ARTICLE 7

South Carolina Trust Code

Editor’s Note

2013 Act No. 100, Section 4, provides as follows:

“SECTION 4. (A) This act [amending Articles 1, 2, 3, 4, 6, and 7] takes effect on January 1, 2014.

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

“(1) this act applies to any estates of decedents dying thereafter and to all trusts created before, on, or after its effective date;

“(2) the act applies to all judicial proceedings concerning estates of decedents and trusts commenced on or after its effective date;

“(3) this act applies to judicial proceedings concerning estates of decedents and trusts commenced before its effective date unless the court finds that application of a particular provision of this act 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or prejudice the rights of the parties, in which case the particular provision of this act does not apply and the superseded law applies;

“(4) subject to item (5) and subsection (C) of this section, any rule of construction or presumption provided in this act applies to governing instruments executed before the effective date of the act unless there is a clear indication of a contrary intent in the terms of the governing instrument; and

“(5) an act done and any right acquired or accrued before the effective date of the act is not affected by this act. Unless otherwise provided in this act, any right in a trust accrues in accordance with the law in effect on the date of the creation of a trust and a substantive right in the decedent’s estate accrues in accordance with the law in effect on the date of the decedent’s death.

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other statute before the effective date of the act, that statute continues to apply to the right even if it has been repealed or superseded.”

CROSS REFERENCES

Powers of conservator in administration, see Section 62‑5‑422.

Part 1

General Provisions and Definitions

General Comment

The South Carolina version of the Uniform Trust Code is referred to as the South Carolina Trust Code or sometimes the SCTC or sometimes the Code throughout this Article. The Uniform Trust Code is sometimes referred to as the UTC. The South Carolina Probate Code, South Carolina Code Ann. Section 62‑1‑100 et seq., is sometimes referred to as the SCPC. The sections of the South Carolina Trust Code are codified at Title 62, Article 7 and consequently are a part of the comprehensive South Carolina Probate Code. Depending on context, general references to “Article” in the UTC Comments may correlate to “Part” in the SCTC.

As with the UTC, the SCTC is primarily a default statute. Most of the Code’s provisions can be overridden in the terms of the trust. The provisions not subject to override are scheduled in Section 62‑7‑105(b). These include the duty of a trustee to act in good faith and with regard to the purposes of the trust, public policy exceptions to enforcement of spendthrift provisions, the requirements for creating a trust, and the authority of the court to modify or terminate a trust on specified grounds.

The remainder of the article specifies the scope of the Code (Section 62‑7‑102), provides definitions (Section 62‑7‑103), and collects provisions of importance not amenable to codification elsewhere in the SCTC. Sections 62‑7‑106 and 62‑7‑107 focus on the sources of law that will govern a trust. Section 62‑7‑106 clarifies that despite the Code’s comprehensive scope, not all aspects of the law of trusts have been codified. The SCTC is supplemented by the common law of trusts and principles of equity. Section 62‑7 107 addresses selection of the jurisdiction or jurisdictions whose laws will govern the trust. A settlor, absent overriding public policy concerns, is free to select the law that will determine the meaning and effect of a trust’s terms.

Changing a trust’s principal place of administration is sometimes desirable, particularly to lower a trust’s state income tax. Such transfers are authorized in Section 62‑7‑108. The trustee, following notice to the “qualified beneficiaries,” defined in Section 62‑7‑103(12), may without approval of court transfer the principal place of administration to another State or country if a qualified beneficiary does not object and if the transfer is consistent with the trustee’s duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries. The settlor, if minimum contacts are present, may also designate the trust’s principal place of administration.

Sections 62‑7‑104 and 62‑7‑109 through 62‑7‑111 address procedural issues. Section 62‑7‑104 specifies when persons, particularly persons who work in organizations, are deemed to have acquired knowledge of a fact. Section 62‑7‑109 specifies the methods for giving notice and excludes from the Code’s notice requirements persons whose identity or location is unknown and not reasonably ascertainable. Section 62‑7‑110 allows beneficiaries with remote interests to request notice of actions, such as notice of a trustee resignation, which are normally given only to the qualified beneficiaries.

Section 62‑7‑111 ratifies the use of nonjudicial settlement agreements. While the judicial settlement procedures may be used in all court proceedings relating to the trust, the nonjudicial settlement procedures will not always be available. The terms of the trust may direct that the procedures not be used, or settlors may negate or modify them by specifying their own methods for obtaining consents. Also, a nonjudicial settlement may include only terms and conditions a court could properly approve.

Section 62‑7‑112 provides that South Carolina’s specific rules on construction of wills, whatever they may be, also apply to the construction of trusts.

**SECTION 62‑7‑101.** Short title.

This article may be cited as the South Carolina Trust Code. In this article, unless the context clearly indicates otherwise, “Code” means the South Carolina Trust Code.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

Effect of Amendment

The 2013 amendment substituted “means” for “shall mean”.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Contracts Section 23, Part Performance.

Forms

Am. Jur. Pl. & Pr. Forms Trusts Section 1 , Introductory Comments.

South Carolina Legal and Business Forms Section 16:2 , Legal Principles‑Types of Trusts.

South Carolina Legal and Business Forms Section 16:3 , Legal Principles‑Powers and Duties of Trustee.

South Carolina Legal and Business Forms Section 16:8 , Checklist‑Drafting Trust Instrument‑Generally.

South Carolina Legal and Business Forms Section 16:12 , Checklist‑Drafting General Trustee Powers.

South Carolina Legal and Business Forms Section 16:94 , Compensation of Trustee‑Fixed Sum.

South Carolina Legal and Business Forms Section 17:39 , Drafting Will.

South Carolina Legal and Business Forms Section 16:100 , Liability of Trustee‑Limitation on Trustee’s Liability‑General Provision.

South Carolina Legal and Business Forms Section 16:102 , Powers and Duties of Trustee‑General Provision.

South Carolina Legal and Business Forms Section 16:122 , Accounting‑Accounting Reports.

South Carolina Legal and Business Forms Section 17:151 , Executors‑Powers‑To Make Investments for Estate.

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 62, American Re‑Enactments of the English Statute.

Bogert ‑ the Law of Trusts and Trustees Section 973, Uniform Acts‑Beneficiaries’ Rights to Information and the Trustee’s Duty to Account.

Bogert ‑ the Law of Trusts and Trustees Section 974, Statutory Regulation of Accounts.

Restatement (3d) Property (Wills & Don. Trans.) Section 6.3, Gifts of Land.

Restatement (3d) Property (Wills & Don. Trans.) Section 6.3 TD 3, Gifts of Land.

LAW REVIEW AND JOURNAL COMMENTARIES

Federal Income Taxation of Insurance Trust: Review and Assessment. 13 SC LQ 141.

The Impact of Significant Substantive Provisions of the South Carolina Trust Code, 57 S.C. L. Rev. 137 (Autumn 2005).

Trusts. 25 S.C. L. Rev. 506.

Trusts by Operation of Law: Constructive Trust. 24 S.C. L. Rev. 694.

Trusts by Operation of Law: Resulting Trust. 24 S.C. L. Rev. 696.

**SECTION 62‑7‑102.** Scope.

This article applies to express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust. The term ‘express trust’ includes both testamentary and inter vivos trusts, regardless of whether the trustee is required to account to the probate court, and includes, but is not limited to, all trusts defined in Section 62‑1‑201(49). This article does not apply to constructive trusts, resulting trusts, conservatorships administered by conservators as defined in Section 62‑1‑201(6), administration of decedent’s estates, all multiple party accounts referred to in Section 62‑6‑101 et seq., custodial arrangements, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, or any arrangement under which a person is nominee or escrowee for another.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section provides a concise statement of the positive inclusion of express trusts within the scope of the SCTC.

South Carolina has another comprehensive statement of the scope of applicable South Carolina trust law, contained in the definition paragraph of the South Carolina Probate Code Section 62‑1‑201(49), which contains an expanded statement of the inclusion of express trusts and further contains detailed statements of the trusts and trust type arrangements that are excluded from the scope. This statement is now included in Section 62‑7‑102 with reference to Section 62‑1‑201(49). Former Section 62‑7‑702(1), in the South Carolina Uniform Trustee’s Powers Act, which was repealed by the SCTC, also contained a comprehensive statement of applicable South Carolina trust law.

Excluded from the Code’s coverage are resulting and constructive trusts, which are not express trusts but remedial devices imposed by law. For the requirements for creating an express trust and the methods by which express trusts are created, see Sections 62‑7‑401 and 62‑7‑402. The Code does not attempt to distinguish express trusts from other legal relationships with respect to property, such as agencies and contracts for the benefit of third parties. For the distinctions, see Restatement (Third) of Trusts Sections 2, 5 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 2, 5‑16C (1959).

The SCTC is directed primarily at trusts that arise in an estate planning or other donative context, but express trusts can arise in other contexts. For example, a trust created pursuant to a divorce action would be included, even though such a trust is not donative but is created pursuant to a bargained‑for exchange. Commercial trusts come in numerous forms, including trusts created pursuant to a state business trust act and trusts created to administer specified funds, such as to pay a pension or to manage pooled investments. Commercial trusts are often subject to special‑purpose legislation and case law, which in some respects displace the usual rules stated in this Code. See John H. Langbein, The Secret Life of the Trust: The Trust as an Instrument of Commerce, 107 Yale L.J. 165 (1997).

Express trusts also may be created by means of court judgment or decree. Examples include trusts created to hold the proceeds of personal injury recoveries and trusts created to hold the assets of a protected person in a conservatorship proceeding.

LAW REVIEW AND JOURNAL COMMENTARIES

Trusts by Operation of Law: Constructive Trust. 24 S.C. L. Rev. 694.

Trusts by Operation of Law: Resulting Trust. 24 S.C. L. Rev. 696.

Trusts. 25 S.C. L. Rev. 506.

**SECTION 62‑7‑103.** Definitions.

In this article:

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

(2) “Beneficiary” means a person that:

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

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

(C) In the case of a charitable trust, has the authority to enforce the terms of the Trust.

(3) “Charitable trust” means a trust, or portion of a trust, created for a charitable purpose described in Section 62‑7‑405(a).

(4) “Conservator” means a person appointed by the court to administer the estate of a protected person.

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

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

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

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

(9) “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.

(10) “Power of withdrawal” means a presently exercisable general power of appointment other than a power exercisable by a trustee which is limited by an ascertainable standard, or which is exercisable by another person only upon consent of the trustee or the person holding an adverse interest.

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

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

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

(B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (A) terminated on that date, but the termination of those interests would not cause the trust to terminate; or

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

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

(14) “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. Neither the possession of, nor the lapse, release, or waiver of a power of withdrawal shall cause a holder of the power to be deemed to be a settlor of the trust, and property subject to such power is not susceptible to the power holder’s creditors.

(15) “Spendthrift provision” means a term of a trust which restrains both voluntary and involuntary transfer of a beneficiary’s interest.

(16) “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.

(17) “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.

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

(19) “Trustee” includes an original, additional, and successor trustee, and a cotrustee, whether or not appointed or confirmed by a court.

(20) “Ascertainable standard” means an ascertainable standard relating to a trustee’s individual’s health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code, as amended.

(21) “Distributee” means any person who receives property of a trust from a trustee, other than as creditor or purchaser.

(22) “Interested person” or “interested party” means any person or party deemed to be a necessary or proper party under Rule 19 of the South Carolina Rules of Civil Procedure.

(23) “Internal Revenue Code” means the Internal Revenue Code, as amended from time to time. Each reference to a provision of the Internal Revenue Code shall include any successor or amendment thereto.

(24) “Serious breach of trust” means either: a single act that causes significant harm or involves flagrant misconduct, or a series of smaller breaches, none of which individually justify removal when considered alone, but which do so when considered together.

(25) “Permissible distributee” means any person who or which on the date of qualification as a beneficiary is eligible to receive current distributions of property of a trust from a trustee, other than as a creditor or purchaser.

(26) “Trust investment advisor” is a person, committee of persons, or entity who is or who are given authority by the terms of a trust instrument to direct, consent to or disapprove a trustee’s actual or proposed investment decisions.

(27) “Trust protector” is a person, committee of persons or entity who is or who are designated as a trust protector whose appointment is provided for in the trust instrument.

The terms and definitions contained in the South Carolina Probate Code that do not conflict with the terms defined in this section shall remain in effect for the South Carolina Trust Code.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

There are a number of definitions in Section 62‑7‑103 referred to throughout the South Carolina Trust Code that have no equivalent in other portions of the South Carolina Code. These include “Action,” “Charitable trust,” “Environmental law,” “Interests of the beneficiaries,” “Jurisdiction,” “Power of withdrawal,” “Qualified beneficiary,” “Revocable,” “Settlor,” “Spendthrift provision,” “Terms of a trust,” and “Trust instrument.” In the interest of uniformity, such terms are included in the South Carolina Trust Code except as noted below.

A definition of “action” (paragraph (1)) is included for drafting convenience, to avoid having to clarify in the numerous places in the SCTC where reference is made to an “action” by the trustee that the term includes a failure to act.

“Beneficiary” (paragraph (2)) refers only to a beneficiary of a trust as defined in the SCTC. In addition to living and ascertained individuals, beneficiaries may be unborn or unascertained. Pursuant to Section 62‑7‑402(c), a trust is valid only if a beneficiary can be ascertained now or in the future. The term “beneficiary” includes not only beneficiaries who received their interests under the terms of the trust but also beneficiaries who received their interests by other means, including by assignment, exercise of a power of appointment, resulting trust upon the failure of an interest, gap in a disposition, operation of an antilapse statute upon the predecease of a named beneficiary, or upon termination of the trust. The fact that a person incidentally benefits from the trust does not mean that the person is a beneficiary. For example, neither a trustee nor persons hired by the trustee become beneficiaries merely because they receive compensation from the trust. See Restatement (Third) of Trusts Section 48 cmt. c (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 126 cmt. c (1959).

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

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

Under Section 62‑7‑302, the holder of a testamentary general power of appointment may represent and bind persons whose interests are subject to the power.

The definition of “beneficiary” includes only those who hold beneficial interests in the trust. Because a charitable trust is not created to benefit ascertainable beneficiaries but to benefit the community at large (see Section 62‑7‑405(a)), persons receiving distributions from a charitable trust are not beneficiaries as that term is defined in this Code. However, pursuant to Section 62‑7‑110(b), charitable organizations expressly designated to receive distributions under the terms of a charitable trust, even though not beneficiaries as defined, are granted the rights of qualified beneficiaries under the Code.

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

Under the SCTC, when a trust has both charitable and noncharitable beneficiaries only the charitable portion qualifies as a “charitable trust” (paragraph (3)). The great majority of the Code’s provisions apply to both charitable and noncharitable trusts without distinction. The distinctions between the two types of trusts are found in the requirements relating to trust creation and modification. Pursuant to Sections 62‑7‑405 and 62‑7‑413 of the SCTC, a charitable trust must have a charitable purpose and charitable trusts may be modified or terminated under the doctrine of equitable deviation. Although South Carolina courts have previously refused to recognize the doctrine of cy pres (see Section 62‑7‑413 comment), a charitable trust in South Carolina could be modified or terminated under the doctrine of equitable deviation. Also, Section 62‑7‑411 allows a noncharitable trust to, in certain instances, be terminated by its beneficiaries while charitable trusts do not have beneficiaries in the usual sense. To the extent of these distinctions, a split‑interest trust is subject to two sets of provisions, one applicable to the charitable interests, the other the noncharitable.

Subsection (4) reflects the definition of “conservator” contained in South Carolina Probate Code Section 62‑1‑201(6).See the definition of “guardian” (paragraph (6)).

To encourage trustees to accept and administer trusts containing real property, the SCTC contains several provisions designed to limit exposure to possible liability for violation of “environmental law” (paragraph (5)). Section 62‑7‑701(c)(2) authorizes a nominated trustee to investigate trust property to determine potential liability for violation of environmental law or other law without accepting the trusteeship. Section 62‑7‑816(13) grants a trustee comprehensive and detailed powers to deal with property involving environmental risks. Section 62‑7‑1010(b) immunizes a trustee from personal liability for violation of environmental law arising from the ownership and control of trust property.

Under the SCTC, a “guardian” (paragraph (6)) makes decisions with respect to personal care; a “conservator” (paragraph (4)) manages property. The terminology used in the SCTC is that employed in Article V of the South Carolina Probate Code. Further, the South Carolina Probate Code (Section 62‑1‑201(18)) specifically excludes “a statutory guardian” and this modification was incorporated into the SCTC definition.

The phrase “interests of the beneficiaries” (paragraph (7)) is used with some frequency in the SCTC. The definition clarifies that the interests are as provided in the terms of the trust and not as determined by the beneficiaries. Section 62‑7‑108 dictates that a trustee is under a continuing duty to administer the trust at a place appropriate to the interests of the beneficiaries. Section 62‑7‑706(b) conditions certain of the grounds for removing a trustee on the court’s finding that removal of the trustee will best serve the interests of the beneficiaries. Section 62‑7‑801 requires the trustee to administer the trust in the interests of the beneficiaries, and Section 62‑7‑802 makes clear that a trustee may not place its own interests above those of the beneficiaries. Section 62‑7‑808(d) requires the holder of a power to direct who is subject to a fiduciary obligation to act with regard to the interests of the beneficiaries. Section 62‑7‑1002(b) may impose greater liability on a cotrustee who commits a breach of trust with reckless indifference to the interests of the beneficiaries. Section 62‑7‑1008 invalidates an exculpatory term to the extent it relieves a trustee of liability for breach of trust committed with reckless indifference to the interests of the beneficiaries.

“Jurisdiction” (paragraph (8)), when used with reference to a geographic area, includes a state or country but is not necessarily so limited. Its precise scope will depend on the context in which it is used. “Jurisdiction” is used in Sections 62‑7‑107 and 62‑7‑403 to refer to the place whose law will govern the trust. The term is used in Section 62‑7‑108 to refer to the trust’s principal place of administration. The term is used in Section 62‑7‑816 to refer to the place where the trustee may appoint an ancillary trustee and to the place in whose courts the trustee can bring and defend legal proceedings.

The definition of “property” (paragraph (11)) is intended to be as expansive as possible and to encompass anything that may be the subject of ownership. Included are choses in action, claims, and interests created by beneficiary designations under policies of insurance, financial instruments, and deferred compensation and other retirement arrangements, whether revocable or irrevocable. Any such property interest is sufficient to support creation of a trust. See Section 62‑7‑401 comment.

Due to the difficulty of identifying beneficiaries whose interests are remote and contingent, and because such beneficiaries are not likely to have much interest in the day‑to‑day affairs of the trust, the SCTC uses the concept of “qualified beneficiary” (paragraph (12)) to limit the class of beneficiaries to whom certain notices must be given or consents received. The definition of qualified beneficiaries is used in Section 62‑7‑705 to define the class to whom notice must be given of a trustee resignation. The term is used in Section 62‑7‑813 to define the class to be kept informed of the trust’s administration. Section 62‑7‑417 requires that notice be given to the qualified beneficiaries before a trust may be combined or divided. Actions which may be accomplished by the consent of the qualified beneficiaries include the appointment of a successor trustee as provided in Section 62‑7‑704. Prior to transferring a trust’s principal place of administration, SCTC Section 62‑7‑108(e) (UTC Section 108(d)) requires that the trustee give at least 60 days notice to the qualified beneficiaries.

The qualified beneficiaries consist of the beneficiaries currently receiving a distribution from the trust together with those who might be termed the first‑line remaindermen. These are the beneficiaries who would receive distributions were the event triggering the termination of a beneficiary’s interest or of the trust itself to occur on the date in question. Such a terminating event will typically be the death or deaths of the beneficiaries currently eligible to receive the income. Should a qualified beneficiary be a minor, incapacitated, or unknown, or a beneficiary whose identity or location is not reasonably ascertainable, the representation and virtual representation principles of Part 3 may be employed, including the possible appointment by the court of a representative to represent the beneficiary’s interest.

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

Charitable trusts and trusts for a valid noncharitable purpose do not have beneficiaries in the usual sense. However, certain persons, while not technically beneficiaries, do have an interest in seeing that the trust is enforced. Section 62‑7‑110 expands the definition of qualified beneficiaries to encompass this wider group. UTC Section 110 grants the rights of qualified beneficiaries to the attorney general of the state and charitable organizations expressly designated to receive distributions under the terms of a charitable trust; SCTC Section 62‑7‑110 grants the rights of qualified beneficiaries only to charitable organizations expressly designated to receive distributions under the terms of a charitable trust. Section 62‑7‑110 also grants the rights of qualified beneficiaries to persons appointed by the terms of the trust or by the court to enforce a trust created for an animal or other noncharitable purpose.

The definition of “revocable” (paragraph (13)) clarifies that revocable trusts include only trusts whose revocation is substantially within the settlor’s control. The consequences of classifying a trust as revocable are many. The SCTC contains provisions relating to liability of a revocable trust for payment of the settlor’s debts (Section 62‑7‑505), the standard of capacity for creating a revocable trust (Section 62‑7‑601), the procedure for revocation (Section 62‑7‑602), the subjecting of the beneficiaries’ rights to the settlor’s control (Section 62‑7‑603), the period for contesting a revocable trust (Section 62‑7‑604), the power of the settlor of a revocable trust to direct the actions of a trustee (Section 62‑7‑808(a)), notice to the qualified beneficiaries upon the settlor’s death (Section 62‑7‑813(b)), and the liability of a trustee of a revocable trust for the obligations of a partnership of which the trustee is a general partner (Section 62‑7‑1011(d)).

The definition of “settlor” (paragraph (14)) refers to the person who creates, or contributes property to, a trust, whether by will, self‑declaration, transfer of property to another person as trustee, or exercise of a power of appointment. For the requirements for creating a trust, see Section 62‑7‑401. Determining the identity of the “settlor” is usually not an issue. The same person will both sign the trust instrument and fund the trust. Ascertaining the identity of the settlor becomes more difficult when more than one person signs the trust instrument or funds the trust. The fact that a person is designated as the “settlor” by the terms of the trust is not necessarily determinative. For example, the person who executes the trust instrument may be acting as the agent for the person who will be funding the trust. In that case, the person funding the trust, and not the person signing the trust instrument, will be the settlor. Should more than one person contribute to a trust, all of the contributors will ordinarily be treated as settlors in proportion to their respective contributions, regardless of which one signed the trust instrument. See Section 62‑7‑602(b).

In the case of a revocable trust employed as a will substitute, gifts to the trust’s creator are sometimes made by placing the gifted property directly into the trust. To recognize that such a donor is not intended to be treated as a settlor, the definition of “settlor” excludes a contributor to a trust that is revocable by another person or over which another person has a power of withdrawal. Thus, a parent who contributes to a child’s revocable trust would not be treated as one of the trust’s settlors. The definition of settlor would treat the child as the sole settlor of the trust to the extent of the child’s proportionate contribution

Ascertaining the identity of the settlor is important for a variety of reasons. It is important for determining rights in revocable trusts. See Sections 62‑7‑505(a)(1), (3) (creditor claims against settlor of revocable trust), 62‑7‑602 (revocation or modification of revocable trust), and 62‑7‑604 (limitation on contest of revocable trust). It is also important for determining rights of creditors in irrevocable trusts. See Section 62‑7‑505 (a)(2) (creditors of settlor can reach maximum amount trustee can distribute to settlor). While the settlor of an irrevocable trust traditionally has no continuing rights over the trust except for the right under Section 62‑7‑411 to terminate the trust with the beneficiaries’ consent, the SCTC also authorizes the settlor of an irrevocable trust to petition for removal of the trustee and to enforce or modify a charitable trust. See Sections 62‑7‑405(c) (standing to enforce charitable trust), 62‑7‑413 (South Carolina, doctrine of equitable deviation), and 62‑7‑706 (removal of trustee).

