relating to the breach.

Section 1010. [Limitation on Personal Liability of Trustee.]

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

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

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

COMMENT

This section is much like G.L. c. 203, § 14A (repealed upon enactment of the Massachusetts Uniform Probate Code), in reversing the common law presumption that the trustee is personally liable for actions taken in the trustee's official capacity. Subsection (b) adds helpful protection for trustees for environmental problems.

Section 1011. [Interest as General Partner.]

(a) Except as otherwise provided in subsection (c) or unless personal liability is imposed in the contract, a trustee who holds an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership after the

trust's acquisition of the interest if the fiduciary capacity was disclosed in the contract or in a statement previously filed pursuant to chapter 108A or chapter 109.

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

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

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

COMMENT

This section goes beyond present Massachusetts law and is helpful to trustees.

Section 1012. [Protection of Person Dealing with Trustee.]

(a) A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers is protected from liability as if the trustee properly exercised the power.

(b) A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise.

(c) A person who in good faith delivers assets to a trustee need not ensure their proper application.

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

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

COMMENT

Persons dealing with trustees in good faith, under reasonable standard of fair dealing, and without knowledge the trustee is exceeding the trustee's authority, are protected, and have no duty to inquire into the trustee's authority or to see to application of funds or assets delivered to the trustee.

Section 1013. [Certification of Trust.]

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

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

(2) the identity of the settlor;

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

(4) the powers of the trustee;

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

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

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

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

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

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

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

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

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

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

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

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

COMMENT

This helpful provision should reduce demands for copies of the trust instrument. It will protect those in good faith relying on a certification. It provides that a person making a demand for the trust instrument in addition to a certification may be liable in damages if a court finds there was a lack of good faith in demanding the instrument.

Effective Date and Transition Rules

The Committee recommends that the Code become effective no less than six months after it is enacted in order to give practitioners and trustees ample time to become acquainted with its provisions. In addition, the Committee recommends that the enacting legislation include the following transition provision:

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

(1) this act shall apply to all trusts created before, on, or after the effective date;

(2) this act shall apply to all judicial proceedings concerning trusts commenced on or after the effective date;

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

(4) an act done before the effective date shall not be affected by this act.

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

Certain provisions of the Code—Section 502’s new rule requiring that a spendthrift clause restrain both voluntary and involuntary alienation, and Section 602’s presumption that all trusts are revocable unless they say otherwise—specifically say they are applicable only to instruments executed after the effective date. All other provisions

are effective with respect to all trusts on the effective date of the Code, regardless of when they were created.

Conclusion

The Committee recommends enactment of the Massachusetts Uniform Trust Code. The Committee believes the Code will simplify and make more accessible the law of trusts in Massachusetts while leaving our vast common law on the subject largely intact.

Respectfully submitted,

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