“Spendthrift provision” (paragraph (15)) means a term of a trust which restrains the transfer of a beneficiary’s interest, whether by a voluntary act of the beneficiary or by an action of a beneficiary’s creditor or assignee, which at least as far as the beneficiary is concerned, would be involuntary. A spendthrift provision is valid under the SCTC only if it restrains both voluntary and involuntary transfer. For a discussion of this requirement and the effect of a spendthrift provision in general, see Section 62‑7‑502. The insertion of a spendthrift provision in the terms of the trust may also constitute a material purpose sufficient to prevent termination of the trust by agreement of the beneficiaries under Section 62‑7‑411, although the Code does not presume this result.

“Terms of a trust” (paragraph (17)) is a defined term used frequently in the SCTC. While the wording of a written trust instrument is almost always the most important determinant of a trust’s terms, the definition is not so limited. Oral statements, the situation of the beneficiaries, the purposes of the trust, the circumstances under which the trust is to be administered, and, to the extent the settlor was otherwise silent, rules of construction, all may have a bearing on determining a trust’s meaning. See Restatement (Third) of Trusts Section 4 cmt. a (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 4 cmt. a (1959). If a trust established by order of court is to be administered as an express trust, the terms of the trust are determined from the court order as interpreted in light of the general rules governing interpretation of judgments. See Restatement (Third) of Trusts Section 4 cmt. f (Tentative Draft No. 1, approved 1996).

A manifestation of a settlor’s intention does not constitute evidence of a trust’s terms if it would be inadmissible in a judicial proceeding in which the trust’s terms are in question. See Restatement (Third) of Trusts Section 4 cmt. b (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 4 cmt. b (1959). See also Restatement (Third) Property: Donative Transfers Sections 10.2, 11.1‑11.3 (Tentative Draft No. 1, approved 1995). For example, South Carolina has chosen to recognize the creation of an oral trust, Section 62‑7‑407. Evidence otherwise relevant to determining the terms of a trust may also be excluded under other principles of law, such as the parol evidence rule.

“Trust instrument” (paragraph (18)) is a subset of the definition of “terms of a trust” (paragraph (17)), referring to only such terms as are found in an instrument executed by the settlor. Section 62‑7‑403 provides that a trust is validly created if created in compliance with the law of the place where the trust instrument was executed. Pursuant to Section 62‑7‑604(a)(2), the contest period for a revocable trust can be shortened by providing the potential contestant with a copy of the trust instrument plus other information. UTC Section 813(b)(1) and SCTC Section 62‑7‑813(b) requires that the trustee upon request furnish a beneficiary with a copy of the trust instrument. To allow a trustee to administer a trust with some dispatch without concern about liability if the terms of a trust instrument are contradicted by evidence outside of the instrument, Section 62‑7‑1006 protects a trustee from liability to the extent a breach of trust resulted from reasonable reliance on those terms. Section 62‑7‑1013 allows a trustee to substitute a certification of trust in lieu of providing a third person with a copy of the trust instrument. Section 62‑7‑1106(a)(4) provides that unless there is a clear indication of a contrary intent, rules of construction and presumptions provided in the SCTC apply to trust instruments executed before the effective date of the Code.

The definition of “trustee” (paragraph (19)) includes not only the original trustee but also an additional and successor trustee as well as a cotrustee. Section 62‑1‑201 of the South Carolina Probate Code contains the language “whether or not appointed or confirmed by court” and the South Carolina Trust Code retains that language. Because the definition of trustee includes trustees of all types, any trustee, whether original or succeeding, single or cotrustee, has the powers of a trustee and is subject to the duties imposed on trustees under the SCTC. Any natural person, including a settlor or beneficiary, has capacity to act as trustee if the person has capacity to hold title to property free of trust. See Restatement (Third) of Trusts Section 32 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 89 (1959). State banking statutes normally impose additional requirements before a corporation can act as trustee.

Subsections (21) (defining “distributee”), (25) (defining “permissible distributee”), (26) (defining “Trust Investment Advisor”), and (27) (defining “Trust Protector”) are South Carolina additions to the UTC.

The South Carolina version of Section 62‑7‑103 expresses the intent that the definitions contained in the South Carolina Probate Code that are not otherwise defined within the South Carolina Trust Code and that do not conflict with the definitions contained in the South Carolina Trust Code shall continue to apply to the law governing trusts in South Carolina.

Effect of Amendment

The 2013 amendment added the last sentence in subsection (14), the definition of “Settlor”; added subsection (25), the definition of “Permissible distributee”; added subsection (26), the definition of “Trust investment advisor”; and added subsection (27), the definition of “Trust protector”.

CROSS REFERENCES

Duty to inform and report, see Section 62‑7‑813.

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 967, Judicial Accountings: Parties.

LAW REVIEW AND JOURNAL COMMENTARIES

Trusts by Operation of Law: Constructive Trust. 24 S.C. L. Rev. 694.

Trusts by Operation of Law: Resulting Trust. 24 S.C. L. Rev. 696.

Trusts. 25 S.C. L. Rev. 506.

Notes of Decisions

Beneficiary 1

1. Beneficiary

It is indispensable that the beneficiaries of a trust be made parties to any proceeding brought for the purpose of adjudicating their interest. Dorn v. Cohen (S.C.App. 2016) 418 S.C. 126, 791 S.E.2d 313, rehearing denied. Mental Health 179; Mental Health 495

Joinder of mother was necessary in action brought by father on children’s behalf seeking to remove mother’s parents as co‑trustees of special needs trust, which was established to provide for mother’s medical needs and named mother as sole primary beneficiary and children as remainder beneficiaries; determination of action had serious consequences for mother, joinder enabled mother through her appointed attorney and guardian ad litem to protect her interests as trust’s primary beneficiary, and potential conflict of interest existed between whether trust funds were used to satisfy mother’s needs versus parents’ perception of mother’s needs. Dorn v. Cohen (S.C.App. 2016) 418 S.C. 126, 791 S.E.2d 313, rehearing denied. Trusts 167

**SECTION 62‑7‑104.** 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.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

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

“Know” is used in its defined sense in Sections 62‑7‑109 (methods and waiver of notice), 62‑7‑305 (appointment of representative), 62‑7‑604(b) (limitation on contest of revocable trust), 62‑7‑1009 (nonliability of trustee upon beneficiary’s consent, release, or ratification), and 62‑7‑1012 (protection of person dealing with trustee). But as to certain actions, a person is charged with knowledge of facts the person would have discovered upon reasonable inquiry. See Section 62‑7‑1005 (limitation of action against trustee following report of trustee).

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

Library References

Notice 1 to 6.

Westlaw Topic No. 277.

C.J.S. Notice Sections 2 to 9, 12 to 16.

**SECTION 62‑7‑105.** Default and mandatory rules.

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

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

(1) the requirements for creating a trust;

(2) the duty of a trustee to act in good faith and in accordance with the purposes of the trust;

(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 possible to achieve;

(4) the power of the court to modify or terminate a trust under Sections 62‑7‑410 through 62‑7‑416;

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

(6) the limitations on the ability of a settlor’s agent under a power of attorney to revoke, amend, or make distributions from a revocable trust pursuant to Section 62‑7‑602A;

(7) the power of the court under Section 62‑7‑708(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 62‑7‑1008;

(9) the rights under Sections 62‑7‑1010 through 62‑7‑1013 of a person other than a trustee or beneficiary;

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

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

(12) the subject matter jurisdiction of the court and venue for commencing a proceeding as provided in Sections 62‑7‑201 and 62‑7‑204.

HISTORY: 2005 Act No. 66, Section 1; 2010 Act No. 244, Section 45, eff June 7, 2010; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑7‑105(a) begins with the premise that the provisions of the South Carolina Trust Code govern trusts when the terms of a trust do not otherwise direct. While this Code provides numerous procedural rules on which a settlor may wish to rely, the settlor is generally free to override these rules and to prescribe the conditions under which the trust is to be administered. However, subsection (b) lists eleven separate requirements that may not be waived and will be controlled by the terms of the SCTC irrespective of the terms of the trust.

With only limited exceptions, the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary are as specified in the terms of the trust.

Subsection (b) lists the items not subject to override in the terms of the trust.

Subsection (b)(1) confirms that the requirements for a trust’s creation, such as the necessary level of capacity and the requirement that a trust have a legal purpose, are controlled by statute and common law, not by the settlor. For the requirements for creating a trust, see Sections 62‑7‑401 through 409. Subsection (b)(10) makes clear that the settlor may not reduce any otherwise applicable period of limitations for commencing a judicial proceeding. See Sections 62‑7‑604 (period of limitations for contesting validity of revocable trust), and 62‑7‑1005 (period of limitation on action for breach of trust). Similarly, a settlor may not so negate the responsibilities of a trustee that the trustee would no longer be acting in a fiduciary capacity. Subsection (b)(2) provides that the terms may not eliminate a trustee’s duty to act in good faith and in accordance with the purposes of the trust. Subsection (b)(3) provides that the terms may not eliminate the requirement that a trust and its terms must be for the benefit of the beneficiaries. Subsection (b)(3) also provides that the terms may not eliminate the requirement that the trust have a purpose that is lawful and possible to achieve. Subsection (b)(2)‑(3) are echoed in Sections 62‑7‑404 (trust and its terms must be for benefit of beneficiaries; trust must have a purpose that is lawful and possible to achieve), 62‑7‑801 (trustee must administer trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries), 62‑7‑802(a) (trustee must administer trust solely in interests of the beneficiaries), 62‑7‑814 (trustee must exercise discretionary power in good faith and in accordance with its terms and purposes and the interests of the beneficiaries), and 62‑7‑1008 (exculpatory term unenforceable to extent it relieves trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust and the interests of the beneficiaries). SCTC Section 62‑7‑404 does not include the words “not contrary to public policy,” found in UTC Section 404, recognizing that existing South Carolina law would invalidate trusts that are contrary to public policy.

The UTC provides that the terms of a trust may not deny a court authority to take such action as necessary in the interests of justice, including requiring that a trustee furnish bond. UTC Subsections (b)(6), (13). The SCTC does not include the UTC version of subsection 105(b)(6). Section 62‑7‑702 of the South Carolina Trust Code provides the situations for which the trustee must provide bond.

UTC subsection (b)(14) and SCTC subsection (b)(12) similarly provides that such provisions cannot be altered in the terms of the trust. The power of the court to modify or terminate a trust under Sections 62‑7‑410 through 62‑7‑416 is not subject to variation in the terms of the trust. Subsection (b)(4). However, all of these Code sections involve situations which the settlor could have addressed had the settlor had sufficient foresight. These include situations where the purpose of the trust has been achieved, a mistake was made in the trust’s creation, or circumstances have arisen that were not anticipated by the settlor.

Section 62‑7‑813 imposes a general obligation to keep the beneficiaries informed as well as several specific notice requirements. UTC Subsections (b)(8) and (b)(9) specify limits on the settlor’s ability to waive these information requirements. The South Carolina Trust Code does not include the UTC version of subsections 105(b)(8)‑(9).

In conformity with traditional doctrine, the SCTC limits the ability of a settlor to exculpate a trustee from liability for breach of trust. The limits are specified in Section 62‑7‑1008. UTC Subsection (b)(10) and SCTC Subsection (b)(8) of this section provide a cross‑reference. Similarly, subsection (b)(7) provides a cross‑reference to Section 708(b), which limits the binding effect of a provision specifying the trustee’s compensation.

Finally, UTC subsection (b)(11) and SCTC subsection (b)(9) clarify that a settlor is not free to limit the rights of third persons, such as purchasers of trust property. Subsection (b)(5) clarifies that a settlor may not restrict the rights of a beneficiary’s creditors except to the extent a spendthrift restriction is allowed as provided in Part 5.

2001 Amendment. By amendment in 2001, subsection (b)(3), (8) and (9) were revised to read as above. The language in subsection (b)(3) “that the trust have a purpose that is lawful and possible to achieve” is new. This addition clarifies that the settlor may not waive this common law requirement, which is codified in the Code at Section 62‑7‑404. SCTC Section 62‑7‑404 does not include the words “not contrary to public policy,” found in UTC Section 404, recognizing that existing South Carolina law would invalidate trusts that are contrary to public policy. As a result, SCTC subsection (b)(3) does not include the words “not contrary to public policy.”

The SCTC does not include the UTC version of Subsections 105 (b)(8)—(9) thus the 2001 Amendment which applies to Subsections 105 (b)(8)‑(9) is not applicable.

2010 Amendment to the SCTC. The 2010 amendment added subsection (b)(6) relating to limitations on a settlor’s agent; and redesignated former subsections (b)(6) through (b)(11) as subsections (b)(7) through (b)(12), respectively.

Effect of Amendment

The 2013 amendment in subsection (b)(6) substituted “62‑7‑602A” for “62‑7‑602(e)”.

Library References

Trusts 7.

Westlaw Topic No. 390.

C.J.S. Trusts Section 143.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 16:2 , Legal Principles‑Types of Trusts.

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 222, Spendthrift Trusts in the United States.

Bogert ‑ the Law of Trusts and Trustees Section 362, Charitable Trust Purposes‑Requisite Benefits to Flow from Charitable Trust.

Bogert ‑ the Law of Trusts and Trustees Section 369, Definitions of Charity.

Bogert ‑ the Law of Trusts and Trustees Section 965, Settlor’s Control Over Trustee’s Duties to Furnish Information and to Account.

**SECTION 62‑7‑106.** Common law of trusts; principles of equity.

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

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

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

The statutory text of the SCTC is also supplemented by these Comments, which, like the Comments to any Uniform Act, may be relied on as a guide for interpretation. See Acierno v. Worthy Bros. Pipeline Corp., 656 A.2d 1085, 1090 (Del. 1995) (interpreting Uniform Commercial Code); Yale University v. Blumenthal, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting Uniform Management of Institutional Funds Act); 2 Norman Singer, Statutory Construction Section 52.05 (6th ed. 2000); Jack Davies, Legislative Law and Process in a Nutshell Section 55‑4 (2d ed. 1986). See also South Carolina Probate Code Section 62‑1‑103.

Library References

Trusts 1, 4.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 1 to 9, 14 to 18, 27.

**SECTION 62‑7‑107.** Governing law.

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

(1) the law of the jurisdiction designated in the terms of the trust; or

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

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section provides rules for determining the law that will govern the meaning and effect of particular trust terms. The law to apply to determine whether a trust has been validly created is determined under Section 62‑7‑403.

Under prior South Carolina law, there was no statutory counterpart to this section; common law principles controlled.

Paragraph (1) allows a settlor to select the law that will govern the meaning and effect of the terms of the trust. The jurisdiction selected need not have any other connection to the trust. The settlor is free to select the governing law regardless of where the trust property may be physically located, whether it consists of real or personal property, and whether the trust was created by will or during the settlor’s lifetime. This section does not attempt to specify the strong public policies sufficient to invalidate a settlor’s choice of governing law. These public policies will vary depending upon the locale and may change over time. See, however, Russell v. Wachovia Bank, 353 S.C. 208, 578 S.E.2d 329 (2003), in which the South Carolina Supreme Court cited language from the Restatement (Second) of Conflict of Laws Sections 268‑270 (1971) in adopting a rule similar to that of SCTC Section 107.

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

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

For the authority of a settlor to designate a trust’s principal place of administration, see UTC Section 108(a) or SCTC Section 62‑7‑108(b). Because SCTC Section 62‑7‑108 includes an additional paragraph not in the UTC, which is at SCTC Section 62‑7‑108(a), the reference to UTC Section 108(a) in the UTC Comment is appropriate for SCTC Section 62‑7‑108(b).

Library References

Trusts 2.

Westlaw Topic No. 390.

C.J.S. Conflict of Laws Sections 73, 85.

C.J.S. Trusts Section 88.

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 206, Settlor Must Make the Trust Active.

**SECTION 62‑7‑108.** Principal place of administration.

(a) Unless otherwise designated by the terms of a trust, the principal place of administration of a 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 he has no such place of business. In the case of cotrustees, 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 cotrustee, 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 cotrustee, and otherwise

(3) the usual place of business or residence of any of the cotrustees as agreed upon by them.

(b) 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.

(c) A trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries.

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

(e) Unless otherwise designated in the trust, the trustee shall notify the qualified beneficiaries of a proposed transfer of a trust’s principal place of administration not less than ninety 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 ninety days after the giving of the notice, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.

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

(g) In connection with a transfer of the trust’s principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed pursuant to Section 62‑7‑704.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section prescribes rules relating to a trust’s principal place of administration. Locating a trust’s principal place of administration will ordinarily determine which court has primary if not exclusive jurisdiction over the trust. It may also be important for other matters, such as payment of state income tax or determining the jurisdiction whose laws will govern the trust. See Section 62‑7‑107 comment.

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

Under the SCTC, the fixing of a trust’s principal place of administration will determine where the trustee and beneficiaries have consented to suit (Section 62‑7‑202), and the rules for locating venue within a particular state (Section 62‑7‑204). It may also be considered by a court in another jurisdiction in determining whether it has jurisdiction, and if so, whether it is a convenient forum.

Because SCTC Section 62‑7‑108 includes an additional paragraph not in the UTC, which is at SCTC Section 62‑7‑108(a), the references to the subsections of UTC Section 108 in the UTC Comment have been adjusted correspondingly for SCTC Section 62‑7‑108.

SCTC Section 62‑7‑108(a) incorporates the provisions of former SCPC Section 62‑7‑202 (which dealt with venue), except SCTC subsection 108(a) is not limited to matters of venue.

A settlor expecting to name a trustee or cotrustees with significant contacts in more than one state may eliminate possible uncertainty about the location of the trust’s principal place of administration by specifying the jurisdiction in the terms of the trust. Under UTC subsection (a) and SCTC subsection (b), a designation in the terms of the trust is controlling if (1) a trustee is a resident of or has its principal place of business in the designated jurisdiction, or (2) all or part of the administration occurs in the designated jurisdiction. Designating the principal place of administration should be distinguished from designating the law to determine the meaning and effect of the trust’s terms, as authorized by Section 62‑7‑107. A settlor is free to designate one jurisdiction as the principal place of administration and another to govern the meaning and effect of the trust’s provisions.

UTC Subsection (b) and SCTC subsection (c) provide that a trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries. “Interests of the beneficiaries,” defined in Section 62‑7‑103(7), means the beneficial interests provided n the terms of the trust. Ordinarily, absent a substantial change or circumstances, the trustee may assume that the original place of administration is also the appropriate place of administration. The duty to administer the trust at an appropriate place may also dictate that the trustee not move the trust.

UTC Subsections (c)‑(f) and SCTC subsections (d)‑(g) provide a procedure for changing the principal place of administration to another state or country. Such changes are often beneficial. A change may be desirable to secure a lower state income tax rate, or because of relocation of the trustee or beneficiaries, the appointment of a new trustee, or a change in the location of the trust investments. The procedure for transfer specified in this section applies only in the absence of a contrary provision in the terms of the trust. See Section 62‑7‑105. To facilitate transfer in the typical case, where all concur that a transfer is either desirable or is at least not harmful, a transfer can be accomplished without court approval unless a qualified beneficiary objects. To allow the qualified beneficiaries sufficient time to review a proposed transfer, the trustee must give the qualified beneficiaries at least 60 days prior notice of the transfer. Notice must be given not only to qualified beneficiaries as defined in Section 62‑7‑103(12) but also to those granted the rights of qualified beneficiaries under Section 62‑7‑110. To assure that those receiving notice have sufficient information upon which to make a decision, minimum contents of the notice are specified. If a qualified beneficiary objects, a trustee wishing to proceed with the transfer must seek court approval.

SCTC Section 62‑7‑108(e), which corresponds to UTC subsection 108(d), adds to the UTC version the introductory phrase “unless otherwise designated in the trust.”

In connection with a transfer of the principal place of administration, the trustee may transfer some or all of the trust property to a new trustee located outside of the state. The appointment of a new trustee may also be essential if the current trustee is ineligible to administer the trust in the new place. UTC Subsection (f) and SCTC subsection (g) clarifies that the appointment of the new trustee must comply with the provisions on appointment of successor trustees as provided in the terms of the trust or under Section 62‑7‑704. Absent an order of succession in the terms of the trust, Section 62‑7‑704(c) provides the procedure for appointment of a successor trustee of a noncharitable trust, and Section 62‑7‑704(d) the procedure for appointment of a successor trustee of a charitable trust.

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

Effect of Amendment

The 2013 amendment in subsection (e) and subsection (e)(5) substituted “ninety days” for “60 days”.

Library References

Trusts 2.

Westlaw Topic No. 390.

C.J.S. Conflict of Laws Sections 73, 85.

C.J.S. Trusts Section 88.

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 966, Duty to Render Formal Account in Court of Equity.

**SECTION 62‑7‑109.** Methods and waiver of notice.

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

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

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

(d) If notice of a hearing on any petition is required and, except for specific notice requirements as otherwise provided, the petitioner shall cause notice of the time and place of hearing of any petition to be given to any interested person or his attorney if he has appeared by attorney or requested that notice be sent to his attorney. Notice shall be given:

(1) by mailing a copy thereof at least twenty days before the time set for the hearing by certified, registered, or ordinary first class mail addressed to the person being notified at the post office address given in his request for notice, if any, or at his office or place of residence, if known;

(2) by delivering a copy thereof to the person being notified personally at least twenty days before the time set for the hearing; or

(3) if the address or identity of any person is not known and cannot be ascertained with reasonable diligence by publishing a copy thereof in the same manner as required by law in the case of the publication of a summons for an absent defendant in the court of common pleas.

(e) The court for good cause shown may provide for a different method or time of giving notice for any hearing.

(f) Proof of the giving of notice shall be made on or before the hearing and filed in the proceeding.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

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

Under the SCTC, certain actions can be taken upon unanimous consent of the beneficiaries or qualified beneficiaries. See Sections 62‑7‑411 (termination of noncharitable irrevocable trust) and 62‑7‑704 (appointment of successor trustee). UTC Subsection (b) of this section only authorizes waiver of notice. A consent required from a beneficiary in order to achieve unanimity is not waived because the beneficiary is missing. But the fact a beneficiary cannot be located may be a sufficient basis for a substitute consent to be given by another person on the beneficiary’s behalf under the representation principles of Part 3.

In a nonjudicial context, SCTC Section 62‑7‑109(b) does not require notification of a person whose identity or location is unknown or cannot be reasonably ascertainable.

To facilitate administration, subsection (c) allows waiver of notice by the person to be notified or sent the document. Among the notices and documents to which this subsection can be applied are notice of a proposed transfer of principal place of administration (UTC Section 108(d) and SCTC Section 62‑7‑108(e)) or of a trustee’s report (Section 62‑7‑813(e)). This subsection also applies to notice to qualified beneficiaries of a proposed trust combination or division (Section 62‑7‑417), of a temporary assumption of duties without accepting trusteeship (Section 62‑7‑701(c)(1)), and of a trustee’s resignation (Section 62‑7‑705(a)(1)).

Notices under the SCTC are nonjudicial.

Previous South Carolina law had no precise counterpart. However, the South Carolina Probate Code contains various provisions respecting notice. The general notice section, SCPC Section 62‑1‑401 provides that notice of a hearing or other petition shall be delivered at least twenty (20) days before the time set for the hearing by certified, registered, or ordinary first class mail, or by delivering a copy to the person being notified at least twenty (20) days before the time set for hearing. That section also provides for the service of notice of hearing by publication if the address or identity of the person cannot be ascertained with reasonable diligence. SCTC Section 62‑7‑109(d) differs from the UTC version and incorporates the substance of SCPC Section 62‑1‑401.

The SCTC adds Subsections 62‑7‑109(e) and (f), which are not in UTC Section 109.

CROSS REFERENCES

Authority to appoint the property of original trust to second trust, see Section 62‑7‑816A.

Trustee’s power to convert an income trust to a total return unitrust, reconvert a total return unitrust to an income trust, or change the percentage used to calculate the unitrust amount, see Section 62‑7‑904C.

Library References

Notice 7, 8.

Trusts 160(3), 167, 173, 322.

Westlaw Topic Nos. 277, 390.

C.J.S. Notice Sections 21 to 22.

C.J.S. Trusts Sections 295 to 297, 300 to 301, 309 to 310, 318 to 324, 330 to 331, 338 to 339, 636.

**SECTION 62‑7‑110.** Requirement of notice to others.

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

(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 article if the charitable organization, on the date the charitable organization’s qualification is being determined:

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

(B) would be a distributee or permissible distributee of trust income or principal upon the termination of the interests of other distributees or permissible distributees then receiving or eligible to receive distributions; or

(C) 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 noncharitable purpose as provided in Section 62‑7‑408 or 62‑7‑409 has the rights of a qualified beneficiary under this article.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Former South Carolina law had no statutory counterpart.

Under the SCTC, certain notices need be given only to the “qualified” beneficiaries. For the definition of “qualified beneficiary,” see Section 62‑7‑103(12). Among these notices are notice of a transfer of the trust’s principal place of administration (UTC Section 108(d) and SCTC Section 62‑7‑108(e)), notice of a trust division or combination (Section 62‑7‑417), notice of a trustee resignation (Section 62‑7‑705(a)(1)), and notice of a trustee’s annual report (Section 62‑7‑813(c)). Subsection (a) of this section authorizes other beneficiaries to receive one or more of these notices by filing a request for notice with the trustee.

Under the Code, certain actions, such as the appointment of a successor trustee, can be accomplished by the consent of the qualified beneficiaries. See, e.g., Section 62‑7‑704 (filling vacancy in trusteeship). Subsection (a) addresses only notice, not required consent. A person who requests notice under subsection (a) does not thereby acquire a right to participate in actions that can be taken only upon consent of the qualified beneficiaries.

Charitable trusts do not have beneficiaries in the usual sense. However, certain persons, while not technically beneficiaries, do have an interest in seeing that the trust is enforced. In the case of a charitable trust, this includes the state’s attorney general and charitable organizations expressly designated to receive distributions under the terms of the trust. Under subsection (b), charitable organizations expressly designated in the terms of the trust to receive distributions and who would qualify as a qualified beneficiary were the trust noncharitable, are granted the rights of qualified beneficiaries. Because the charitable organization must be expressly named in the terms of the trust and must be designated to receive distributions, excluded are organizations that might receive distributions in the trustee’s discretion but that are not named in the trust’s terms. Requiring that the organization have an interest similar to that of a beneficiary of a private trust also denies the rights of a qualified beneficiary to organizations holding remote interests. For further discussion of the definition of “qualified beneficiary,” see Section 62‑7‑103 comment.

Subsection (c) similarly grants the rights of qualified beneficiaries to persons appointed by the terms of the trust or by the court to enforce a trust created for an animal or other trust with a valid purpose but no ascertainable beneficiary. For the requirements for creating such trusts, see Sections 62‑7‑408 and 62‑7‑409.

Section 62‑7‑110 does not include a counterpart to UTC subsection 110(d), in the 2004 UTC Amendments, which gives the state Attorney General the rights of a qualified beneficiary in certain cases. See, however, SCTC Section 62‑7‑405, which provides certain rights and powers to the South Carolina Attorney General.

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

Library References

Charities 45(1).

Notice 7.

Trusts 160(3), 167, 173, 322.

Westlaw Topic Nos. 75, 277, 390.

C.J.S. Charities Sections 64 to 65.

C.J.S. Notice Section 21.

C.J.S. Trusts Sections 295 to 297, 300 to 301, 309 to 310, 318 to 324, 330 to 331, 338 to 339, 636.

**SECTION 62‑7‑111.** Nonjudicial settlement agreements.

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

(b) Interested persons may enter into a binding nonjudicial settlement agreement with respect to only the following trust matters:

(1) the approval of a trustee’s report or accounting;

(2) direction to a trustee to perform or refrain from performing a particular administrative act or the grant to a trustee of any necessary or desirable administrative power;

(3) the resignation or appointment of a trustee and the determination of a trustee’s compensation;

(4) transfer of a trust’s principal place of administration; and

(5) liability of a trustee for an action relating to the trust.

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

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

While the SCTC recognizes that a court may intervene in the administration of a trust to the extent its jurisdiction is invoked by interested persons or otherwise provided by law (see Section 62‑7‑201(a)), resolution of disputes by nonjudicial means is encouraged. This section facilitates the making of such agreements by giving them the same effect as if approved by the court. To achieve such certainty, however, subsection (c) requires that the nonjudicial settlement must contain terms and conditions that a court could properly approve. Under this section, a nonjudicial settlement cannot be used to produce a result not authorized by law, such as to terminate a trust in an impermissible manner.

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

The fact that the trustee and beneficiaries may resolve a matter nonjudicially does not mean that beneficiary approval is required. For example, a trustee may resign pursuant to Section 62‑7‑705 solely by giving notice to the qualified beneficiaries, a living settlor, and any cotrustees. But a nonjudicial settlement between the trustee and beneficiaries will frequently prove helpful in working out the terms of the resignation.

Because of the great variety of matters to which a nonjudicial settlement may be applied, this section does not attempt to precisely define the “interested persons” whose consent is required to obtain a binding settlement as provided in subsection (a). However, the consent of the trustee would ordinarily be required to obtain a binding settlement with respect to matters involving a trustee’s administration, such as approval of a trustee’s report or resignation.

Library References

Trusts 332.

Westlaw Topic No. 390.

C.J.S. Trusts Section 593.

**SECTION 62‑7‑112.** Rules of construction.

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

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section is patterned after Restatement (Third) of Trusts Section 25(2) and comment e (Tentative Draft No. 1, approved 1996), although this section, unlike the Restatement, also applies to irrevocable trusts. The revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property upon the settlor’s death. Given this functional equivalence between the revocable trust and a will, the rules for interpreting the disposition of property at death should be the same whether the individual has chosen a will or revocable trust as the individual’s primary estate planning instrument. Over the years, the legislatures of the States and the courts have developed a series of rules of construction reflecting the legislative or judicial understanding of how the average testator would wish to dispose of property in cases where the will is silent or insufficiently clear. Few legislatures have yet to extend these rules of construction to revocable trusts, and even fewer to irrevocable trusts, although a number of courts have done so as a matter of judicial construction. See Restatement (Third) of Trusts Section 25, Reporter’s Notes to cmt. d and e (Tentative Draft No. 1, approved 1996).

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

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

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

The most direct counterpart in the law of wills is South Carolina Probate Code Section 62‑2‑601 (Rules of Construction and Presumption). That section provides that the testator’s intent controls the legal effect of his dispositions, and it refers to succeeding sections, which contain some, but not all, rules of construction with respect to wills. Other will construction rules are left to the common law in South Carolina. As to construction of wills, see S. Alan Medlin, The Law of Wills and Trusts, Volume 1, Estate Planning in South Carolina (2002) at Section 330 et seq. South Carolina Trust Code Section 62‑7‑112 is in part analogous to SCPC Sections 62‑1‑102 and 62‑1‑103. SCPC Section 62‑1‑102, entitled “Purposes; Rule of Construction,” provides for a liberal interpretation of the SCPC in furtherance of the policies set forth in that section. SCPC Section 62‑1‑103 provides that the provisions of the SCPC supplement existing principles of law and equity.

Library References

Trusts 112.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 202 to 214.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 201, Right of Elective Share by Surviving Spouse.

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 211, Trusts for Unlawful Purposes.

Restatement (3d) Property (Wills & Don. Trans.) Section 9.1, Surviving Spouse’s Elective Share‑Non‑Community‑Property States Other Than Those that Have Adopted a Revised Uniform Probate Code‑Type Statute.

Restatement (3d) Property (Wills & Don. Trans.) Section 9.1 TD 3, Surviving Spouse’s Elective Share‑Noncommunity‑Property States Other Than Those that Have Adopted a Revised Uniform Probate Code‑Type Statute.

Restatement (3d) of Trusts Section 25, Validity and Effect of Revocable Inter Vivos Trust.

Restatement (3d) of Trusts Section 25 TD 1, Validity and Effect of Revocable Inter Vivos Trust.

Part 2

Judicial Proceedings

General Comment

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

Section 201 makes clear that the jurisdiction of the court is available as invoked by interested persons or as otherwise provided by law. Proceedings involving the administration of a trust normally will be brought in the court at the trust’s principal place of administration. Section 202 provides that the trustee and beneficiaries are deemed to have consented to the jurisdiction of the court at the principal place of administration as to any matter relating to the trust. Sections 203 and 204 are optional, bracketed provisions relating to subject‑matter jurisdiction and venue.

This article addresses selected issues involving jurisdiction and venue. This article is not intended to provide comprehensive coverage of procedure with respect to trusts. These issues are better addressed elsewhere, for example in the State’s rules of civil procedure or as provided by court rule.

Section 62‑7‑201 makes clear that the jurisdiction of the court is available as invoked by interested persons or as otherwise provided by law. Proceedings involving the administration of a trust normally will be brought in the court at the trust’s principal place of administration. Section 62‑7‑202 provides that the trustee and beneficiaries are deemed to have consented to the jurisdiction of the court at the principal place of administration as to any matter relating to the trust.

There is significant overlap between Part 2 of the SCTC covering judicial proceedings and former Part II under Article 7 of the South Carolina Probate Code. To promote consistency and familiarity with existing South Carolina law and practice, the relevant South Carolina Probate Code language has been maintained whenever possible under this part of the South Carolina Trust Code. Additionally, several separate statutes formerly under the South Carolina Probate Code regarding court jurisdiction of trusts have been consolidated into a single section herein.

**SECTION 62‑7‑201.** Role of court in administration of trust.

(a) Subject to the provisions of Section 62‑1‑302(d), the probate court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts. These proceedings must be formal as defined by Section 62‑1‑201(17) but consent petitions are not subject to the requirements of formal proceedings. Proceedings that may be maintained pursuant to this section are those concerning the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and beneficiaries of trusts. These include, but are not limited to, proceedings to:

(1) ascertain beneficiaries, determine a question arising in the administration or distribution of a trust including questions of construction of trust instruments, instruct trustees, and determine the existence or nonexistence of any immunity, power, privilege, duty, or right;

(2) review and settle interim or final accounts;

(3) review the propriety of employment of a person by a trustee including an attorney, auditor, investment advisor or other specialized agent or assistant, and the reasonableness of the compensation of a person so employed, and the reasonableness of the compensation determined by the trustee for his own services. A person who has received excessive compensation from a trust may be ordered to make appropriate refunds. The provisions of this section do not apply to the extent there is a contract providing for the compensation to be paid for the trustee’s services or if the trust directs otherwise; and

(4) appoint or remove a trustee.

(b) A proceeding under this section does not result in continuing supervisory proceedings. The management and distribution of a trust estate, submission of accounts and reports to beneficiaries, payment of trustee’s fees and other obligations of a trust, acceptance and change of trusteeship, and other aspects of the administration of a trust shall proceed expeditiously consistent with the terms of the trust, free of judicial intervention and without order, approval, or other action of any court, subject to the jurisdiction of the court as invoked by interested parties or as otherwise exercised as provided by law or by the terms of the trust.

(c) The probate court has concurrent jurisdiction with the circuit courts of this State of actions and proceedings concerning the external affairs of trusts. These include, but are not limited to, the following proceedings:

(1) determine the existence or nonexistence of trusts created other than by will;

(2) actions by or against creditors or debtors of trusts; and

(3) other actions and proceedings involving trustees and third parties.

(d) The probate court has concurrent jurisdiction with the circuit courts of this State over attorney’s fees. Attorney’s fees may be set at a fixed or hourly rate or by contingency fee.

(e) The court will not, over the objection of a party, entertain proceedings under this section 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 business, or the court may grant a continuance or enter any other appropriate order.

HISTORY: 2005 Act No. 66, Section 1; 2010 Act No. 244, Section 46, eff June 7, 2010; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑7‑201(a) grants exclusive subject matter jurisdiction to the probate court of interested parties’ proceedings concerning the internal affairs of trusts. The subsection provides two illustrative and nonexclusive lists of such proceedings. The lists have this in common: all items on both lists are matters of dispute primarily between and among the trustees and the beneficiaries of trusts, i.e., matters internal to trust administration, and are not matters immediately involving third parties, such as creditors and debtors of trusts. Compare the actions and proceedings concerning the external affairs of trusts, which are the subject matter of Section 62‑7‑204. See also the specific coverage of proceedings concerning a trustee’s compensation, Section 62‑7‑205, and for this State’s Uniform Declaratory Judgments Act, see Section 155‑53‑10 of the 1976 Code et seq., especially Section 15‑53‑50.

Section 62‑7‑201(b) makes it clear that no single proceeding in the probate court concerning the internal affairs of a trust will have the effect of subjecting the administration of the trust to later continuous supervision by the probate court.

SCTC subsections 62‑7‑201(a) and (b) incorporate former South Carolina Probate Code Section 62‑7‑201 regarding the Probate Court’s exclusive jurisdiction over the internal affairs of trusts. Subsection (a)(3) has been taken from former South Carolina Probate Code Section 62‑7‑205. Such exclusive jurisdiction is subject to Section 62‑1‑302(d) of the South Carolina Probate Code regarding a party’s right to remove a proceeding to the circuit court.

Subsections (c) and (d) are taken from former South Carolina Probate Code Section 62‑7‑204(A).

Subsection (e) is taken from former South Carolina Probate Code Section 62‑7‑203.

Subsection (e) refers to a trust’s “principal place of administration” which is addressed under South Carolina Trust Code Section 62‑7‑108.

Whereas the Uniform Trust Code encourages resolution of disputes without resort to courts through options such as nonjudicial settlements authorized by Section 111, the South Carolina Trust Code limits nonjudicial settlements to specified matters set forth in Section 62‑7‑111, thereby generally maintaining the practice requiring court involvement for resolution of trust disputes.

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

Effect of Amendment

The 2010 amendment in subsection (a) substituted “(d)” for “(c)” following “62‑1‑302” in the first sentence; and made other nonsubstantive changes.

The 2013 amendment added the second sentence in subsection (a), relating to Section 62‑1‑201, and made other nonsubstantive changes.

CROSS REFERENCES

Banks and trust companies acting as fiduciaries, see Sections 34‑15‑10 et seq.

Constitutional provisions regarding jurisdiction in matters testamentary and of administration, see SC Const Art. V, Section 12.

Declaratory judgments, generally, see Sections 15‑53‑10 et seq.

Examination of banks doing a trust business, see Section 34‑21‑20.

Jurisdiction of Probate Court judges, see Section 14‑23‑1150.

Service of process on nonresident individual fiduciaries, see Section 15‑9‑450.

Subject matter jurisdiction, concurrent jurisdiction with family court, see Section 62‑1‑302.

Library References

Trusts 158, 177, 178, 254, 271.5, 298, 363.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 291, 295 to 296, 347 to 348, 350 to 360, 555, 564 to 565, 712 to 718.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Charities Section 19, Qualification of Trustees.

S.C. Jur. Charities Section 34, Judicial Supervision.

S.C. Jur. Wills Section 128, Removal from Probate Court.

Forms

South Carolina Litigation Forms and Analysis Section 3:63 , Complaint to Set Aside Trust.

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 519, Removal of Trustees‑Court’s Power to Remove.

Bogert ‑ the Law of Trusts and Trustees Section 743, Statutes Regarding Court or Trustee’s Sales.

Bogert ‑ the Law of Trusts and Trustees Section 870, Jurisdiction to Enforce Trust‑Actions Available.

Bogert ‑ the Law of Trusts and Trustees Section 871, Procedure‑Parties‑Costs and Fees.

Bogert ‑ the Law of Trusts and Trustees Section 966, Duty to Render Formal Account in Court of Equity.

Bogert ‑ the Law of Trusts and Trustees Section 974, Statutory Regulation of Accounts.

LAW REVIEW AND JOURNAL COMMENTARIES

The Impact of Significant Substantive Provisions of the South Carolina Trust Code, 57 S.C. L. Rev. 137 (Autumn 2005).

“Probate Court Jurisdiction Over Testamentary Trusts.” 2 SCLQ 13 (1949). Trusts. 25 S.C. L. Rev. 506.

NOTES OF DECISIONS

In general 1

Under former Section 21‑29‑30 (“Substitution of trustees”) 2

1. In general

Reference in provision of probate code specifically dealing with internal affairs of trusts, to section in code granting probate court jurisdiction to determine family law issues in connection with estate and trust actions, amounted to scrivener’s error; legislature intended to reference section in code which specifically discussed divestment of probate court’s “exclusive jurisdiction,” to allow removal of internal trust matters by a party or the probate court on its own motion to the circuit court. Ex parte Cannon (S.C.App. 2009) 385 S.C. 643, 685 S.E.2d 814, on remand 2010 WL 9044590. Courts 198

On its own motion, probate court properly removed petition for removal of trustee to the circuit court, so as to give circuit court subject matter jurisdiction to hear case. Ex parte Cannon (S.C.App. 2009) 385 S.C. 643, 685 S.E.2d 814, on remand 2010 WL 9044590. Courts 487(2)

Circuit court lacked subject matter jurisdiction to declare diocese and national church to be incidental beneficiaries of trust deed, as probate court had exclusive jurisdiction to ascertain beneficiaries. All Saints Parish, Waccamaw v. Protestant Episcopal Church in the Diocese of South Carolina (S.C.App. 2004) 358 S.C. 209, 595 S.E.2d 253, rehearing denied, certiorari denied, on subsequent appeal 385 S.C. 428, 685 S.E.2d 163, certiorari dismissed 130 S.Ct. 2088, 176 L.Ed.2d 580. Courts 472.4(7)

2. Under former Section 21‑29‑30 (“Substitution of trustees”)

Under this section [Code 1962 Section 67‑52] relating to substitution of trustees, the new trustee does not have to consent to act in order to make the trust in him valid. Kirton v. Howard (S.C. 1926) 137 S.C. 11, 134 S.E. 859. Trusts 169(1)

Where a trust property was sold under order of court for reinvestment of the proceeds and a mortgage was taken for part of the price and subsequently it was agreed and ordered that the grantee should, in satisfaction of the mortgage, reconvey to the new trustee theretofore appointed, upon the original trusts, the agreement made the grantee a trustee of the land, and this section [Code 1962 Section 67‑52], relative to the appointment of new trustees, vested the title in the new trustee, even if no deed was executed. Kirton v. Howard (S.C. 1926) 137 S.C. 11, 134 S.E. 859.

Courts will assume that the designated public officers performed the duties required of them by this section [Code 1962 Section 67‑52], relating to the substitution of trustees and the endorsement of such fact on the trust deed and the recording of the certificate thereof. Kirton v. Howard (S.C. 1926) 137 S.C. 11, 134 S.E. 859. Evidence 83(1)

**SECTION 62‑7‑202.** Jurisdiction over trustee and beneficiary.

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

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

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

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

There was no corresponding statute under the South Carolina Probate Code prior to the enactment of the SCTC.

This section clarifies that the courts of the principal place of administration have jurisdiction to enter orders relating to the trust that will be binding on both the trustee and beneficiaries. A trust’s “principal place of administration” is addressed in SCTC Section 62‑7‑108. Consent to jurisdiction does not dispense with any required notice, however. With respect to jurisdiction over a beneficiary, the Comment to Uniform Probate Code Section 7‑103, upon which portions of this section are based, is instructive:

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

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

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

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

Library References

Trusts 177, 178, 254, 271.5, 298, 363.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 347 to 348, 350 to 360, 555, 564 to 565, 712 to 718.

RESEARCH REFERENCES

Forms

South Carolina Litigation Forms and Analysis Section 3:63 , Complaint to Set Aside Trust.

NOTES OF DECISIONS

In general 1

1. In general

Trustee consented to circuit court’s personal jurisdiction and waived any defense of lack of personal jurisdiction in proceedings for his removal, and for contempt, by appearing and arguing the merits of the action multiple times before the circuit court. Ex parte Cannon (S.C.App. 2009) 385 S.C. 643, 685 S.E.2d 814, on remand 2010 WL 9044590. Contempt 44; Trusts 167

**SECTION 62‑7‑203.** RESERVED.

**SECTION 62‑7‑204.** Venue.

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

(b) If a trust has no trustee, venue for a judicial proceeding for the appointment of a trustee is in a county in which any trust property is located or the county where the last trustee had its principal place of administration, and if the trust is created by will, in the county in which the decedent’s estate was or is being administered.

(c) If proceedings concerning the same trust could be maintained in more than one place in South Carolina, the court in which the proceeding is first commenced has the exclusive right to proceed.

(d) If proceedings concerning the same trust are commenced in more than one court of South Carolina, the court in which the proceeding was first commenced shall continue to hear the matter, and the other courts shall hold the matter in abeyance until the question of venue is decided, and, if the ruling court determines that venue is properly in another court, it shall transfer the proceeding to the other court.

(e) If a court transfers venue of a proceeding concerning a trust to a court in another county, venue for that proceeding, and any subsequent matters concerning that proceeding, including appeals, shall be retained by the county to which the venue has been transferred.

(f) If a probate court judge is disqualified from matters concerning a trust proceeding, and venue has not been transferred to another county, a special probate court judge appointed for that proceeding has all of the powers and duties appertaining to the probate court judge of the county where the proceeding commenced, and venue for any subsequent matters concerning that proceeding, including appeals, remains with the county where that proceeding or file commenced.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

South Carolina Trust Code subsections 62‑7‑204 (a) and (b) are taken from former South Carolina Probate Code Section 62‑7‑202 and incorporate provisions of UTC Section 204. SCTC subsections (c), (d), and (e) are taken from former South Carolina Probate Code Section 62‑1‑303 and do not incorporate UTC provisions. A trust’s “principal place of administration” is addressed in SCTC Section 62‑7‑108. SCTC Section 62‑7‑204 differs significantly from UTC Section 204.

The 2013 amendment clarified that, when venue of a trust proceeding is transferred to another county, subsequent matters concerning that proceeding, including appeals, shall be retained by the county to which venue has been transferred. If a special probate judge is appointed because a probate judge is disqualified and recused from hearing a trust proceeding, venue remains with the county where the proceeding or file commenced, unless a probate court otherwise transfers venue.

Library References

Trusts 158, 254, 298, 364.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 291, 295 to 296, 555, 564 to 565, 719.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Charities Section 19, Qualification of Trustees.

S.C. Jur. Charities Section 34, Judicial Supervision.

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 871, Procedure‑Parties‑Costs and Fees.

Part 3

Representation

General Comment

This article deals with representation of beneficiaries, both representation by fiduciaries (personal representatives, trustees, guardians, and conservators), and what is known as virtual representation.

There is significant overlap between Part 3 of the South Carolina Trust Code covering judicial proceedings and South Carolina Probate Code provisions concerning representation of others. To promote consistency and familiarity with existing South Carolina law and practice, the relevant South Carolina Probate Code language has been maintained whenever possible under this part of the South Carolina Trust Code.

Section 62‑7‑301 is the introductory section, laying out the scope of the article. The representation principles of this article have numerous applications under this Code. The representation principles of the article apply for purposes of settlement of disputes, whether by a court or nonjudicially. They apply for the giving of required notices. They apply for the giving of consents to certain actions.

Sections 62‑7‑302 through 305 cover the different types of representation. Section 62‑7‑302 deals with representation by the holder of a general testamentary power of appointment. Section 62‑7‑303 deals with representation by a fiduciary, whether of an estate, trust, conservatorship, or guardianship. The section also allows a parent without a conflict of interest to represent and bind a minor or unborn issue. Section 62‑7‑304 is the virtual representation provision. It provides for representation of and the giving of a binding consent by another person having a substantially identical interest with respect to the particular issue. Section 62‑7‑305 authorizes the court to appoint a representative to represent the interests of unrepresented persons or persons for whom the court concludes the other available representation might be inadequate.

The provisions of this article are subject to modification in the terms of the trust. Settlors are free to specify their own methods for providing substituted notice and obtaining substituted consent.

**SECTION 62‑7‑301.** When parties bound by others.

(a) For purposes of this part, “beneficiary representative” refers to a person who may represent and bind another person concerning the affairs of trusts.

(b) Notice to a beneficiary representative has the same effect as if notice were given directly to the represented person. Notice of a hearing on any petition in a judicial proceeding must be given pursuant to Section 62‑7‑109(d).

(c) The consent of a beneficiary representative is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.

(d) Except as otherwise provided in Sections 62‑7‑411 and 62‑7‑602, a person who under this part may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor’s behalf.

(e) In judicial proceedings, orders binding a beneficiary representative under this part bind the person(s) represented by that beneficiary representative.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section applies to both judicial and nonjudicial matters involving trusts. Nonjudicial matters may include, for example, the transfer of a trust’s principal place of business, a proposed trust combination or division, a trustee’s resignation, appointment of a successor trustee by consent, a trustee’s resignation, and the consent to, release of, or affirmance of a trustee’s actions. See SCTC Section 62‑7‑111.

Subsection (a) defines the terms “beneficiary representative” for purposes of this part in an effort to avoid confusion between the SCTC term “representative” and the familiar term “personal representative” under the South Carolina Probate Code.

Subsection (b) of South Carolina Trust Code Section 62‑7‑301 confirms that notice of a hearing on a petition in a judicial proceeding must be given in the manner prescribed under SCTC Section 62‑7‑109(d). However, this section does not expressly address the manner of commencing a judicial proceeding.

Subsection (c) deals with the effect of a consent, whether by actual or virtual representation. Subsection (c) may be used to facilitate consent of the beneficiaries to modification or termination of a trust, with or without the consent of the settlor (Section 62‑7‑411), agreement of the qualified beneficiaries on appointment of a successor trustee of a noncharitable trust (Section 62‑7‑704(c)(2)), and a beneficiary’s consent to or release or affirmance of the actions of a trustee (Section 62‑7‑1009 ). A consent by a beneficiary representative bars a later objection by the person represented, but a consent is not binding if the person represented raises an objection prior to the date the consent would otherwise become effective. The possibility that a beneficiary might object to a consent given on the beneficiary’s behalf will not be germane in many cases because the person represented will be unborn or unascertained. However, the representation principles of this article will sometimes apply to adult and competent beneficiaries.

Subsection (d) addressing a person who may represent an incapacitated settlor specifically references the possibility of additional requirements imposed under Section 62‑7‑411 regarding modification or termination of noncharitable irrevocable trusts by consent and Section 62‑7‑602 addressing revocation or amendment of revocable trusts.

Subsection (e) confirms that orders in a judicial proceeding binding a beneficiary representative bind the person(s) represented by that beneficiary representative.

Library References

Trusts 257, 366.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 555 to 556, 568 to 572, 725 to 728.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 16:3 , Legal Principles‑Powers and Duties of Trustee.

South Carolina Legal and Business Forms Section 16:8 , Checklist‑Drafting Trust Instrument‑Generally.

South Carolina Legal and Business Forms Section 16:12 , Checklist‑Drafting General Trustee Powers.

South Carolina Legal and Business Forms Section 16:100 , Liability of Trustee‑Limitation on Trustee’s Liability‑General Provision.

South Carolina Legal and Business Forms Section 16:102 , Powers and Duties of Trustee‑General Provision.

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 394, Duties of Charitable Trustees‑Standard of Care‑Liabilities for Breach.

LAW REVIEW AND JOURNAL COMMENTARIES

Administration of a Trust: Duties and Liabilities of Trustees. 24 S.C. L. Rev. 693.

The Impact of Significant Substantive Provisions of the South Carolina Trust Code, 57 S.C. L. Rev. 137 (Autumn 2005).

**SECTION 62‑7‑302.** Representation by holder of general testamentary power of appointment.

To the extent there is no conflict of interest between the holder of a presently exercisable general 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. The term “presently exercisable general power of appointment” includes a testamentary general power of appointment having no conditions precedent to its exercise other than the death of the holder, the validity of the holder’s last Will and Testament, and the inclusion of a provision in the Will sufficient to exercise this power.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section tracks the language of current South Carolina Probate Code Section 62‑1‑108 which defines the term “presently exercisable general power of appointment.” This section does not extend the substitute representation under this section to limited or nongeneral powers of appointment (which are also not covered under South Carolina Probate Code Section 62‑1‑108).

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

CROSS REFERENCES

Proceeding to determine decedent’s intent regarding application of certain federal tax formulas, see Section 62‑2‑612.

Library References

Principal and Agent 49.

Westlaw Topic No. 308.

C.J.S. Agency Sections 131 to 132.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Charities Section 22, Powers of Trustee.

S.C. Jur. Guardian and Conservator Section 28, Powers and Duties in General.

Forms

South Carolina Legal and Business Forms Section 16:3 , Legal Principles‑Powers and Duties of Trustee.

South Carolina Legal and Business Forms Section 16:8 , Checklist‑Drafting Trust Instrument‑Generally.

South Carolina Legal and Business Forms Section 8:32 , Deed‑Trustee.

South Carolina Legal and Business Forms Section 16:12 , Checklist‑Drafting General Trustee Powers.

South Carolina Legal and Business Forms Section 17:39 , Drafting Will.

South Carolina Legal and Business Forms Section 16:102 , Powers and Duties of Trustee‑General Provision.

South Carolina Legal and Business Forms Section 17:151 , Executors‑Powers‑To Make Investments for Estate.

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 122, Different Classes of Trustees.

Bogert ‑ the Law of Trusts and Trustees Section 541, General Duties‑Duty to Exercise Ordinary Skill and Diligence.

Bogert ‑ the Law of Trusts and Trustees Section 543, Trustee’s Duty of Loyalty to the Beneficiaries.

Bogert ‑ the Law of Trusts and Trustees Section 612, Skill and Prudence Demanded of Trustee in Investing.

Bogert ‑ the Law of Trusts and Trustees Section 613, Court or Statutory Guides for Trust Investments.

Bogert ‑ the Law of Trusts and Trustees Section 654, Pennsylvania.

Bogert ‑ the Law of Trusts and Trustees Section 656, South Carolina.

**SECTION 62‑7‑303.** Representation by fiduciaries and parents.

(a) To the extent there is no conflict of interest between the following beneficiary representatives 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 to the extent of the powers and authority conferred upon conservators generally or by court order;

(2) a guardian may represent and bind the ward if a conservator of the ward’s estate has not been appointed to the extent of the powers and authority conferred upon guardians generally or by court order;

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

(4) a trustee may represent and bind the beneficiaries of the trust with respect to questions or disputes involving the trust;

(5) a personal representative of a decedent’s estate may represent and bind persons interested in the estate with respect to questions or disputes involving the decedent’s estate; and

(6) a person may represent and bind the person’s minor or unborn issue if a conservator or guardian for the issue has not been appointed.

(b) The order in which the beneficiary representatives are listed above sets forth the priority each such beneficiary representative has relative to the others. In any judicial proceeding or upon petition to the court, the court for good cause may appoint a beneficiary representative having lower priority or a person having no priority.

HISTORY: 2005 Act No. 66, Section 1; 2010 Act No. 244, Section 47, eff June 7, 2010; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section allows for representation of persons by their fiduciaries (conservators, guardians, agents, trustees, and personal representatives). Representation is not available if the fiduciary or parent is in a conflict position with respect to the particular matter or dispute, however. A typical conflict would be where the fiduciary or parent seeking to represent the beneficiary is either the trustee or holds an adverse beneficial interest.

South Carolina Probate Code Section 62‑1‑403 is the counterpart to South Carolina Trust Code Section 62‑7‑303. The SCTC, however, adds representation by an agent on behalf of the principal under Subsection (a)(3).

The authority of a conservator or guardian under this section is subject to the authority conferred upon conservators and guardians generally under provisions of the South Carolina Probate Code or by court order, it not being the intent herein to enlarge a conservator’s or guardian’s powers otherwise.

Subsection (a)(2) authorizes a guardian to bind and represent a ward if a conservator of the ward’s estate has not been appointed. Granting a guardian authority to represent the ward with respect to interests in the trust can avoid the need to seek appointment of a conservator. Under the South Carolina Trust Code, a “conservator” is appointed by the court to manage the ward’s property, a “guardian” to make decisions with respect to the ward’s personal affairs. See Section 62‑7‑103.

Subsection (a)(3) authorizes an agent to represent a principal only to the extent the agent has authority to act with respect to the particular question or dispute. Pursuant to Sections 62‑7‑411 and 62‑7‑602, an agent may represent a settlor with respect to the amendment, revocation or termination of the trust only to the extent this authority is expressly granted either in the trust or the power. Otherwise, depending on the particular question or dispute, a general grant of authority in the power may be sufficient to confer the necessary authority.

Subsection (b) prioritizes the right to act as substitute representative where more than one such representation may apply.

Effect of Amendment

The 2010 amendment rewrote subsection (a)(6).

Library References

Guardian and Ward 28.

Mental Health 179.

Parent and Child 8.

Principal and Agent 49.

Trusts 173.

Westlaw Topic Nos. 196, 257A, 285, 308, 390.

C.J.S. Agency Sections 131 to 132.

C.J.S. Guardian and Ward Sections 70 to 76, 100.

C.J.S. Mental Health Sections 158 to 159.

C.J.S. Parent and Child Sections 270 to 278.

C.J.S. Right to Die Sections 5, 8.

C.J.S. Trusts Sections 318 to 324, 330 to 331, 338 to 339.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 16:3 , Legal Principles‑Powers and Duties of Trustee.

South Carolina Legal and Business Forms Section 16:122 , Accounting‑Accounting Reports.

**SECTION 62‑7‑304.** 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 beneficiary representative and the person represented and provided the interest of the person represented is adequately represented by the beneficiary representative.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section authorizes a person with a substantially identical interest with respect to a particular question or dispute to represent and bind an otherwise unrepresented minor, incapacitated or unborn individual, or person whose location is unknown and not reasonably ascertainable. This section extends the doctrine of virtual representation to representation of minors and incapacitated individuals. This section does not apply to the extent there is a conflict of interest between the beneficiary representative and the person represented by the beneficiary representative, consistent with current South Carolina Probate Code Section 62‑1‑403(2)(iii).

Typically, the interests of the beneficiary representative and the person represented will be identical. A common example would be a trust providing for distribution to the settlor’s children as a class, with an adult child being able to represent the interests of children who are either minors or unborn. Exact identity of interests is not required, only substantial identity with respect to the particular question or dispute. Whether such identity is present may depend on the nature of the interest. For example, a presumptive remaindermen may be able to represent alternative remaindermen with respect to approval of a trustee’s report but not with respect to interpretation of the remainder provision or termination of the trust. Even if the beneficial interests of the beneficiary representative and person represented are identical, representation is not allowed in the event of conflict of interest. The beneficiary representative may have interests outside of the trust that are adverse to the interest of the person represented, such as a prior relationship with the trustee or other beneficiaries.

South Carolina Probate Code Section 62‑1‑403(2)(iii) is the current counterpart to this Section 62‑7‑304. However, the South Carolina Trust Code adds an incapacitated person to the list of those who may be represented by another person under this section.

Library References

Trusts 257, 366.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 555 to 556, 568 to 572, 725 to 728.

**SECTION 62‑7‑305.** Appointment of representative.

At any point in a judicial proceeding, a court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, unborn, or unascertained person, or a person whose identity or address is unknown, if the court determines that representation of the interest otherwise would be inadequate. If not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests. The court shall set out its reasons for appointing a guardian ad litem as a part of the record of the proceeding.

HISTORY: 2005 Act No. 66, Section 1; 2010 Act No. 244, Section 48, eff June 7, 2010; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Whereas the Uniform Trust Code encourages nonjudicial settlements and authorizes court appointment of a representative to act like a guardian ad litem but without ongoing court involvement, South Carolina expressly limits the scope of nonjudicial settlements to those matters specified in Section 62‑7‑111 and follows current practice for the appointment of guardians ad litem and ongoing court involvement pursuant to South Carolina Probate Code Section 62‑1‑403(4).

Effect of Amendment

The 2010 amendment substituted “unascertained” for “ascertained” following “incapacitated, unborn, or” in the first sentence.

Library References

Infants 76.

Mental Health 485.

Westlaw Topic Nos. 211, 257A.

C.J.S. Infants Sections 195, 321 to 336, 338 to 343.

C.J.S. Mental Health Sections 264 to 274.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 16:3 , Legal Principles‑Powers and Duties of Trustee.

South Carolina Legal and Business Forms Section 16:8 , Checklist‑Drafting Trust Instrument‑Generally.

South Carolina Legal and Business Forms Section 16:12 , Checklist‑Drafting General Trustee Powers.

South Carolina Legal and Business Forms Section 16:102 , Powers and Duties of Trustee‑General Provision.

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 433, Status of Judicial Cy Pres in the United States.

LAW REVIEW AND JOURNAL COMMENTARIES

Administration of a Trust: Duties and Liabilities of Trustees. 24 S.C. L. Rev. 693, Trusts. 25 S.C. L. Rev. 506.

Wills—Doctrine of Facts or Independent Significance—Validity of Devise to Trustees Under the Will of Another. 18 S.C. L. Rev. 683.

Part 4

Creation, Validity, Modification, and Termination of Trusts

**SECTION 62‑7‑401.** Methods of creating trust.

(a)(1) A trust described in Section 62‑7‑102 may be created by:

(i) 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;

(ii) written declaration signed by the owner of property that the owner holds identifiable property as trustee; or

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

(2) To be valid, a trust of real property, created by transfer in trust or by declaration of trust, must be proved by some writing signed by the party creating the trust. A transfer in trust of personal property does not require written evidence, but must be proven by clear and convincing evidence, pursuant to Section 62‑7‑407.

(b) A trust that arises by act or operation of law does not require the existence of a writing.

(c) A revocable inter vivos trust may be created either by declaration of trust or by a transfer of property and is not rendered invalid because the settler retains substantial control over the trust including, but not limited to, (i) a right of revocation, (ii) substantial beneficial interests in the trust, or (iii) the power to control investments or reinvestments. This subsection does not prevent a finding that a revocable inter vivos trust, enforceable for other purposes, is illusory for purposes of determining a spouse’s elective share rights pursuant to Article 2, Title 62. A finding that a revocable inter vivos trust is illusory and thus invalid for purposes of determining a spouse’s elective share rights pursuant to Article 2, Title 62 does not render that revocable inter vivos trust invalid, but allows inclusion of the trust assets as part of the probate estate of the settlor only for the purpose of calculating the elective share. In that event, the trust property that passes or has passed to the surviving spouse, including a beneficial interest of the surviving spouse in that trust property, must be applied first to satisfy the elective share and to reduce contributions due from other recipient of transfers including the probate estate, and the trust assets are available for satisfaction of the elective share only to any remaining extent necessary pursuant to Section 62‑2‑207.

HISTORY: 2005 Act No. 66, Section 1; 2010 Act No. 181, Section 2, eff May 28, 2010; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section is based on Restatement (Third) of Trusts Section 10 (Tentative Draft No. 1, approved 1996), and Restatement (Second) of Trusts Section 17 (1959). Under the methods specified for creating a trust in this section, a trust is not created until it receives property. For what constitutes an adequate property interest, see Restatement (Third) of Trusts Sections 40‑41 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 74‑86 (1959). The property interest necessary to fund and create a trust need not be substantial. A revocable designation of the trustee as beneficiary of a life insurance policy or employee benefit plan has long been understood to be a property interest sufficient to create a trust. See Section 62‑7‑103(11) (“property” defined). Furthermore, the property interest need not be transferred contemporaneously with the signing of the trust instrument. A trust instrument signed during the settlor’s lifetime is not rendered invalid simply because the trust was not created until property was transferred to the trustee at a much later date, including by contract after the settlor’s death. A pourover devise to a previously unfunded trust is also valid and may constitute the property interest creating the trust. See Unif Testamentary Additions to Trusts Act Section 1 (1991), codified at Uniform Probate Code Section 2‑511 and SCPC Section 62‑2‑510 (pourover devise to trust valid regardless of existence, size, or character of trust corpus). See also Restatement (Third) of Trusts Section 19 (Tentative Draft No. 1, approved 1996).

Section 62‑7‑401(a) provides different methods to create a trust, creating a distinction between third‑party‑trusteed trusts in subsection (a)(1)(i) and self‑trusteed trusts in subsection (a)(1)(ii). Subsection (a)(1)(i) provides that, if a third party is to serve as trustee, transfer of property to that other person, whether during life or at death, is sufficient to create a trust; no writing is required.

Subsection (a)(1)(ii) requires that, if the settlor is also to be the trustee, then some written declaration signed by the settlor is required to create the trust. Such a declaration need not be a trust agreement, but can be some written evidence signed by the settlor sufficient to establish that the settlor intended to hold the property in trust.

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

The methods set out in Section 62‑7‑401 are not the exclusive methods to create a trust as recognized by Section 62‑7‑102. A trust can also be created by a promise that creates enforceable rights in a person who immediately or later holds these rights as trustee. See Restatement (Third) of Trusts Section 10(e) (Tentative Draft No. 1, approved 1996). A trust thus created is valid notwithstanding that the trustee may resign or die before the promise is fulfilled. Unless expressly made personal, the promise can be enforced by a successor trustee. For examples of trusts created by means of promises enforceable by the trustee, see Restatement (Third) of Trusts Section 10 cmt. g (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 14 cmt. h, 26 cmt. n (1959).

Pre‑SCTC South Carolina law made a distinction between trusts for personal property and trusts in land. Trusts in personal property could be proved, as well as created, by parol declarations. See Harris v. Bratton, 34 S.C. 259. 13 S.E. 447 (1891). On the other hand, for a trust of any “land, tenements, or hereditaments” to be valid, former South Carolina Probate Code Section 62‑7‑101 mandated that the trust be proved by a writing signed by the party creating the trust. An exception to the requirement of a writing to establish a trust in land was found in former SCPC Section 62‑7‑103 for trusts arising by operation of law, such as resulting and constructive trusts. Because the SCTC applies only to express trusts and not to trusts implied in law (Section 62‑7‑102), Sections 62‑7‑401(a)(1)(i) and (1)(ii) codify existing law that trusts of real property must be established by a writing, transfers in trust of personal property do not have the same requirement, and trusts containing real property that arise by operation of law do not require evidence of writing to be valid.

Former SCPC Section 62‑7‑112 has been retained as SCTC Section 62‑7‑401(c). Former SCPC Section 62‑7‑112 was enacted after the Siefert decision, Seifert v. Southern Nat’l Bank of South Carolina, 305 S.C. 353, 409 S.E. 2d 337 (1991), to clarify that the settlor’s retention of substantial control over a trust, such as a right to revoke, does not render that trust invalid.

While a trust created by will may come into existence immediately at the testator’s death and not necessarily only upon the later transfer of title from the personal representative, Section 62‑7‑701 makes clear that the nominated trustee does not have a duty to act until there is an acceptance of the trusteeship, express or implied. To avoid an implied acceptance, a nominated testamentary trustee who is monitoring the actions of the personal representative but who has not yet made a final decision on acceptance should inform the beneficiaries that the nominated trustee has assumed only a limited role. The failure so to inform the beneficiaries could result in liability if misleading conduct by the nominated trustee causes harm to the trust beneficiaries. See Restatement (Third) of Trusts Section 35 cmt. b (Tentative Draft No. 2, approved 1999).

While this section confirms the familiar principle that a trust may be created by means of the exercise of a power of appointment (paragraph ((a)(1)(iii)), this Code does not legislate comprehensively on the subject of powers of appointment but addresses only selected issues. See Section 62‑7‑302 (representation by holder of general testamentary power of appointment). For the law on powers of appointment generally, see Restatement (Second) of Property: Donative Transfers Sections 11.1‑24.4 (1986); Restatement (Third) of Property: Wills and Other Donative Transfers (in progress).

Effect of Amendment

The 2010 amendment rewrote subsection (c) to include a surviving spouse’s beneficial interests in trust property in calculating the elective share.

The 2013 amendment rewrote subsections (a) and (b).

CROSS REFERENCES

Probate estate, see Section 62‑2‑202.

Library References

Trusts 19 to 37.5.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 16, 35 to 63, 68 to 70.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Wills Section 205, Definition of Probate Estate for Purposes of Elective Share.

S.C. Jur. Wills Section 207, Exercise of Right of Election by Surviving Spouse‑Procedure; Time Limitations.

Forms

Am. Jur. Pl. & Pr. Forms Trusts Section 2 , Introductory Comments.

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 63, Analysis of Wordings of American Statutes.

Bogert ‑ the Law of Trusts and Trustees Section 87, Contents of Memorandum.

Bogert ‑ the Law of Trusts and Trustees Section 816, Allocation of Receipts to Principal or Income.

Bogert ‑ the Law of Trusts and Trustees Section 859, The Development of Principal and Income Law With Regard to Corporate Benefits and Distributions.

LAW REVIEW AND JOURNAL COMMENTARIES

The Impact of Significant Substantive Provisions of the South Carolina Trust Code, 57 S.C. L. Rev. 137 (Autumn 2005).

NOTES OF DECISIONS

In general 1

Retention of substantial control 2

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Trusts 4

1. In general

Deed was insufficient to impose a trust in land, in action by father against children, seeking to set aside deed and establish a constructive trust, absent any other writing signed by settlor other than the deed. Foster v. Foster (S.C. 2011) 393 S.C. 95, 711 S.E.2d 878. Trusts 31

Trust in which testator, as settlor, had retained substantial control, was illusory for purposes of determining widow’s elective share of testator’s estate, although trust remained valid for all other purposes, under statute governing methods of creating trusts; testator retained such extensive powers over the assets of the trust that he had until his death the same rights in the assets after creation of the trust that he had before its creation. Dreher v. Dreher (S.C. 2006) 370 S.C. 75, 634 S.E.2d 646. Wills 801(6)

Father who purchased real property and titled it in daughter’s name failed to present clear evidence of an oral agreement with daughter to reconvey the property to him, for purposes of father’s claim that his alleged partial performance of the agreement created an oral express trust that was enforceable under the statute of frauds; daughter testified that there was no oral agreement, and father admitted that the parties did not orally express such an agreement, but rather that he trusted daughter to act as he wanted (decided under former law). Settlemeyer v. McCluney (S.C.App. 2004) 359 S.C. 317, 596 S.E.2d 514. Trusts 110

The issue of oral trusts in lands is more appropriately addressed by reference to the trust Statute of Frauds than to the parol evidence rule and its exceptions. Thus, parol evidence was inadmissible to demonstrate the existence of an alleged trust, under which a daughter was obligated to reconvey real property to her father, to vary the terms of a deed conveying land from the father to the daughter (decided under former law). Beckham v. Short (S.C. 1989) 298 S.C. 348, 380 S.E.2d 826.

2. Retention of substantial control

The retention, and not the exercise, of substantial control by settlor is the key to determining whether a revocable inter vivos trust is illusory. Dreher v. Dreher (S.C. 2006) 370 S.C. 75, 634 S.E.2d 646. Trusts 1

Trust in which testator, as settlor, had retained substantial control, was illusory for purposes of determining widow’s elective share of testator’s estate, although trust remained valid for all other purposes, under statute governing methods of creating trusts; testator retained such extensive powers over the assets of the trust that he had until his death the same rights in the assets after creation of the trust that he had before its creation. Dreher v. Dreher (S.C. 2006) 370 S.C. 75, 634 S.E.2d 646. Wills 801(6)

3. Third party beneficiaries

Beneficiaries of an existing will or estate planning document, who are named in the instrument or otherwise identified in the instrument by their status, are required to prove by clear and convincing evidence their entitlement to relief as third‑party beneficiaries against an attorney whose drafting error defeats or diminishes the client’s intent under legal malpractice or breach of contract theories. Fabian v. Lindsay (S.C. 2014) 410 S.C. 475, 765 S.E.2d 132, rehearing denied. Attorney and Client 26

Beneficiaries of an existing will or estate planning document may recover as third‑party beneficiaries against an attorney whose drafting error defeats or diminishes the client’s intent under legal malpractice or breach of contract theories, but recovery is limited to those persons who are named in the instrument or otherwise identified in the instrument by their status. Fabian v. Lindsay (S.C. 2014) 410 S.C. 475, 765 S.E.2d 132, rehearing denied. Attorney and Client 26

Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third‑party is not, as such, recoverable by the plaintiff; however, if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person. Fabian v. Lindsay (S.C. 2014) 410 S.C. 475, 765 S.E.2d 132, rehearing denied. Contracts 186(1); Contracts 187(1)

4. Trusts

Fund created by home builders corporation to fulfill corporate members’ obligations and liabilities under South Carolina Workers’ Compensation Act was not a “trust”; corporation did not transfer any money or property to fund’s board of trustees to hold in trust for fund’s members, agreement creating the fund contained no provision for beneficiaries, and members were required to apply to become fund members. Patterson v. Witter (S.C.App. 2016) 418 S.C. 66, 791 S.E.2d 294, rehearing denied. Trusts 1

**SECTION 62‑7‑402.** Requirements for creation; merger of title.

(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 62‑7‑408; or

(C) a trust for a noncharitable purpose, as provided in Section 62‑7‑409;

(4) the trustee has duties to perform; and

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

(b) If the trust agreement is in writing, the trust instrument may be signed by the settlor or in the settlor’s name by some other person in the settlor’s presence and by the settlor’s direction.

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

(d) 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.

(e) For purposes of Section 62‑7‑402(a)(5), if a person holds legal title to property in a fiduciary capacity and also has an equitable or beneficial title in the same property, either by transfer, by declaration, or by operation of law, no merger of the legal and equitable titles shall occur unless:

(1) the fiduciary is the sole fiduciary and is also the sole current and future beneficiary; and

(2) the legal title and the equitable title are of the same quality and duration.

If either one of these conditions is not met, no merger may occur and the fiduciary relationship does not terminate.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Subsection (a) codifies the basic requirements for the creation of a trust. To create a valid trust, the settlor must indicate an intention to create a trust. See Restatement (Third) of Trusts Section 13 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 23 (1959). But only such manifestations of intent as are admissible as proof in a judicial proceeding may be considered. See Section 62‑7‑103(17) (“terms of a trust” defined).

To create a trust, a settlor must have the requisite mental capacity. To create a revocable or testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have capacity during lifetime to transfer the property free of trust. See Section 62‑7‑601 (capacity of settlor to create revocable trust), and see generally Restatement (Third) of Trusts Section 11 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 18‑22 (1959); and Restatement (Third) of Property: Wills and Other Donative Transfers Section 8.1 (Tentative Draft No. 3, 2001).

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

Subsection (a)(4) recites standard doctrine that a trust is created only if the trustee has duties to perform. See Restatement (Third) of Trusts Section 2 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 2 (1959). Trustee duties are usually active, but a validating duty may also be passive, implying only that the trustee has an obligation not to interfere with the beneficiaries’ enjoyment of the trust property. Such passive trusts, while valid under this Code, may be terminable under the Statute of Uses. See Restatement (Third) of Trusts Section 6 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 67‑72 (1959).

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

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

No similar statutory provisions existed under South Carolina law prior to the enactment of the SCTC, except that former SCPC Section 62‑7‑603(A)(3) specified the requirements for merger of equitable and legal title. Former Section 62‑7‑603(A)(3) has been retained as subsection (e).

South Carolina case law provides that, for a trust to exist, certain elements must be present, including a declaration creating the trust, a trust res, and designated beneficiaries. See Whetstone v. Whetstone, 309 S.C. 227, 231‑32, 420 S.E.2d 877, 879 (Ct. App. 1992). The declaration of trust has to be in writing when the trust property includes realty. See Id. If the declaration of trust is in writing, the SCTC allows the grantor to sign the trust agreement, but also allows, under Section 62‑7‑402 (b), the grantor to direct a third party to sign on the grantor’s behalf and in the grantor’s presence.

The Supreme Court has found that, with respect to the spousal elective share, a revocable inter vivos trust that conferred only custodial powers on the trustee, and that expressly barred the trustee from exercising any powers of sale, investment, or reinvestment during the settlor’s lifetime without the settlor’s consent, was illusory and invalid. See Seifert v. Southern Nat. Bank of South Carolina, 409 S.E.2d 337, 305 S.C. 353 (1991). Former SCPC Section 62‑7‑112 was subsequently enacted and is retained at SCTC Section 62‑7‑401(c).

Effect of Amendment

The 2013 amendment added subsection (b), relating to written trust agreements, and redesignated subsections accordingly.

CROSS REFERENCES

Powers of agent acting pursuant to power of attorney, see Section 62‑7‑602A.

Library References

Charities 4 to 23.

Trusts 1 to 37.5, 154.

Westlaw Topic Nos. 75, 390.

C.J.S. Charities Sections 3 to 4, 7 to 13, 15, 17, 19 to 27, 32.

C.J.S. Conflict of Laws Sections 73, 85.

C.J.S. Trusts Sections 1 to 9, 14 to 63, 68 to 70, 88, 143, 283.

Notes of Decisions

Construction and application 1

1. Construction and application

Fund created by home builders corporation to fulfill corporate members’ obligations and liabilities under South Carolina Workers’ Compensation Act was not a “trust”; corporation did not transfer any money or property to fund’s board of trustees to hold in trust for fund’s members, agreement creating the fund contained no provision for beneficiaries, and members were required to apply to become fund members. Patterson v. Witter (S.C.App. 2016) 418 S.C. 66, 791 S.E.2d 294, rehearing denied. Trusts 1

**SECTION 62‑7‑403.** 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.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

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

Former South Carolina Probate Code Section 62‑7‑106 recognized religious, educational, or charitable trusts validly created in the Settlor’s state of domicile where a beneficiary or object of the trust resided or was located in South Carolina. The remainder of this SCTC section appears to have no prior South Carolina statutory equivalent.

Section 62‑7‑403 is comparable to South Carolina Probate Code Section 62‑2‑505 recognizing the validity of wills executed in compliance with the law of a variety of places where the testator had a significant contact, but expands the possible jurisdictions beyond those allowed for a valid will.

Section 62‑7‑403 extends the common law rule by validating a trust if its creation complies with the law of any of a variety of states in which the settlor or trustee had significant contacts. Pursuant to Section 62‑7‑403, a trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation the settlor was domiciled, had a place of abode, or was a national; the trustee was domiciled or had a place of business; or any trust property was located.

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

Library References

Trusts 46.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 78 to 79.

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 298, Charitable Trusts.

Bogert ‑ the Law of Trusts and Trustees Section 541, General Duties‑Duty to Exercise Ordinary Skill and Diligence.

Bogert ‑ the Law of Trusts and Trustees Section 543, Trustee’s Duty of Loyalty to the Beneficiaries.

Bogert ‑ the Law of Trusts and Trustees Section 816, Allocation of Receipts to Principal or Income.

Bogert ‑ the Law of Trusts and Trustees Section 824, Proceeds of the Sale of Unproductive or Underproductive Property.

**SECTION 62‑7‑404.** Trust purposes.

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

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

For an explication of the requirement that a trust must not have a purpose that is unlawful, see Restatement (Third) of Trusts Sections 27‑30 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 59‑65 (1959). A trust with a purpose that is unlawful is invalid. Depending on when the violation occurred, the trust may be invalid at its inception or it may become invalid at a later date. The invalidity may also affect only particular provisions. Generally, a trust has a purpose, which is illegal if (1) its performance involves the commission of a criminal or tortious act by the trustee; (2) the settlor’s purpose in creating the trust was to defraud creditors or others; or (3) the consideration for the creation of the trust was illegal. See Restatement (Third) of Trusts Section 28 cmt. a (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 60 cmt. a (1959. The 2013 amendment included the words “not contrary to public policy” because existing common law invalidates trusts that violate public policy.

Pursuant to Section 62‑7‑402(a), a trust must have an identifiable beneficiary unless the trust is of a type that does not have beneficiaries in the usual sense, such as a charitable trust or, as provided in Sections 62‑7‑408 and 62‑7‑409, trusts for the care of an animal or other valid noncharitable purpose. The general purpose of trusts having identifiable beneficiaries is to benefit those beneficiaries in accordance with their interests as defined in the trust’s terms. The requirement of this section that a trust and its terms be for the benefit of its beneficiaries, which is derived from Restatement (Third) of Trusts Section 27(2) (Tentative Draft No. 2, approved 1999), implements this general purpose. While a settlor has considerable latitude in specifying how a particular trust purpose is to be pursued, the administrative and other nondispositive trust terms must reasonably relate to this purpose and not divert the trust property to achieve a trust purpose that is invalid, such as one which is frivolous or capricious.

See Restatement (Third) of Trusts Section 27 cmt. b (Tentative Draft No. 2, approved 1999).

Section 62‑7‑412(b), which allows the court to modify administrative terms that are impracticable, wasteful, or impair the trust’s administration, is a specific application of the requirement that a trust and its terms be for the benefit of the beneficiaries. The fact that a settlor suggests or directs an unlawful or other inappropriate means for performing a trust does not invalidate the trust if the trust has a substantial purpose that can be achieved by other methods. See Restatement (Third) of Trusts Section 28 cmt. e (Tentative Draft No. 2, approved 1999).

There was no South Carolina statutory provision that correlated with SCTC Section 62‑7‑404. South Carolina case law has been consistent with Section 62‑7‑404 in refusing to impose an express trust, resulting trust, or constructive trust on property in favor of a transferor attempting to impose a trust on property he transferred to the transferee, when the facts indicate no written agreement between them existed, the transferor had a fraudulent purpose for the transfers, and the transferee committed no fraud or deceit. See Settlemeyer v. McCluney, 359 S.C. 317, 596 S.E.2d 514 (S.C. Ct. App. 2004); All v. Prillaman, 200 S.C. 279, 20 S.E.2d 741 (S.C. 1942). “The law will not permit a party to deliberately put his property out of his control for a fraudulent purpose, and then, through intervention of a court of equity, regain the same after his fraudulent purpose has been accomplished” All v. Prillaman, 200 S.C. 279, 308, 20 S.E.2d 741, 753, quoting Jolly v. Graham, 78 N.E. 919, 920 (Ill. 1906). See also Colin McK. Grant Home V. Medlock, 292 S.C. 466, 349 S.E.2d 655 (Ct. App. 1987), involving a charitable trust, in which the equitable doctrine of equitable deviation was used to eliminate the racial restrictions from a charitable trust’s requirements. See also Buck v. Toler, 146 S.C. 294, 141 S.E. 1 (1928), in which a testamentary trust that violated the rule against perpetuities and that was determined to have been created by the testatrix merely to tie up the property was found to be void.

Effect of Amendment

The 2013 amendment inserted “, not contrary to public policy,”.

Library References

Trusts 11.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 22 to 23.

**SECTION 62‑7‑405.** Charitable purposes; enforcement.

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

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

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

(d) Unless otherwise required by statute or by rule or regulation of the Attorney General, the trustees of charitable trusts shall not be required to file with the Attorney General any copies of trusts instruments or reports concerning the activities of charitable trusts.

(e) The Attorney General may make such rules and regulations relating to the information to be contained with the filing of a trust as may be required.

(f) All trustees of any trust governed by the laws of this State whose governing instrument does not expressly provide that this section shall not apply to such trust are required to act or to refrain from acting so as not to subject the trust to the taxes imposed by Sections 4941, 4942, 4943, 4944, or 4945 of the Internal Revenue Code, or corresponding provisions of any subsequent United States internal revenue law.

(g) Nothing contained in Sections 33‑31‑150 and 33‑31‑151 may be construed to cause a forfeiture or reversion of any of the property of a trust which is subject to such Sections, or to make the purposes of the trust impossible of accomplishment.

HISTORY: 2005 Act No. 66, Section 1; 2006 Act No. 330, Section 1; 2006 Act No. 365, Section 2; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

The required purposes of a charitable trust specified in subsection (a) restate the well‑established categories of charitable purposes listed in Restatement (Third) of Trusts Section 28 (Tentative Draft No. 3, approved 2001), and Restatement (Second) of Trusts Section 368 (1959), which ultimately derive from the Statute of Charitable Uses, 43 Eliz. I, c.4 (1601). The directive to the courts to validate purposes the achievement of which are beneficial to the community has proved to be remarkably adaptable over the centuries. The drafters concluded that it should not be disturbed.

South Carolina Trust Code Section 62‑7‑405 adds “distress” to the Uniform Trust Code version, to cover disasters or sudden catastrophes in addition to “poverty.” The SCTC also adds “scientific, literary and benevolent” to the UTC version. Practically, the specified charitable purposes will be identical to Internal Revenue Code Section 501 (c)(3).

Charitable trusts are subject to the restriction in Section 62‑7‑404 that a trust purpose must be legal. This would include trusts that involve invidious discrimination. See Restatement (Third) of Trusts Section 28 cmt. f (Tentative Draft No. 3, approved 2001).

Under subsection (b), a trust that states a general charitable purpose does not fail if the settlor neglected to specify a particular charitable purpose or organization to receive distributions. The court may instead validate the trust by specifying particular charitable purposes or recipients, or delegate to the trustee the framing of an appropriate scheme. See Restatement (Second) of Trusts Section 397 cmt. d (1959). Subsection (b) of this section is a corollary to Section 413, which states the doctrine of cy pres. Under Section 62‑7‑413(a), a trust with a particular charitable purpose which is impracticable or impossible to achieve does not necessarily fail. The court must instead apply the trust property in a manner consistent with the settlor’s charitable purposes to the extent they can be ascertained.

Subsection (b) does not apply to the long‑established estate planning technique of delegating to the trustee the selection of the charitable purposes or recipients. In that case, judicial intervention to supply particular terms is not necessary to validate the creation of the trust. The necessary terms instead will be supplied by the trustee. See Restatement (Second) of Trusts Section 396 (1959). Judicial intervention under subsection (b) will become necessary only if the trustee fails to make a selection. See Restatement (Second) of Trusts Section 397 cmt. d (1959). Pursuant to Section 62‑7‑110(b), the charitable organizations selected by the trustee would not have the rights of qualified beneficiaries under this Code because they are not expressly designated to receive distributions under the terms of the trust.

Section 62‑7‑405(b) must be read in conjunction with SCTC Sections 62‑7‑404 and 62‑7‑413. SCTC Section 62‑7‑413 incorporates the doctrine of equitable deviation from South Carolina common law. See the South Carolina Comment to SCTC Section 62‑7‑413.

SCTC Section 62‑7‑405(c) adds “the trustee and the Attorney General” to those who may maintain a proceeding to enforce the trust under the UTC version.

Former South Carolina Probate Code Sections 62‑7‑501 through 62‑7‑507, Part 5 of Article 7 of Title 62, covered charitable trusts. These sections are revised and incorporated in SCTC Section 62‑7‑405.

SCPC Section 62‑7‑501 required individual trustees of certain charitable trusts to file a copy of the trust with the Attorney General. Section 62‑7‑405 (d) makes this initial filing applicable to all charitable trusts, subject to certain exceptions.

SCPC Section 62‑7‑502 required that certain charitable trusts file annual reports with the attorney general.

SCPC Section 62‑7‑505 exempted many charitable trusts from the filing requirements of Part Five:

“... trusts or trustees of the following: Churches, cemeteries, orphanages operated in conjunction with churches, hospitals, colleges, or universities, or school districts, nor shall it apply to banking institutions which act as trustees under the supervision of the State Board of Financial Institutions or under the supervision of federal banking agencies.”

SCPC Sections 62‑7‑502 and 62‑7‑505 are repealed. The exemption is anachronistic. SCTC Section 62‑7‑405(d) requires that every charitable trust make an initial filing at inception with the Attorney General, subject to certain exceptions.

SCPC Section 62‑7‑504 is retained at Section 62‑7‑405(e), empowering the Attorney General to issue regulations to require further reporting from charitable trusts.

SCPC Section 62‑7‑506 incorporated the prohibited transaction provisions applicable to private foundations and charitable trusts into every trust and is retained in SCTC Section 62‑7‑405(f). (Existing Section 33‑31‑150 applies the restrictions to not‑for‑profit South Carolina corporations.)

SCPC Section 62‑7‑507 made clear that incurring an excise tax for violation of the prohibited transaction provisions will not result in trust termination, and is retained in Section 62‑7‑405(g).

South Carolina expressly rejects the portion of the UTC Comment which makes “public policy” or “invidious discrimination” a basis to find that a trust violates Section 62‑7‑404.

South Carolina common law does not allow enforcement of a trust for an unlawful purpose. South Carolina’s existing case law is sufficient to prohibit discrimination in a charitable trust.

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

Library References

Charities 9, 49.

Westlaw Topic No. 75.

C.J.S. Charities Sections 7 to 11, 48 to 51.

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 361, Charitable Trusts‑Fundamental Theories‑Introduction.

Bogert ‑ the Law of Trusts and Trustees Section 373, The Relief of Poverty.

Bogert ‑ the Law of Trusts and Trustees Section 966, Duty to Render Formal Account in Court of Equity.

NOTES OF DECISIONS

In general 1

Justiciability 2

1. In general

State attorney general has a duty to represent unspecified charitable beneficiaries of a trust. Wilson v. Dallas (S.C. 2013) 403 S.C. 411, 743 S.E.2d 746. Charities 49

Attorney General is the proper party to protect the interests of the public at large in the matter of administering or enforcing charitable trusts (decided under former Section 62‑7‑503). Epworth Children’s Home v. Beasley (S.C. 2005) 365 S.C. 157, 616 S.E.2d 710. Charities 49

Merger doctrine would not be applied to permit trustee to terminate testamentary charitable trust from its inception and immediately distribute all trust assets, even though desired disclaimer by one charitable beneficiary would leave trustee the sole beneficiary of the trust, where terms of trust indicated that testatrix intended to provide an ongoing annual benefit for beneficiaries; merger doctrine would not be applied so as to defeat or frustrate intent of testatrix (decided under former Section 62‑7‑501). Epworth Children’s Home v. Beasley (S.C. 2005) 365 S.C. 157, 616 S.E.2d 710. Trusts 30

2. Justiciability

Initial trustees for testator’s irrevocable trust had standing to appeal circuit court’s approval of settlement agreement and attorney general’s intervention in estate controversy, even though trustees had been removed by circuit court order both as trustees, where explicit terms of trust agreement conferred upon trustees the authority to handle claims for or against the trust estate. Wilson v. Dallas (S.C. 2013) 403 S.C. 411, 743 S.E.2d 746. Wills 741

**SECTION 62‑7‑406.** Creation of trust induced by fraud, duress, or undue influence.

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

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section is a specific application of Restatement (Third) of Trusts Section 12 (Tentative Draft No. 1, approved 1996), and Restatement (Second) of Trusts Section 333 (1959), which provide that a trust can be set aside or reformed on the same grounds as those which apply to a transfer of property not in trust, among which include undue influence, duress, and fraud, and mistake. This section addresses undue influence, duress, and fraud. For reformation of a trust on grounds of mistake, see Section 62‑7‑415. See also Restatement (Third) of Property: Wills and Other Donative Transfers Section 8.3 (Tentative Draft No. 3, approved 2001), which closely tracks the language above. Similar to a will, the invalidity of a trust on grounds of undue influence, duress, or fraud may be in whole or in part.

The South Carolina version of this section changes the word “void” to “voidable” to eliminate any suggestion that a trust might be void ab initio or that the trustee’s actions might be invalid even though taken in good faith and before any determination that the trust is void.

Third parties dealing with the trustee of a voidable trust will be protected by South Carolina Trust Code Section 62‑7‑1012.

This section is similar to present South Carolina law regarding the validity of wills.

Library References

Trusts 45.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 78 to 86.

**SECTION 62‑7‑407.** Evidence of oral trust.

Except as otherwise required by statute, a trust need not be evidenced by a trust instrument. The creation of an oral trust and its terms may be established only by clear and convincing evidence.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

While it is always advisable for a settlor to reduce a trust to writing, the SCTC follows established law in recognizing oral trusts. Such trusts are viewed with caution, however.

This section is in accordance with existing South Carolina law requiring oral trusts to be proved by clear and convincing evidence. However, South Carolina statutory law has consistently required that the declaration or creation of trusts in lands, tenements or hereditaments be manifested and proved by some writing such as a trust agreement or last will. Absent such a writing, the trust would be void, per former South Carolina Probate Code Section 62‑7‑101 et seq. Historically, a distinction has been made between the creation of the trust and the conveyance of real property thereto, but the writing must manifest a previous trust. This section no longer distinguishes between trusts funded with real estate from those funded with personalty. Both must be established by clear and convincing evidence. See Beckham v. Short, 380 S.E. 2d 826 (S.C. 1989).

Absent some specific statutory provision, such as a Statute of Frauds provision requiring that transfers of real property be proved by writing, a trust need not be evidenced by a writing.

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

South Carolina Trust Code Section 62‑7‑401(a)(2) requires a writing to create a declaration of trust (a self‑trusteed trust).

CROSS REFERENCES

Methods of creating trust, see Section 62‑7‑401.

Library References

Trusts 17, 44(3).

Westlaw Topic No. 390.

C.J.S. Trusts Sections 28 to 34, 36, 71, 77.

**SECTION 62‑7‑408.** Trust for care of animal.

(a) A trust may be created to provide for the care of an animal or animals alive or in gestation during the settlor’s lifetime, whether or not alive at the time the trust is created. The trust terminates 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 concerned for 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.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

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

This section addresses a particular type of honorary trust, the trust for the care of an animal. Section 62‑7‑409 specifies the requirements for trusts without ascertainable beneficiaries that are created for other noncharitable purposes. A trust for the care of an animal may last for the life of the animal. While the animal will ordinarily be alive on the date the trust is created, an animal may be added as a beneficiary after that date as long as the addition is made prior to the settlor’s death. Animals in gestation but not yet born at the time of the trust’s creation may also be covered by its terms. A trust authorized by this section may be created to benefit one designated animal or several designated animals.

South Carolina Trust Code Section 62‑7‑408 differs in several minor ways from the uniform version. Two provisions found in the UTC Comment have been added to the body of Section 62‑7‑408(a): (1) that the trust can benefit animals alive during the settlor’s lifetime, regardless of whether they are alive at the time the trust is created, and (2) that animals in gestation at the settlor’s death can be included in the trust. Surplus language in the UTC has also been omitted from the SCTC version.

Subsection (b) addresses enforcement. SCTC Section 62‑7‑408(b) modifies the UTC version, attempting to clarify that a person need be concerned only for an animal’s welfare to petition the court. That person does not have to have a legally cognizable interest in the animal. Noncharitable trusts ordinarily may be enforced by their beneficiaries. Charitable trusts may be enforced by the State’s attorney general or by a person deemed to have a special interest. See Restatement (Second) of Trusts Section 391 (1959). But at common law, a trust for the care of an animal or a trust without an ascertainable beneficiary created for a noncharitable purpose was unenforceable because there was no person authorized to enforce the trustee’s obligations.

Sections 62‑7‑408 and 62‑7‑409 close this gap. The intended use of a trust authorized by either section may be enforced by a person designated in the terms of the trust or, if none, by a person appointed by the court. In either case, Section 62‑7‑110(b) grants to the person appointed the rights of a qualified beneficiary for the purpose of receiving notices and providing consents. If the trust is created for the care of an animal, a person with an interest in the welfare of the animal has standing to petition for an appointment. The person appointed by the court to enforce the trust should also be a person who has exhibited an interest in the animal’s welfare. The concept of granting standing to a person with a demonstrated interest in the animal’s welfare is derived from the Uniform Guardianship and Protective Proceedings Act, which allows a person interested in the welfare of a ward or protected person to file petitions on behalf of the ward or protected person

Subsection (c) addresses the problem of excess funds. If the court determines that the trust property exceeds the amount needed for the intended purpose and that the terms of the trust do not direct the disposition, a resulting trust is ordinarily created in the settlor or settlor’s successors in interest. See Restatement (Third) of Trusts Section 47 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 124 (1959). Successors in interest include the beneficiaries under the settlor’s will, if the settlor has a will, or in the absence of an effective will provision, the settlor’s heirs. The settlor may also anticipate the problem of excess funds by directing their disposition in the terms of the trust. The disposition of excess funds is within the settlor’s control: See Section 62‑7‑105(a). While a trust for an animal is usually not created until the settlor’s death; subsection (a) allows such a trust to be created during the settlor’s lifetime. Accordingly, if the settlor is still living, subsection (c) provides for distribution of excess funds to the settlor, and not to the settlor’ s successors in interest.

Should the means chosen not be particularly efficient, a trust created for the care of an animal can also be terminated by the trustee or court under Section 62‑7‑414. Termination of a trust under that section, however, requires that the trustee or court develop an alternative means for carrying out the trust purposes. See Section 62‑7‑414(c).

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

A trust created under this section would not be recognized under former South Carolina law. Thus, this section creates a new concept for South Carolina.

Library References

Charities 10.

Westlaw Topic No. 75.

C.J.S. Charities Section 7.

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 818, Apportionment of Income.

**SECTION 62‑7‑409.** Noncharitable trust without ascertainable beneficiary.

Except as otherwise provided in this section or by another statute, the following rules apply:

(1) A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. The trust may not be enforced for more than the period allowed under any rule against perpetuities applicable under South Carolina law, except for the care and maintenance of a cemetery or cemetery plots, graves, mausoleums, columbaria, grave markers, or monuments.

(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.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

South Carolina Trust Code Section 62‑7‑409 had no exact statutory counterpart under prior South Carolina law, although this Section continues South Carolina’s allowance of trusts for the perpetual care of cemetery plots as set forth in S. C. Code Section 27‑5‑70.

This section authorizes two types of trusts without ascertainable beneficiaries; trusts for general but noncharitable purposes, and trusts for a specific noncharitable purpose other than the care of an animal, on which see Section 62‑7‑408. Examples of trusts for general noncharitable purposes include a bequest of money to be distributed to such objects of benevolence as the trustee might select. Unless such attempted disposition was interpreted as charitable, at common law the disposition was honorary only and did not create a trust. Under this section, however, the disposition is enforceable as a trust for a period of up to the maximum allowed under any applicable state rule against perpetuities.

The most common example of a trust for a specific noncharitable purpose is a trust for the care of a cemetery plot. The rule against perpetuities limitation does not apply to cemeteries, cemetery plots, grave sites, mausoleums, columbaria, grave markers, or monuments.

Perpetual care cemeteries are addressed in Title 40, Chapter 8, Sections 40‑8‑110 et. seq.

For the requirement that a trust, particularly the type of trust authorized by this section, must have a purpose that is not capricious, see Section 62‑7‑404 Comment. For examples of the types of trusts authorized by this section, see Restatement (Third) of Trusts Section 47 (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Section 62 cmt. W and Section 124 (1959). The case law on capricious purposes is collected in 2 Austin W. Scott & William F. Fratcher, The Law of Trusts Section 124.7 (4th ed. 1987).

This section is similar to Section 62‑7‑408, although less detailed. Much of the Comment to Section 62‑7‑408 also applies to this section.

Effect of Amendment

The 2013 amendment in subsection (1) substituted “any rule against perpetuities applicable under South Carolina law” for “the South Carolina Uniform Statutory Rule Against Perpetuities (S.C. Code Section 27‑6‑10 et. seq.)”.

Library References

Trusts 21(2).

Westlaw Topic No. 390.

C.J.S. Trusts Sections 35 to 36, 42, 44 to 47.

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 161, Necessity for an Identifiable Beneficiary.

Bogert ‑ the Law of Trusts and Trustees Section 818, Apportionment of Income.

**SECTION 62‑7‑410.** Modification or termination of trust; proceedings for approval or disapproval.

(a) In addition to the methods of termination prescribed by Sections 62‑7‑411 through 62‑7‑414, a trust terminates to the extent the trust is revoked or expires pursuant to its terms.

(b) A proceeding to approve or disapprove a proposed modification or termination under Sections 62‑7‑411 through 62‑7‑416, or trust combination or division under Section 62‑7‑417, may be commenced by a trustee or beneficiary, and a proceeding to approve or disapprove a proposed modification or termination under Section 62‑7‑411 may be commenced by the settlor. The settlor of a charitable trust as well as the Attorney General, among others, may maintain a proceeding to modify the trust under Section 62‑7‑413.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

South Carolina Trust Code Section 62‑7‑410 provides for the modification or termination of trusts and refers to the more specific provisions of Sections 62‑7‑411 through 62‑7‑417. This SCTC Section does not adopt the provisions of Uniform Trust Code Section 62‑7‑410, calling for termination of the trust when “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.” These may be grounds to terminate a trust under the SCTC, but only upon appropriate notice to interested parties and an opportunity for a hearing. A declaratory judgment may be sought to determine if the trust has terminated.

CROSS REFERENCES

Powers and discretions of a trust protector, see Section 62‑7‑818.

Library References

Trusts 58, 59, 61.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 96 to 127.

**SECTION 62‑7‑411.** Modification or termination of noncharitable irrevocable trust by consent with court approval.

(a) A noncharitable irrevocable trust may be modified or terminated with court approval upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust. A settlor’s power to consent to a trust’s modification or termination may be exercised by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust; by the settlor’s conservator with the approval of the court supervising the conservator if an agent is not so authorized; or by the settlor’s guardian with the approval of the court supervising the guardianship if an agent is not so authorized and a conservator has not been appointed.

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

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

(d) 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.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section describes the circumstances in which termination or modification of a noncharitable irrevocable trust may be compelled by the beneficiaries, with or without the concurrence of the settlor, but with court approval. For provisions governing modification or termination of trusts without the need to seek beneficiary consent, see Sections 62‑7‑412 (modification or termination due to unanticipated circumstances or inability to administer trust effectively), 62‑7‑414 (termination or modification of uneconomic noncharitable trust), and 62‑7‑416 (modification to achieve settlor’s tax objectives). If the trust is revocable by the settlor, the method of revocation specified in Section 62‑7‑602 applies. South Carolina Trust Code Section 62‑7‑411(a) adds the phrase “with court approval” to the first sentence of the Uniform Trust Code version and the phrase “modification or” to the second sentence of the UTC version. The SCTC omits UTC subsection 411(c), which provided that a spendthrift provision would not be presumed to constitute a material purpose of the trust. SCTC Section 62‑7‑411(c) substitutes the phrase “as ordered by the court” to the UTC version of subsection (d) for the phrase “as agreed by the beneficiaries.”

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

Under this section, a trust may be modified or terminated over a trustee’s objection. However, pursuant to Section 62‑7‑410, the trustee has standing to object to a proposed termination or modification.

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

The provisions of Part 3 on representation, virtual representation and the appointment and approval of representatives appointed by the court apply to the determination of whether all beneficiaries have signified consent under this section. The authority to consent on behalf of another person, however, does not include authority to consent over the other person’s objection. See Section 62‑7‑301(c). Regarding the persons who may consent on behalf of a beneficiary, see Sections 62‑7‑302 through 62‑7‑305. A consent given by a representative is invalid to the extent there is a conflict of interest between the representative and the person represented. If virtual or other form of representation is unavailable, Section 62‑7‑305 of the Code permits the court to appoint a representative who may give the necessary consent to the proposed modification or termination on behalf of the minor, incapacitated, unborn, or unascertained beneficiary. The ability to use virtual and other forms of representation to consent on a beneficiary’s behalf to a trust termination or modification has not traditionally been part of the law, although there are some notable exceptions. Compare Restatement (Second) Section 337(1) (1959) (beneficiary must not be under incapacity), with Hatch v. Riggs National Bank, 361 F.2d 559 (D.C. Cir. 1966) (guardian ad litem authorized to consent on beneficiary’s behalf).

Subsection (a) also addresses the authority of an agent, conservator, or guardian to act on a settlor’s behalf. Consistent with Section 62‑7‑602 on revocation or modification of a revocable trust, the section assumes that a settlor, in granting an agent general authority, did not intend for the agent to have authority to consent to the termination or modification of a trust, authority that could be exercised to radically alter the settlor’s estate plan. In order for an agent to validly consent to a termination or modification of the settlor’s revocable trust, such authority must be expressly conveyed either in the power or in the terms of the trust.

Subsection (a), however, does not impose restrictions on consent by a conservator or guardian, other than prohibiting such action if the settlor is represented by an agent. The section instead leaves the issue of a conservator’s or guardian’s authority to local law. Many conservatorship statutes recognize that termination or modification of the settlor’s trust is a sufficiently important transaction that a conservator should first obtain the approval of the court supervising the conservatorship. See, e.g., Unif Probate Code Section 5‑411(a)(4). Because the SCTC uses the term “conservator” to refer to the person appointed by the court to manage an individual’s property (see Section 62‑7‑103(4)), a guardian may act on behalf of a settlor under this section only if a conservator has not been appointed.

Subsection (a) is similar to Restatement (Third) of Trusts Section 65(2) (Tentative Draft No. 3, approved 2001), and Restatement (Second) of Trusts Section 338(2) (1959), both of which permit termination upon joint action of the settlor and beneficiaries. Unlike termination by the beneficiaries alone under subsection (b), termination with the concurrence of the settlor does not require a finding that the trust no longer serves a material purpose. No finding of failure of material purpose is required because all parties with a possible interest in the trust’s continuation, both the settlor and beneficiaries, agree there is no further need for the trust. Restatement Third goes further than subsection (b) of this section and Restatement Second, however, in also allowing the beneficiaries to compel termination of a trust that still serves a material purpose if the reasons for termination outweigh the continuing material purpose.

Subsection (b), similar to Restatement Third but not Restatement Second, allows modification by beneficiary action. The beneficiaries may modify any term of the trust if the modification is not inconsistent with a material purpose of the trust. Restatement Third, though, goes further than this Code in also allowing the beneficiaries to use trust modification as a basis for removing the trustee if removal would not be inconsistent with a material purpose of the trust. Under the Code, however, Section 62‑7‑706 is the exclusive provision on removal of trustees. Section 62‑7‑706(b)(4) recognizes that a request for removal upon unanimous agreement of the qualified beneficiaries is a factor for the court to consider, but before removing the trustee the court must also find that such action best serves the interests of all the beneficiaries, that removal is not inconsistent with a material purpose of the trust, and that a suitable cotrustee or successor trustee is available. Compare Section 62‑7‑706(b)(4), with Restatement (Third) Section 65 cmt. f (Tentative Draft No. 3, approved 2001).

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

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

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

Subsection (c) recognizes that, once termination has been approved, how the trust property is to be distributed is solely for the court to decide.

No similar statutory provisions existed under prior South Carolina law.

Under South Carolina case law, a court has the power to alter or modify an irrevocable trust to effectuate the intent of the settler, but it is the duty of the courts to preserve, not destroy, trusts. See Chiles v. Chiles, 270 S.C. 379, 242 S.E.2d 426 (S.C. 1978). When a settler sought modification of an irrevocable trust without the consent of the beneficiaries, the court would modify the trust to effectuate the settlor’s intent only when some exigency or emergency made the modification indispensable to the preservation of the trust. See Chiles.

Under existing South Carolina case law, a spendthrift trust cannot be terminated by agreement of all beneficiaries when the purpose of the trust is to provide an income stream for life or until the trust fund was exhausted, since to do so would defeat a material purpose of the trust. See Germann v. New York Life Insurance Co, 286 S.C. 34, 331 S.E.2d 385(S.C. App. 1985).

CROSS REFERENCES

Powers and discretions of a trust protector, see Section 62‑7‑818.

Library References

Trusts 58, 61(1).

Westlaw Topic No. 390.

C.J.S. Trusts Sections 96 to 102, 118 to 127.

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 1005, Termination at Request of Settlor and All Beneficiaries.

Bogert ‑ the Law of Trusts and Trustees Section 1007, Court Termination at Request of Beneficiaries‑Trust Purposes Accomplished.

**SECTION 62‑7‑412.** Modification or termination because of unanticipated circumstances or inability to administer trust effectively.

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

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

(c) Upon termination of a trust under this section, the trustee shall distribute the trust property as ordered by the court.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section broadens the court’s ability to apply equitable deviation to terminate or modify a trust. South Carolina Trust Code Section 62‑7‑412(a) conceptually broadens the traditional authority of the court to modify trust provisions because of unanticipated circumstances, especially with respect to dispositive provisions. Subsection (a) is similar to Restatement (Third) of Trusts Section 66(1) (Tentative Draft No. 3, approved 2001), except that this section, unlike the Restatement, does not impose a duty on the trustee to petition the court if the trustee is aware of circumstances justifying judicial modification. The purpose of the “equitable deviation” authorized by subsection (a) is not to disregard the settlor’s intent but to modify inopportune provisions to effectuate better the settlor’s broader purposes. Among other things, equitable deviation may be used to modify administrative or dispositive terms due to the failure to anticipate economic change or the incapacity of a beneficiary. For numerous illustrations, see Restatement (Third) of Trusts Section 66 cmt. b (Tentative Draft No. 3, approved 2001). While it is necessary that there be circumstances not anticipated by the settlor before the court may grant relief under subsection (a), the circumstances may have been in existence when the trust was created. This section thus complements Section 62‑7‑415, which allows for reformation of a trust based on mistake of fact or law at the creation of the trust.

Subsection (b) broadens the court’s ability to modify the administrative terms of a trust. The standard under subsection (b) is similar to the standard for applying equitable deviation to a charitable trust. See Section 62‑7‑413(a). Just as a charitable trust may be modified if its particular charitable purpose becomes impracticable or wasteful, so can the administrative terms of any trust, charitable or non‑charitable. Subsections (a) and (b) are not mutually exclusive. Many situations justifying modification of administrative terms under subsection (a) will also justify modification under subsection (b). Subsection (b) is also an application of the requirement in Section 62‑7‑404 that a trust and its terms must be for the benefit of its beneficiaries. See also Restatement (Third) of Trusts Section 27(2) & cmt. b (Tentative Draft No. 2, approved 1999). Although the settlor is granted considerable latitude in defining the purposes of the trust, the principle that a trust have a purpose which is for the benefit of its beneficiaries precludes unreasonable restrictions on the use of trust property. An owner’s freedom to be capricious about the use of the owner’s own property ends when the property is impressed with a trust for the benefit of others. See Restatement (Second) of Trusts Section 124 cmt. g (1959). Thus, attempts to impose unreasonable restrictions on the use of trust property will fail. See Restatement (Third) of Trusts Section 27 Reporter’s Notes to cmt. b (Tentative Draft No. 2, approved 1999). Subsection (b), unlike subsection (a), does not have a direct precedent in the common law, but various states have adopted such a measure by statute. See, e.g., Mo. Rev. Stat. Section 456.590.1.

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

South Carolina Trust Code Section 62‑7‑412(c) modifies the uniform version to provide that, upon termination, trust property is to be distributed as ordered by the court.

CROSS REFERENCES

Powers and discretions of a trust protector, see Section 62‑7‑818.

Library References

Trusts 58, 61.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 96 to 102, 117 to 127.

**SECTION 62‑7‑413.** Equitable deviation.

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

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

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

(3) the court may deviate from the terms of the trust to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor’s charitable intent.

(b) A provision in the terms of a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power of the court under subsection (a) to modify or terminate the trust only if, when the provision takes effect:

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

(2) fewer than the number of years allowed under any rule against perpetuities applicable under South Carolina law, have elapsed since the date of the trust’s creation.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section clarifies and codifies in part existing South Carolina law that recognizes “equitable deviation,” which is the power of a court in certain situations to change the provisions of a charitable trust.

South Carolina has long recognized the doctrine of equitable deviation, which permits a court of equity to deviate from the strict terms of a trust when changed conditions render the accomplishment of the charitable purpose impossible or impracticable. Subsection (a) codifies the court’s inherent authority to apply equitable deviation. The power may be applied to modify an administrative or dispositive term. The court may order the trust terminated and distributed to other charitable entities.

When the Section 62‑7‑413 was enacted, the words “cy pres” in the Uniform Trust Code version were deleted and replaced with language referring to equitable deviation because South Carolina courts have refused to recognize the doctrine of cy pres. See e.g., Mars v. Gilbert, 93 S.C. 455, 77 S.E. 131 (S.C. 1913) (expressly rejecting the doctrine of equitable cy pres. but making clear that literal compliance with the terms of a will is not always required when the conditions have changed). See also All Saints Parish, Waccamaw, a South Carolina non‑profit corporation, a/k/a The Episcopal Church of All Saints and a/k/a The Vestry and Church Wardens of the Episcopal Church of All Saints Parish, 358 S.C. 209, 595 S.E. 2d 253 (Ct. App 2004), rev’d on other grounds, 385 S. C. 428, 685 S.E. 2d 163 (2009).

Although Section 62‑7‑413 changes the references from cy pres in the UTC version to equitable deviation terminology, Section 62‑7‑413 is otherwise taken verbatim from the UTC (except for a slight modification in the manner of referring to the rule against perpetuities). Consequently, the substantive provisions of UTC section 413 are exactly the same as those in Section 62‑7‑413.

Effect of Amendment

The 2013 amendment in subsection (b)(2) substituted “any rule against perpetuities applicable under South Carolina law” for “the South Carolina Uniform Statutory Rule Against Perpetuities, (S.C. Code Section 27‑6‑10 et seq.)”.

Library References

Charities 37.

Westlaw Topic No. 75.

C.J.S. Charities Sections 36 to 37.

**SECTION 62‑7‑414.** Modification or termination of uneconomic trust.

(a) After notice to the qualified beneficiaries, and without court approval, the trustee of a trust consisting of trust property having a total value less than one hundred thousand dollars 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 as ordered by the court or, if the court does not specify the manner of distribution, or if no court approval is required, in a manner consistent with the purposes of the trust.

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

HISTORY: 2005 Act No. 66, Section 1; 2010 Act No. 244, Section 49, eff June 7, 2010; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Subsection (a) assumes that a trust with a value of $100,000 or less is sufficiently likely to be inefficient to administer that a trustee should be able to terminate it without the expense of a judicial termination proceeding. Also, in subsection (c) a phrase added to the uniform version clarifies that the court may specify how the trust assets should be distributed—e.g., in cases when the court is involved in a termination under subsection (b).

Because subsection (a) is a default rule, a settlor is free to set a higher or lower figure or to specify different procedures or to prohibit termination without a court order. See Section 62‑7‑105.

Subsection (b) allows the court to modify or terminate a trust if the costs of administration would otherwise be excessive in relation to the size of the trust. The court may terminate a trust under this section even if the settlor has forbidden it. See Section 62‑7‑105(b)(4). Judicial termination under this subsection may be used whether or not the trust is larger or smaller than $100,000.

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

Upon termination of a trust under this section, subsection (c) requires that the trust property be distributed in a manner consistent with the purposes of the trust. In addition to outright distribution to the beneficiaries, Section 62‑7‑816(21) authorizes payment to be made by a variety of alternate payees. Distribution under this section will typically be made to the qualified beneficiaries in proportion to the actuarial value of their interests.

If the trustee or cotrustee is a beneficiary and would receive part or all of the trust assets upon termination of a trust under subsection (a), then the trustee’s power to terminate is subject to the limitations in SCTC Section 62‑7‑814.

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

While this Section is not directed principally at honorary trusts, it may be so applied. See Sections 62‑7‑408 and 62‑7‑409.

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

Subsection (a) had no counterpart in prior South Carolina law, though a trust document might contain similar provisions.

Effect of Amendment

The 2010 amendment in subsection (a) added “and without court approval,” following “After notice to the qualified beneficiaries,”; and in subsection (c) added “or if no court approval is required,” following “the manner of distribution,”.

Library References

Trusts 58, 61.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 96 to 102, 117 to 127.

**SECTION 62‑7‑415.** 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 what the settlor’s intention was and that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

There was no comparable South Carolina statutory provision authorizing a court to reform an unambiguous trust to conform to the settlor’s intent.

South Carolina Trust Code Section 62‑7‑415 would permit the introduction of parol evidence to show the settlor’s intent and the existence of a mistake of fact or law, provided that the evidence is clear and convincing to protect against the possibility of unreliable or fraudulent evidence. This section permits consideration of evidence relevant to the settlor’s intention even when contradicted by the plain meaning of the words in the instrument.

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

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

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

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

The 2013 amendment better conforms the language of this section to the language of the Restatement (Third) of Property provision on which this section is based.

Library References

Trusts 57.

Westlaw Topic No. 390.

C.J.S. Trusts Section 95.

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 816, Allocation of Receipts to Principal or Income.

Bogert ‑ the Law of Trusts and Trustees Section 826, Bonds Bought at a Discount.

Bogert ‑ the Law of Trusts and Trustees Section 828, Bonds Purchased at a Premium.

Bogert ‑ the Law of Trusts and Trustees Section 855, Dividends in Notes or Bonds.

**SECTION 62‑7‑416.** Modification to achieve settlor’s tax objectives.

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

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section is copied from Restatement (Third) of Property: Donative Transfers Section 12.2 (Tentative Draft No. 1, approved 1995). “Modification” under this section is to be distinguished from the “reformation” authorized by Section 62‑7‑415. Reformation under Section 62‑7‑415 is available when the terms of a trust fail to reflect the donor’s original, particularized intention. The mistaken terms are then reformed to conform to this specific intent. The modification authorized here allows the terms of the trust to be changed to meet the settlor’s tax‑saving objective as long as the resulting terms, particularly the dispositive provisions, are not inconsistent with the settlor’s probable intent. The modification allowed by this subsection is similar in concept to the equitable deviation doctrine for charitable trusts (see Section 62‑7‑413), and the deviation doctrine for unanticipated circumstances (see Section 62‑7‑412).

There was no South Carolina statutory provision that correlates with this Section. Former Section 62‑7‑211 of the South Carolina Probate Code provided for division or consolidation of trusts, provided that the consolidation or division was not inconsistent with the intent of the trustor, the action would facilitate trust administration, and the action would be in the best interests of all beneficiaries and not materially impair their interests. See South Carolina Trust Code Section 62‑7‑417.

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

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

South Carolina case law indicates that the courts will not allow a beneficiary’s interest to be negated if the beneficiary objects, regardless of the tax benefit desired. See Chiles v. Chiles, 270 S.C. 379, 242 S.E.2d 426 (S.C. 1978) (the Supreme Court reversed, with respect to the one appellant only, the lower court’s extinguishment of certain noncharitable beneficiaries’ interests to vest a charitable contribution deduction for federal estate tax purposes).

CROSS REFERENCES

Proceeding to determine decedent’s intent regarding application of certain federal tax formulas, see Section 62‑2‑612.

Library References

Trusts 58.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 96 to 102.

**SECTION 62‑7‑417.** 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.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section expands former South Carolina Probate Code Section 62‑7‑211, which allowed the division or consolidation of trusts only with court approval when such action was not authorized by the trust instrument and is subject to contrary provision in the terms of the trust. Many trust instruments and standardized estate planning forms include comprehensive provisions governing combination and division of trusts. Except for the requirement that the qualified beneficiaries receive advance notice of a proposed combination or division, this section is similar to Restatement (Third) of Trusts Section 68 (Tentative Draft No. 3, approved 2001).

This section allows a trustee to combine two or more trusts even though their terms are not identical. Typically the trusts to be combined will have been created by different members of the same family and will vary on only insignificant details, such as the presence of different perpetuities savings periods. The more the dispositive provisions of the trusts to be combined differ from each other the more likely it is that a combination would impair some beneficiary’s interest, hence the less likely that the combination can be approved. Combining trusts may prompt more efficient trust administration and is sometimes an alternative to terminating an uneconomic trust as authorized by Section 62‑7‑414. Administrative economies promoted by combining trusts include a potential reduction in trustees’ fees, particularly if the trustee charges a minimum fee per trust, the ability to file one trust income tax return instead of multiple returns, and the ability to invest a larger pool of capital more effectively. Particularly if the terms of the trust are identical, available administrative economies may suggest that the trustee has a responsibility to pursue a combination. See Section 62‑7‑805 (duty to incur only reasonable costs).

Division of trusts is often beneficial and, in certain circumstances, almost routine. Division of trusts is frequently undertaken due to a desire to obtain maximum advantage of exemptions available under the federal generation‑skipping tax. While the terms of the trusts which result from such a division are identical, the division will permit differing investment objectives to be pursued and allow for discretionary distributions to be made from one trust and not the other. Given the substantial tax benefits often involved, a failure by the trustee to pursue a division might in certain cases be a breach of fiduciary duty. The opposite could also be true if the division is undertaken to increase fees or to fit within the small trust termination provision. See Section 62‑7‑414.

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

This section does not require that a combination or division be approved either by the court or by the beneficiaries. Prudence may dictate, however, that court approval under Section 62‑7‑410 be sought and beneficiary consent obtained whenever the terms of the trusts to be combined or the trusts that will result from a division differ substantially one from the other. For the provisions relating to beneficiary consent, or ratification of a transaction, or release of trustee from liability, see Section 62‑7‑1009.

While the consent of the beneficiaries is not necessary before a trustee may combine or divide trusts under this section, advance notice to the qualified beneficiaries of the proposed combination or division is required. This is consistent with Section 62‑7‑813, which requires that the trustee keep the qualified beneficiaries reasonably informed of trust administration, including the giving of advance notice to the qualified beneficiaries of several specified actions that may have a major impact on their interests.

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

For a provision authorizing a trustee, in distributing the assets of the divided trust, to make non‑pro‑rata distributions, see Section 62‑7‑816(22).

CROSS REFERENCES

Proceeding to determine decedent’s intent regarding application of certain federal tax formulas, see Section 62‑2‑612.

Library References

Trusts 58.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 96 to 102.

**SECTION 62‑7‑418.** Estate and possession of trust estates shall be in beneficiaries thereof.

(a) When any person shall be seized of any lands, tenements, rents, reversions, remainders, or other hereditaments to the use, confidence, or trust of any other person or of any body politic by reason of any bargain, sale, feoffment, covenant, contract, agreement, will, or otherwise, the person or body politic that shall have such use, confidence, or trust, in fee simple, fee tail, for term of life or for years or otherwise or any use, confidence, or trust in remainder or reversion, shall be deemed and adjudged in lawful seizing, estate and possession of and in such lands, tenements, rents, reversions, remainders, and hereditaments, with their appurtenances, to all intents, constructions, and purposes in law of and in such like estates as they shall have in use, trust, or confidence of or in them.

(b) When several persons shall be jointly seized of any lands, tenements, rents, reversions, remainders, or other hereditaments to the use, confidence, or trust of any of them that be so jointly seized, such person or persons who shall have any such use, confidence, or trust in any such lands, tenements, rents, reversions, remainders, or hereditaments shall have such estate, possession, and seizing of and in such lands, tenements, rents, reversions, remainders, and other hereditaments only to him or them that shall have any such use, confidence, or trust, in like nature, manner, form, condition, and course as he or they had before in the use, confidence, or trust of such lands, tenements, or hereditaments, saving and reserving to all and singular persons and bodies politic, their heirs and successors, other than such person or persons who are seized of such lands, tenements, or hereditaments to any use, confidence, or trust, all such right, title, entry, interest, possession, rents, and action as they or any of them had or might have had without this section and also saving to all and singular those persons and their heirs who are seized to any use all such former right, title, entry, interest, possession, rents, customs, services, and action as they or any of them might have had to his or their own proper use in or to any lands, tenements, rents, or hereditaments whereof they are seized to any other use, anything contained in this chapter to the contrary notwithstanding.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

There is no counterpart to this section in the Uniform Trust Code.

South Carolina Trust Code Subsections 62‑7‑418(a) and (b) retain and incorporate former South Carolina Probate Code Sections 62‑7‑107 and 62‑7‑108.

Library References

Trusts 140.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 251, 254 to 262.

Part 5

Creditors’ Claims; Spendthrift and Discretionary Trusts

General Comment

This article addresses the validity of a spendthrift provision and the rights of creditors, both of the settlor and beneficiaries, to reach a trust to collect a debt. Sections 62‑7‑501 and 62‑7‑502 state the general rules. To the extent that a trust is protected by a spendthrift provision, a beneficiary’s creditor may not reach the beneficiary’s interest until distribution is made by the trustee. To the extent not protected by a spendthrift provision, however, the creditor can reach the beneficiary’s interest subject to the court’s power to limit the relief. Section 62‑7‑503 lists the categories of creditors whose claims are not subject to a spendthrift restriction. Sections 62‑7‑504 through 62‑7‑507 address special categories in which the rights of a beneficiary’s creditors are the same whether or not the trust contains a spendthrift provision. Section 62‑7‑504 deals with discretionary trusts and trusts for which distributions are subject to a standard. Section 62‑7‑505 covers creditor claims against a settlor, whether the trust is revocable or irrevocable, and if revocable, whether the claim is made during the settlor’s lifetime or incident to the settlor’s death. Section 62‑7‑506 provides a creditor with a remedy if a trustee fails to make a mandated distribution within a reasonable time. Section 62‑7‑507 clarifies that although the trustee holds legal title to trust property, that property is not subject to the trustee’s personal debts.

The provisions of this article relating to the validity and effect of a spendthrift provision and the rights of certain creditors and assignees to reach the trust may not be modified by the terms of the trust. See Section 62‑7‑105(b)(5).

This article does not supersede state exemption statutes nor any fraudulent transfer statutes, which, when applicable, invalidates any type of gratuitous transfer, including transfers into trust.

**SECTION 62‑7‑501.** Rights of beneficiary’s creditor or assignee.

(a) Except as provided in subsection (b), 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.

(b) This section shall not apply and a trustee shall have no liability to any creditor of a beneficiary for any distributions made to or for the benefit of the beneficiary to the extent a beneficiary’s interest:

(1) is protected by a spendthrift provision, or

(2) is a discretionary trust interest as referred to in S.C. Code Section 62‑7‑504.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

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

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

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

The case law in South Carolina was uncertain as to the effectiveness and application of the spendthrift provision but appears to indicate that a spendthrift provision operated against only income interests but not principal interests. See S. Alan Medlin, The Law of Wills and Trusts, Vol. I. Estate Planning in South Carolina, Section 508.2(a), p. 5‑19 (2002). Older cases seem to allow a cessor clause to prevent the voluntary or involuntary alienation of the beneficiary’s interest. See S. Alan Medlin, supra. This Section avoids the confusion regarding the effectiveness and application of the spendthrift provision and also clarifies and broadens the laws in South Carolina so that a spendthrift provision operates as a restraint against both income and principal interests, except as otherwise provided in the following sections of the SCTC.

Section 62‑7‑501 provides additional protection not only for spendthrift interests, but also for interests in discretionary trusts as referred to in S. C. Code Section 62‑7‑504. Discretionary trusts do not have to rely on spendthrift language for a beneficiary’s present or future interest in the trust to be exempt from creditor attachment.

For a definition of discretionary trust, resort should be made to the South Carolina common law. See generally Heath v. Bishop, 25 S. C. Eq. (4 Rich. Eq.) 446 (S.C. 1851); Collins v. Collins, 219 S.C. 1. 63 S.E. 2d 811 (S.C.1951); see also Sarlin v. Sarlin, 312 S. C. 27, 430 S. E. 2d 530 (S.C. App. 1993); Page v. Page, 243 S. C. 312, 133 S. E. 2d 829 (S.C. 1963).

Library References

Trusts 150.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 269 to 280.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 16:2 , Legal Principles‑Types of Trusts.

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 395, Investments‑Accounting‑Compensation.

Bogert ‑ the Law of Trusts and Trustees Section 411, The Attorney General as the Protector, Supervisor and Enforcer of Charitable Trusts.

LAW REVIEW AND JOURNAL COMMENTARIES

The Impact of Significant Substantive Provisions of the South Carolina Trust Code, 57 S.C. L. Rev. 137 (Autumn 2005).

State Enforcement of Racially Discriminatory Charitable Trust and the Equal Protection Clause of the Fourteenth Amendment. 22 S.C. L. Rev. 411.

**SECTION 62‑7‑502.** Spendthrift provision.

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

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

(c) A 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.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Under this section, a settlor has the power to restrain the transfer of a beneficiary’s interest, regardless of whether the beneficiary has an interest in income, in principal, or in both. Unless one of the exceptions under this article applies, a creditor of the beneficiary is prohibited from attaching a protected interest and may only attempt to collect directly from the beneficiary after payment is made. This section is similar to Restatement (Third) of Trusts Section 58 (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Sections 152‑153 (1959). For the definition of spendthrift provision, see Section 62‑7‑103(15).

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

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

A disclaimer, because it is a refusal to accept ownership of an interest and not a transfer of an interest already owned, is not affected by the presence or absence of a spendthrift provision. Most disclaimer statutes expressly provide that the validity of a disclaimer is not affected by a spendthrift protection. See, e.g., Unif. Probate Code Section 2‑801(a) and SCPC Section 62‑2‑801(c)(6). Releases and exercises of powers of appointment are also not affected because they are not transfers of property. See Restatement (Third) of Trusts Section 58 cmt. c (Tentative Draft No. 2, approved 1999).

A spendthrift provision is ineffective against a beneficial interest retained by the settlor. See Restatement (Third) of Trusts Section 58(2) (Tentative Draft No. 2, approved 1999). This is a necessary corollary to Section 62‑7‑505(a)(2), which allows a creditor or assignee of the settlor to reach the maximum amount that can be distributed to or for the settlor’s benefit. This right to reach the trust applies whether or not the trust contains a spendthrift provision.

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

For discussion of the treatment of spendthrift provisions in South Carolina, see Comment to SCTC Section 62‑7‑501.

Library References

Trusts 12, 141, 152.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 23, 251, 263, 269 to 272.

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 222, Spendthrift Trusts in the United States.

**SECTION 62‑7‑503.** Exceptions to spendthrift provision.

(a) In this section, “child” includes any person for whom an order or judgment for child support has been entered in this or another State.

(b) Even if a trust contains a spendthrift provision, a beneficiary’s child who has a judgment or court order against the beneficiary for support or maintenance may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary.

(c) The exception in subsection (b) is unenforceable against a special needs trust, supplemental needs trust, or similar trust established for a disabled person if the applicability of such a provision could invalidate such a trust’s exemption from consideration as a countable resource for Medicaid or Supplemental Security Income (SSI) purposes or if the applicability of such a provision has the effect or potential effect of rendering such disabled person ineligible for any program of public benefit, including, but not limited to, Medicaid and SSI.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

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

The exception in subsection (b) for judgments or orders to support a beneficiary’s child is in accord with Restatement (Third) of Trusts Section 59(a) (Tentative Draft No. 2, approved 1999), Restatement (Second) of Trusts Section 157(a) (1959), and numerous state statutes. It is also consistent with federal bankruptcy law, which exempts such support orders from discharge. South Carolina Trust Code Section 62‑7‑503(b), however, eliminates the exceptions contained in Uniform Trust Code Section 503 for a beneficiary’s spouse or former spouse who has a judgment or court order against the beneficiary for support or maintenance as well as a judgment creditor who has provided services for the protection of a beneficiary’s interest in a spendthrift trust. The effect of this exception is to permit the claimant for unpaid support to attach present or future distributions that would otherwise be made to the beneficiary. Distributions subject to attachment include distributions required by the express terms of the trust, such as mandatory payments of income, and distributions the trustee has otherwise decided to make, such as through the exercise of discretion. Subsection (b), unlike Section 62‑7‑504, does not authorize the child claimant to compel a distribution from the trust. Section 62‑7‑504 authorizes a child claimant to compel a distribution to the extent the trustee has abused a discretion or failed to comply with a standard for distribution.

Subsection (b) refers both to “support” and “maintenance” in order to accommodate differences among the states in terminology employed. No difference in meaning between the two terms is intended.

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

South Carolina has eliminated the exceptions found in UTC Section 503 (b) and (c) certain judgment creditors and for a claim made by the State of South Carolina or the United States to the extent a state or federal law provides for any such claim. Thus, under the SCTC, the only exception to a spendthrift trust will be for a beneficiary’s child who has a judgment or court order against the beneficiary for support or maintenance. South Carolina also adds a new subsection (c), not found in the UTC, which makes clear that the exception in subsection (b) for child support shall be unenforceable against a special or supplemental needs trusts under the circumstances described in subsection (c). Unlike Restatement (Third) of Trusts Section 59(2) (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Section 157(b) (1959), this Code does not create an exception to the spendthrift restriction for creditors who have furnished necessary services or supplies to the beneficiary. There is also no exception for tort claimants. For a discussion of the exception for tort claims, which has not generally been recognized, see Restatement (Third) of Trusts Section 59 Reporter’s Notes to cmt. a (Tentative Draft No. 2, approved 1999). For a discussion of other exceptions to a spendthrift restriction, recognized in some States, see George G. Bogert & George T. Bogert, The Law of Trusts and Trustees Section 224 (Rev. 2d ed. 1992); and 2A Austin W. Scott & William F. Fratcher, The Law of Trusts Sections 157‑157. 5 (4th ed. 1987).

Library References

Trusts 12, 141, 152.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 23, 251, 263, 269 to 272.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Attorney General Section 14, Protection of Public Charities.

Forms

South Carolina Legal and Business Forms Section 16:2 , Legal Principles‑Types of Trusts.

**SECTION 62‑7‑504.** Discretionary trusts; effect of standard.

(a) In this section, “child” includes any person for whom an order or judgment for child support has been entered in this or another state.

(b) Except as otherwise provided in subsection (c), a creditor of a beneficiary may not compel a distribution from a trust in which the beneficiary has a discretionary trust interest, even if:

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

(2) the trustee has abused the discretion.

(c) To the extent a trustee has not complied with a standard of distribution or has abused a discretion:

(1) a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary’s child; and

(2) the court shall direct the trustee to pay to the child such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

(d) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution; provided, however, this right may not be exercised by a creditor of the beneficiary.

(e) Whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution from insurance proceeds payable to the trustee as beneficiary to the extent state law exempts such insurance proceeds from creditors’ claims.

(f) A creditor of a beneficiary who is also a trustee or cotrustee may not reach the trustee’s beneficial interest or otherwise compel a distribution if the trustee’s discretion to make distributions for the trustee’s own benefit is limited by an ascertainable standard.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

South Carolina Trust Code Section 62‑7‑504 eliminates the exceptions allowed under Uniform Trust Code Section 504 for judgments or court orders in favor of a beneficiary’s spouse or former spouse. As with SCTC Section 62‑7‑503, the only exception will be for a beneficiary’s child who has a judgment or court order against the beneficiary for support or maintenance. However, a child’s claim against a discretionary trust interest will be limited to those cases where a trustee has not complied with a standard of distribution or has abused a discretion.

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

This section could have limited application. Pursuant to Section 62‑7‑502, the effect of a valid spendthrift provision, where applicable, is to prohibit a creditor from collecting on a distribution prior to its receipt by the beneficiary. Only if the trust is not protected by a spendthrift provision, or if the creditor falls within one of the exceptions to spendthrift enforcement created by Section 62‑7‑503, does this section become relevant.

For a discussion of the definition of “child” in subsection (a), see Section 62‑7‑503 Comment.

Subsection (b), which establishes the general rule, forbids a creditor from compelling a distribution from the trust, even if the trustee has failed to comply with the standard of distribution or has abused a discretion. Under subsection (d), the power to force a distribution due to an abuse of discretion or failure to comply with a standard belongs solely to the beneficiary. Under Section 62‑7‑814(a), a trustee must always exercise a discretionary power in good faith and with regard to the purposes of the trust and the interests of the beneficiaries.

Subsection (c) creates an exception for support claims of a child who has a judgment or order against a beneficiary for support or maintenance. While a creditor of a beneficiary generally may not assert that a trustee has abused a discretion or failed to comply with a standard of distribution, such a claim may be asserted by the beneficiary’s child enforcing a judgment or court order against the beneficiary for unpaid support or maintenance. The court must direct the trustee to pay the child such amount as is equitable under the circumstances but not in excess of the amount the trustee was otherwise required to distribute to or for the benefit of the beneficiary. Before fixing this amount, the court having jurisdiction over the trust should consider that in setting the respective support award, the family court has already considered the respective needs and assets of the family. The SCTC does not prescribe a particular procedural method for enforcing a judgment or order against the trust, leaving that matter to local collection law.

The South Carolina Trust Code adds to the UTC version the proviso at the end of subsection (d), which prevents a beneficiary’s creditor from enforcing on behalf of the beneficiary the beneficiary’s right, to the extent it exists, to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard of distribution.

South Carolina’s version of subsection (e), not found in the UTC, ensures that even if there is no spendthrift provision, insurance proceeds remain exempt from creditors’ claims pursuant to S. C. Code Section 38‑63‑40 et seq. and other relevant state laws.

Library References

Trusts 151 to 151.3.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 269, 273 to 280.

LAW REVIEW AND JOURNAL COMMENTARIES

State Enforcement of Racially Discriminatory Charitable Trust and the Equal Protection Clause of the Fourteenth Amendment. 22 S.C. L. Rev. 411.

**SECTION 62‑7‑505.** Creditors’ claims against settlor.

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

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

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

(3) After the death of a settlor, and subject to the settlor’s right to direct the source from which liabilities will be paid, and except to the extent state or federal law exempts any property of the trust from claims, costs, expenses, or allowances, the property held in a revocable trust at the time of the settlor’s death is subject to claims of the settlor’s creditors, costs of administration of the settlor’s estate, the expenses of the settlor’s funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent the settlor’s probate estate is inadequate to satisfy those claims, costs, expenses, and allowances, unless barred by Section 62‑3‑801 et seq.

(b) For purposes of this section:

(1) a beneficiary who is a trustee of a trust, but who is not the settlor of the trust, cannot be treated in the same manner as the settlor of a revocable trust if the beneficiary‑trustee’s power to make distributions to the beneficiary‑trustee is limited by an ascertainable standard related to the beneficiary‑trustee’s health, education, maintenance, and support;

(2) the assets in a trust that are attributable to a contribution to an inter vivos marital deduction trust described in either Section 2523(e) or (f) of the Internal Revenue Code of 1986, after the death of the spouse of the settlor of the inter vivos marital deduction trust are deemed to have been contributed by the settlor’s spouse and not by the settlor.

HISTORY: 2005 Act No. 66, Section 1; 2010 Act No. 244, Section 50, eff June 7, 2010; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Subsection (a)(1) states what is now a well accepted conclusion, that a revocable trust is subject to the claims of the settlor’s creditors while the settlor is living. See Restatement (Third) of Trusts Section 25 cmt. a (Tentative Draft No. 1, approved 1996). Such claims were not allowed at common law, however. See Restatement (Second) of Trusts Section 330 cmt. o (1959). Because a settlor usually also retains a beneficial interest that a creditor may reach under subsection (a)(2), the common law rule, were it retained in this Code, would be of little significance. See Restatement (Second) of Trusts Section 156(2) (1959).

Subsection (a)(2), which is based on Restatement (Third) of Trusts Section 58(2) and cmt. e (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Section 156 (1959), follows traditional doctrine in providing that a settlor who is also a beneficiary may not use the trust as a shield against the settlor’s creditors. The drafters of the Uniform Trust Code concluded that traditional doctrine reflects sound policy. Consequently, the drafters rejected the approach taken in States like Alaska and Delaware, both of which allow a settlor to retain a beneficial interest immune from creditor claims. See Henry J. Lischer, Jr., Domestic Asset Protection Trusts: Pallbearers to Liability, 35 Real Prop. Prob. & Tr. J. 479 (2000); John E. Sullivan, III, Gutting the Rule Against Self‑Settled Trusts: How the Delaware Trust Law Competes with Offshore Trusts, 23 Del. J. Corp. L. 423 (1998). The SCTC confirms this policy. Under the Code, whether the trust contains a spendthrift provision or not, a creditor of the settlor may reach the maximum amount that the trustee could have paid to the settlor‑beneficiary. If the trustee has discretion to distribute the entire income and principal to the settlor, the effect of this subsection is to place the settlor’s creditors in the same position as if the trust had not been created. For the definition of “settlor,” see Section 62‑7‑103(14).

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

Subsection (a)(3) recognizes that a revocable trust is usually employed as a will substitute. As such, the trust assets, following the death of the settlor, should be subject to the settlor’s debts and other charges. However, under SCTC 62‑7‑505(a)(3), only assets held in a revocable trust at the time of the settlor’s death will be subject to creditor’s claims. Assets transferred to a revocable trust following the settlor’s death will not become subject to creditor’s claims as a result of the transfer. For example, life insurance proceeds and cash surrender values that would be exempt under the terms of the trust pursuant to Section 38‑63‑40 or Section 38‑65‑90 would maintain the exempt status if payable to the trust. Also, in accordance with traditional doctrine, the assets of the settlor’s probate estate must normally first be exhausted before the assets of the revocable trust can be reached. This section does not attempt to address the procedural issues raised by the need first to exhaust the decedent’s probate estate before reaching the assets of the revocable trust. Nor does this section address the priority of creditor claims or liability of the decedent’s other nonprobate assets for the decedent’s debts and other charges. Subsection (a)(3), however, does ratify the typical pourover will, revocable trust plan. As long as the rights of the creditor or family member claiming a statutory allowance are not impaired, the settlor is free to shift liability from the probate estate to the revocable trust. Regarding other issues associated with potential liability of nonprobate assets for unpaid claims, see Section 6‑102 of the Uniform Probate Code, which was added to that Code in 1998.

Upon the lapse, release, or waiver of a power of withdrawal, the property formerly subject to the power will normally be subject to the claims of the power holder’s creditors and assignees the same as if the power holder were the settlor of a now irrevocable trust. Pursuant to subsection (a)(2), a creditor or assignee of the power holder generally may reach the power holder’s entire beneficial interest in the trust, whether or not distribution is subject to the trustee’s discretion. The Uniform Trust Code does not address creditor issues with respect to property subject to a special power of appointment or a testamentary general power of appointment. For creditor rights against such interests, see Restatement (Property) Second: Donative Transfers Sections 13.1—3.7 (1986).

Effect of Amendment

The 2010 amendment in subsections (a)(3) and (b) made nonsubstantive changes.

The 2013 amendment, in subsection (a)(3), substituted “the property held in a revocable trust at the time of the settlor’s death” for “the property of a trust that was revocable at the settlor’s death”, added subsection identifier (1) to subsection (b), and added subsection (b)(2), relating to Section 2523 of the Internal Revenue Code of 1986.

Library References

Trusts 153.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 281 to 282.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 16:2 , Legal Principles‑Types of Trusts.

Treatises and Practice Aids

Family Estate Planning Guide Section 36:11, Self‑Settled Trusts.

**SECTION 62‑7‑506.** Overdue distribution.

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. For purposes of this section, a mandatory distribution is a distribution where the trustee has no discretion in determining whether the distribution shall be made or the amount or timing of such distribution.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

The effect of a spendthrift provision is generally to insulate totally a beneficiary’s interest until a distribution is made and received by the beneficiary. See Section 62‑7‑502. But this section, along with several other sections in this article, recognizes exceptions to this general rule. Whether a trust contains a spendthrift provision or not, a trustee should not be able to avoid creditor claims against a beneficiary by refusing to make a distribution required to be made by the express terms of the trust. On the other hand, a spendthrift provision would become largely a nullity were a beneficiary’s creditors able to attach all required payments as soon as they became due. This section reflects a compromise between these two competing principles. A creditor can reach a mandatory distribution, including a distribution upon termination, if the trustee has failed to make the payment within a reasonable time after the designated distribution date. Following this reasonable period, payments mandated by the express terms of the trust are in effect being held by the trustee as agent for the beneficiary and should be treated as part of the beneficiary’s personal assets.

South Carolina Trust Code Section 62‑7‑506 adds to the Uniform Trust Code version of Section 506 a definition of “mandatory distribution” to prevent the South Carolina section from being interpreted to require distributions from discretionary trusts as referred to in SCTC Section 62‑7‑504. Common examples of mandatory distributions are found in qualified terminable interest property trusts, charitable remainder trusts, and grantor retained trusts, when the trustee is required to make a distribution annually of a sum certain.

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

Library References

Trusts 151, 151.1.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 269, 273 to 275.

**SECTION 62‑7‑507.** Personal obligations of trustee.

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

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENTS

Because the beneficiaries of the trust hold the beneficial interest in the trust property and the trustee holds only legal title without the benefits of ownership, the creditors of the trustee have only a personal claim against the trustee. See Restatement (Third) Section 5 cmt. k (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 12 cmt. a (1959). Similarly, a personal creditor of the trustee who attaches trust property to satisfy the debt does not acquire title as a bona fide purchaser even if the creditor is unaware of the trust. See Restatement (Second) of Trusts Section 308 (1959). The protection afforded by this section is consistent with that provided by the Bankruptcy Code. Property in which the trustee holds legal title as trustee is not part of the trustee’s bankruptcy estate. 11 U.S.C. Section 541(d).

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

Library References

Trusts 136.5.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 245 to 246, 250.

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 411, The Attorney General as the Protector, Supervisor and Enforcer of Charitable Trusts.

Part 6

Revocable Trusts

General Comment

This article deals with issues of significance not totally settled under prior law. Because of the widespread use in recent years of the revocable trust as an alternative to a will, this short article is one of the more important articles of the Code. This article and the other articles of the Code treat the revocable trust as the functional equivalent of a will. Section 62‑7‑601 provides that the capacity standard for wills applies in determining whether the settlor had capacity to create a revocable trust. Section 62‑7‑602, after providing that a trust is presumed revocable unless stated otherwise, prescribes the procedure for revocation or amendment, whether the trust contains one or several settlors. Section 62‑7‑603 provides that while a trust is revocable and the settlor has capacity, the rights of the beneficiaries are subject to the settlor’s control. Section 62‑7‑604 prescribes a statute of limitations on contest of revocable trusts.

Sections 62‑7‑601 and 62‑7‑604, because they address requirements relating to creation and contest of trusts, are not subject to alteration or restriction in the terms of the trust. See Section 62‑7‑105. Sections 62‑7‑602 and 62‑7‑603, by contrast, are not so limited and are fully subject to the settlor’s control.

**SECTION 62‑7‑601.** Capacity of settlor of revocable trust.

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

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section is patterned after Restatement (Third) of Trusts Section 11(1) (Tentative Draft No. 1, approved 1996). The revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property upon the settlor’s death. To solidify the use of the revocable trust as a device for transferring property at death, the settlor usually also executes a pourover will. The use of a pourover will assures that property not transferred to the trust during life will be combined with the property the settlor did manage to convey. Given this primary use of the revocable trust as a device for disposing of property at death, the capacity standard for wills rather than that for lifetime gifts should apply. The application of the capacity standard for wills does not mean that the revocable trust must be executed with the formalities of a will. There are no execution requirements under this Code for a trust not created by will, and a trust not containing real property may be created by an oral statement. See Section 62‑7‑407 and comment. See SCTC Section 62‑7‑401, which requires a writing for a self‑trusteed declaration of trust.

The SCTC does not explicitly spell out the standard of capacity necessary to create other types of trusts, although Section 62‑7‑402 does require that the settlor have capacity. This section includes a capacity standard for creation of a revocable trust because of the uncertainty in the case law and the importance of the issue in modern estate planning. No such uncertainty exists with respect to the capacity standard for other types of trusts. To create a testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have the capacity that would be needed to transfer the property free of trust. See generally Restatement (Third) of Trusts Section 11 (Tentative Draft No. 1, approved 1996); Restatement (Third) of Property: Wills and Other Donative Transfers Section 8.1 (Tentative Draft No. 3, approved 2001).

South Carolina Probate Code Section 62‑2‑501 provides that a person who is “of sound mind and who is not a minor as defined in Section 62‑2‑201(27) may make a will.” Section 62‑2‑201(27) defines a minor as a person under eighteen excluding persons under eighteen who are married or emancipated by court decree. The test for mental capacity is whether the person has the capability to know (1) his estate, (2) the objects of his affections, and (3) to whom he wishes to give his property. The capacity to understand as opposed to actual knowledge or understanding is sufficient. It is a lower standard than that required to sign a deed or contract. Weeks v. Drawdy, 329 S.C. 251, 495 S.E.2d 454 (S.C. Ct.App. 1997); McCollum v. Banks, et al., 213 S.C. 476, 50 S.E.2d 199 (S.C. 1948).

A higher degree of capacity is required to execute an irrevocable trust. The settlor must have the mental capacity to understand the nature of the trust and its probable consequences. Macauley, et al. v. Wachovia Bank, et al., 351 S.C. 287, 569 S.E.2d 371 (S.C. Ct.App. 2002).

There was no prior statutory counterpart to this Section.

As a practical matter, the relatively common use of pour over wills in conjunction with minimally funded revocable trusts indicates that the measure of capacity for execution of the trust is the same as that for a will. See Bowles v. Bradley, 219 S.C. 377, 461 S.E.2d 811 (S.C. 1995).

Library References

Trusts 8, 59.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 19, 103 to 116.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Charities Section 22, Powers of Trustee.

LAW REVIEW AND JOURNAL COMMENTARIES

The Impact of Significant Substantive Provisions of the South Carolina Trust Code, 57 S.C. L. Rev. 137 (Autumn 2005).

**SECTION 62‑7‑602.** 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 article.

(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; and

(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 substantial compliance with a method provided in the terms of the trust; or

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

(A) a later will or codicil that expressly refers to the trust, manifesting clear and convincing evidence of the settlor’s intent; or

(B) by oral statement to the trustee if the trust was created orally; or

(C) any other written method, other than a later will or codicil, delivered to the trustee and 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) RESERVED

(f) A conservator of the settlor or, if no conservator has been appointed, a guardian of the settlor may exercise a settlor’s powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the conservatorship or guardianship and with regard to the requirements of Section 62‑5‑408 (3)(c).

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

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

South Carolina Trust Code Section 62‑7‑602(a) is a departure from former South Carolina law, which presumed that a trust was irrevocable unless a power of revocation was validly reserved and that, if a particular method of revocation was specified, it must be strictly followed. Where the right to revoke was reserved and no particular mode was specified, any mode sufficiently showing an intention to revoke was effective. See Peoples National Bank of Greenville v. Peden et al., 229 S.E. 2d 163 (S.C. 1956), citing to 4 Bogert on Trusts and Trustees Section 996 and 54 Am. Jur. Section 77 on Trusts. Likewise, a settlor had to expressly reserve the right to modify a trust. First Carolinas Joint Stock Land Bank v. Deschamps, et al., 171 S. C. 466 172 S.E. 622 (S.C. 1934).

The South Carolina Supreme Court has noted that there are some exceptions to the general rule that a trust cannot be revoked or modified unless such a power is expressly reserved in the trust instrument, such as mistake. Chiles v. Chiles, et al., 20 S. C. 379, 242 S.E. 2d 426 (S.C. 1978), citing to the Restatement 2d of Trusts Section 330(2).

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

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

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

With respect to separate property contributed to the trust, or all property of the trust if none of the trust property consists of community property, subsection (b) provides that each settlor may revoke or amend the trust as to the portion of the trust contributed by that settlor. The inclusion of a rule for contributions of separate property does not mean that the use of joint trusts should be encouraged. The rule is included because of the widespread use of joint trusts in noncommunity property states in recent years. Due to the desire to preserve the community character of trust property, joint trusts are a necessity in community property states. Unless community property will be contributed to the trust, no similarly important reason exists for the creation of a joint trust in a noncommunity property state. Joint trusts are often poorly drafted, confusing the dispositive provisions of the respective settlors. Their use can also lead to unintended tax consequences. See Melinda S. Merk, Joint Revocable Trusts for Married Couples Domiciled in Common‑Law Property States, 32 Real Prop. Prob. & Tr. J. 345 (1997).

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

Subsection (b)(3) requires that the other settlor or settlors be notified if a joint trust is revoked by less than all of the settlors. Notifying the other settlor or settlors of the revocation or amendment will place them in a better position to protect their interests. If the revocation or amendment by less than all of the settlors breaches an implied agreement not to revoke or amend the trust, those harmed by the action can sue for breach of contract. If the trustee fails to notify the other settlor or settlors of the revocation or amendment, the parties aggrieved by the trustee’s failure can sue the trustee for breach of trust.

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

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

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

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

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

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

Subsection (c) does not require that a trustee concur in the revocation or amendment of a trust. Such a concurrence would be necessary only if required by the terms of the trust. If the trustee concludes that an amendment unacceptably changes the trustee’s duties, the trustee may resign as provided in Section 62‑7‑705.

As to SCTC Section 62‑7‑602(c), although prior South Carolina case law required strict compliance with method of revocation provided by the terms of the trust, the courts would recognize a valid revocation as long as it was clear that the settlor had exercised every right within his power to revoke the trust and if notice requirements which were strictly for the benefit of the trustee were waived by the trustee. Peoples National Bank of Greenville v. Peden et al., 229 S.C. 167, 92 S.E. 2d 163 (S.C. 1956). SCTC subsection (c)(2) differs from the UTC version by requiring a writing to revoke or amend a trust unless the trust was created orally.

Under prior South Carolina case law, if the power to revoke was not expressly reserved in a trust, the terms of a later will could not control the disposition of property under a previously executed trust document. Bonney v. Granger, et al., 292 S.C. 308, 356 S.E. 2d 138 (S.C. Ct. App. 1987). If the right to revoke was reserved and no particular method of revocation was specified, a revocable trust could be revoked by a testamentary devise of the corpus of the trust. Whether a will impliedly revoked a revocable trust was a question of intention. Peoples National Bank of Greenville v. Peden et al., 229 S.C. 167, 92 S.E. 2d 163 (S.C. 1956), citing to 54 Am Jur. Section 77. A residuary clause was insufficient to revoke or amend a trust. First Carolinas Joint Stock Land Bank v. Deschamps, et al., 171 S.C. 466, 172 S.E. 622 (S.C.1934).

See SCTC Section 62‑7‑401, which requires a writing for the creation of self‑trusteed declarations of trust.

Subsection (d), providing that upon revocation the trust property is to be distributed as the settlor directs, codifies a provision commonly included in revocable trust instruments. Prior South Carolina case law required a trustee upon termination of a trust to distribute the assets to the beneficiaries or to their nominee. Beaty Trust Co. v. S. C. Tax Com., 278 S.C. 113, 292 S.E. 2d 788 (S.C. 1982). There was no prior South Carolina law that addressed the responsibility of the trustee in regard to a revocable trust.

A settlor’s power to revoke is not terminated by the settlor’s incapacity. The power to revoke may instead be exercised by an agent in accordance with Section 62‑7‑602.1.

Subsection (f) addresses the authority of a conservator or guardian to revoke or amend a revocable trust. Under the South Carolina Trust Code, a “conservator” is appointed by the court to manage the ward’s party, a “guardian” to make decisions with respect to the ward’s personal affairs. See Section 62‑7‑103. Consequently, subsection (f) authorizes a guardian to exercise a settlor’s power to revoke or amend a trust only if a conservator has not been appointed.

In South Carolina, the probate court, acting through a conservator, exercises control over the estate and affairs of an incapacitated person in regard to trusts. Acting through the conservator, the court may create, amend or fund, but not revoke (unless amendment could be construed so broadly as to constitute a right to revoke), a revocable trust. In exercising these powers, the court must consider the estate plan and the terms of any revocable trust of which the incapacitated person is settlor.

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

Editor’s Note

ARTICLE 5 of Title 62 was rewritten by 2017 Act No. 87, Section 5.A, effective January 1, 2019. For Section 62‑5‑408, referenced in (f), see now, Sections 62‑5‑107, 62‑5‑108, 62‑5‑404, 62‑5‑405, 62‑5‑414, 62‑5‑422, and 62‑5‑423.

Effect of Amendment

The 2013 amendment deleted and reserved former subsection (e), relating to agents. See, now, Section 62‑7‑602A.

CROSS REFERENCES

Uniform Power of Attorney Act, agent’s duties, see Section 62‑8‑114.

Library References

Trusts 58, 59.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 96 to 116.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Charities Section 22, Powers of Trustee.

**SECTION 62‑7‑602A.** Powers of agent acting pursuant to power of attorney.

(a) An agent acting pursuant to a power of attorney may exercise the following powers of the settlor with respect to a revocable trust only to the extent expressly authorized by the terms of the trust or the power of attorney:

(1) revocation of the trust;

(2) amendment of the trust;

(3) additions to the trust;

(4) direction to dispose of property of the trust;

(5) creation of the trust, notwithstanding the provisions of Section 62‑7‑402(a)(1) and (2).

(b) An agent acting pursuant to a power of attorney may exercise the following powers of the settlor with respect to an irrevocable trust only to the extent expressly authorized by the terms of the trust or the power of attorney:

(1) additions to the trust;

(2) creation of the trust, notwithstanding the provisions of Section 62‑7‑402(a)(1) and (2).

(c) The exercise of the powers described in subsection (a) and (b) shall not alter the amount of property beneficiaries are to receive on the settlor’s death under the settlor’s existing will or other estate planning documents or in the absence thereof in accordance with the law of intestate succession.

HISTORY: 2005 Act No. 66, Section 1; 1976 Code Section 62‑7‑602(e); 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section replaces former SCTC Section 62‑7‑602(e) and expands agent powers with respect to a revocable trust.

Subsection (a) expands the powers found in the Uniform Trust Code and former Section 62‑7‑602(e) which authorized an agent under a power of attorney to revoke, amend, or distribute property from a revocable trust of the principal. Subsection (a) adds to these powers the authorization of an agent of the settlor to create or add to a revocable trust. Subsection (b) revises the limitations of the former Section 62‑7‑602(e) that prohibited an agent from deviating from the settlor’s estate plan by stating that there shall be no deviation in regard to the amount of property beneficiaries are to receive from the settlor’s will or in the absence thereof from the law of intestate succession.

CROSS REFERENCES

Uniform Power of Attorney Act, authority that requires specific grant, grant of general authority, see Section 62‑8‑201.

**SECTION 62‑7‑603.** Settlor’s powers.

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

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

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

Pursuant to this section, the duty under Section 62‑7‑813 to inform and report to beneficiaries is owed to the settlor of a revocable trust as long as the settlor has capacity.

The beneficiaries are entitled to request information concerning the trust and the trustee must provide the beneficiaries with annual trustee reports and whatever other information may be required under Section 62‑7‑813. However, because this section may be freely overridden in the terms of the trust, a settlor is free to deny the beneficiaries these rights, even to the point of directing the trustee not to inform them of the existence of the trust. Also, should an incapacitated settlor later regain capacity, the beneficiaries’ rights will again be subject to the settlor’s control. The cessation of the settlor’s control upon the settlor’s incapacity or death does not mean that the beneficiaries may reopen transactions the settlor approved while having capacity.

Typically, the settlor of a revocable trust will also be the sole or primary beneficiary of the trust. Upon the settlor’s incapacity, any right of action the settlor‑trustee may have against the trustee for breach of fiduciary duty will pass to the settlor’s agent or conservator.

Prior South Carolina law addressed the trustee’s duty of loyalty to the beneficiaries of the trust. See e.g., Ramage v. Ramage, 283 S.C. 239, 322 S.E. 2d 22 (S.C. Ct. App. 1984). SCTC Section 62‑7‑603 omits the language found in the UTC 2004 Amendments expressly providing that a trust is revocable only while the settlor has the capacity to revoke.

Library References

Trusts 59, 140, 153, 172.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 103 to 116, 251, 254 to 262, 281 to 282, 318 to 320.

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 551, Express and Implied Powers.

**SECTION 62‑7‑604.** Limitation on action contesting validity of revocable trust; distribution of trust property.

(a) A person must 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) one hundred twenty days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust’s existence, of the trustee’s name 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 one hundred twenty 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.

HISTORY: 2005 Act No. 66, Section 1; 2010 Act No. 244, Section 51, eff June 7, 2010; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

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

A trust can be contested on a variety of grounds. For example, the contestant may allege that no trust was created due to lack of intent to create a trust or lack of capacity (see Section 62‑7‑402), that undue influence, duress, or fraud was involved in the trust’s creation (see Section 62‑7‑406), or that the trust had been revoked or modified (see Section 62‑7‑602). A “contest” is an action to invalidate all or part of the terms of the trust or of property transfers to the trustee. An action against a beneficiary or other person for intentional interference with an inheritance or gift, not being a contest, is not subject to this section. For the law on intentional interference, see Restatement (Second) of Torts Section 774B (1979). Nor does this section preclude an action to determine the validity of a trust that is brought during the settlor’s lifetime, such as a petition for a declaratory judgment, if such action is authorized by other law. See Section 62‑7‑106 (SCTC supplemented by common law of trusts and principles of equity).

This section applies only to a revocable trust that becomes irrevocable by reason of the settlor’s death. A trust that became irrevocable by reason of the settlor’s lifetime release of the power to revoke is outside its scope. A revocable trust does not become irrevocable upon a settlor’s loss of capacity. Pursuant to Section 62‑7‑602 and 62‑7‑602.1, the power to revoke may be exercised by the settlor’s agent, conservator, or guardian, or personally by the settlor if the settlor regains capacity.

Subsection (a) specifies a time limit on when a contest can be brought. A contest is barred upon the first to occur of two possible events. The maximum possible time for bringing a contest is one year from the settlor’s death. This should provide potential contestants with ample time in which to determine whether they have an interest that will be affected by the trust, even if formal notice of the trust is lacking. The one‑year period is derived from Section 62‑3‑108, under which the contest of an informally probate will must occur by the later of one year from death or eight months after informal probate

A trustee who wishes to shorten the contest period may do so by giving notice. Subsection (a)(2) bars a contest by a potential contestant 120 days after the date the trustee sent that person a copy of the trust instrument and informed the person of the trust’s existence, of the trustee’s name and address, and of the time allowed for commencing a contest. The 120 day period in subsection (a)(2) is subordinate to the one‑year bar in subsection (a)(1). A contest is automatically barred one year after the settlor’s death even if notice is sent by the trustee less than 120 days prior to the end of that period.

Because only a small minority of trusts are actually contested, trustees should not be restrained from making distributions because of concern about possible liability should a contest later be filed. Absent a protective statute, a trustee is ordinarily absolutely liable for misdelivery of the trust assets, even if the trustee reasonably believed that the distribution was proper. See Restatement (Second) of Trusts Section 226 (1959). Subsection (b) addresses liability concerns by allowing the trustee, upon the settlor’s death, to proceed expeditiously to distribute the trust property. The trustee may distribute the trust property in accordance with the terms of the trust until and unless the trustee receives notice of a pending judicial proceeding contesting the validity of the trust, or until notified by a potential contestant of a possible contest, followed by its filing within 120 days.

Even though a distribution in compliance with subsection (b) discharges the trustee from potential liability, subsection (c) makes the beneficiaries of what later turns out to have been an invalid trust liable to return any distribution received. Issues as to whether the distribution must be returned with interest, or with income earned or profit made are not addressed in this section but are left to the law of restitution.

For purposes of notices under this section, the substitute representation principles of Part 3 are applicable. The notice by the trustee under subsection (a)(2) or by a potential contestant under subsection (b)(2) must be given in a manner reasonably suitable under the circumstances and likely to result in its receipt. See Section 62‑7‑109(a).

This section does not address possible liability for the debts of the deceased settlor or a trustee’s possible liability to creditors for distributing trust assets. For possible liability of the trust, see Section 62‑7‑505(a)(3) and Comment

For statutory limitations periods applicable to wills, see South Carolina Probate Code Section 62‑3‑108.

For statutory limitations periods applicable to claims of beneficiaries against the trustee, see SCTC Section 62‑7‑1005.

Effect of Amendment

The 2010 amendment in subsections (a)(2) and (b)(2) substituted “one hundred twenty” for “60” preceding “days after the”.

Library References

Trusts 365(1) to 365(3).

Westlaw Topic No. 390.

C.J.S. Trusts Sections 720 to 724.

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 7, Development of Trust Law in England and the United States‑Court Decisions and Statutes.

Bogert ‑ the Law of Trusts and Trustees Section 47, Creation of a Trust of a Savings Account‑Joint Accounts.

Bogert ‑ the Law of Trusts and Trustees Section 973, Uniform Acts‑Beneficiaries’ Rights to Information and the Trustee’s Duty to Account.

**SECTION 62‑7‑605.** Effect of penalty clause for contest.

A provision in a revocable trust purporting to penalize any interested person for contesting the validity of the trust or instituting other proceedings relating to the trust is unenforceable if probable cause exists for instituting proceedings.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This Section is analogous to South Code Probate Code Section 62‑3‑905, which is applicable to wills.

Library References

Trusts 140(2).

Westlaw Topic No. 390.

C.J.S. Trusts Sections 251, 254 to 258.

**SECTION 62‑7‑606.** Anti‑lapse provision in trust.

(A) Unless the trust expressly provides otherwise, if the beneficiary under a revocable trust, who is a great‑grandparent or a lineal descendant of a great‑grandparent of the settlor, is dead at the time of execution of the trust, fails to survive the settlor, or is treated as if he predeceased the settlor, the issue of the deceased beneficiary who survived the settlor take in place of the deceased beneficiary and if they are all of the same degree of kinship to the beneficiary they take equally, but if of unequal degree then those of more remote degree take by representation. One who would have been a beneficiary under a class gift if he had survived the settlor is treated as a beneficiary for purposes of this section whether his death occurred before or after the execution of the trust.

(B) Except as provided in subsection (A), if the disposition of any real or personal property under a revocable trust fails for any reason, this property becomes a part of the residue of the trust.

(C) Except as provided in subsection (A), if the residue under a revocable trust is distributed to two or more persons and the share of one of the residuary beneficiaries fails for any reason, his share passes to the other residuary beneficiary or to other residuary beneficiaries in proportion to their interests in the residue.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This Section retains and incorporates former South Carolina Probate Code Section 62‑7‑113 (except for the deletion of the words “inter vivos” when used to describe the trust and the addition of the introductory “Unless the trust expressly provides otherwise”) and is analogous to SCPC Section 62‑2‑603 applicable to wills.

Library References

Trusts 124, 140.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 227 to 228, 230 to 240, 251, 254 to 262.

**SECTION 62‑7‑607.** Divorce or annulment as revoking revocable trust.

If after executing a revocable trust the settlor is divorced or the marriage annulled or the spouse is a party to a valid proceeding concluded by an order purporting to terminate all marital property rights or confirming equitable distribution between spouses, the divorce or annulment or order revokes any disposition or appointment of property including beneficial interests made by such trust to the spouse, any provision conferring a general or special power of appointment on the spouse, and any nomination of the spouse as trustee, unless the trust expressly provides otherwise. Property prevented from passing to a spouse because of revocation by divorce or annulment or order passes as if the spouse failed to survive the settlor, and other provisions conferring some power or office on this spouse are interpreted as if the spouse failed to survive the settlor. If these provisions for the spouse are revoked solely by this section, they are revived by the settlor’s remarriage to the former spouse. For purposes of this section, divorce or annulment or order means any divorce or annulment or order which would exclude the spouse as a surviving spouse within the meaning of subsections (a) and (b) of Section 62‑2‑802. A decree of separate maintenance which does not terminate the status of husband and wife is not a divorce for purposes of this section. No change of marital circumstances other than as described in this section revokes a disposition to a spouse in a revocable trust.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This Section retains and incorporates South Carolina Probate Code Section 62‑7‑114 (except for the deletion of the words “inter vivos” when used to describe the trust) and is consistent with SCPC Section 62‑2‑507.

Effect of Amendment

The 2013 amendment substituted “If these provisions for the spouse” for “If provisions”, in the third sentence; in the last sentence, deleted “or parental” before “change of marital” and inserted “a disposition to a spouse in” before “a revocable trust”; and made other nonsubstantive changes.

Library References

Trusts 61(0.5), 61(1), 61(3).

Westlaw Topic No. 390.

C.J.S. Trusts Sections 117 to 127.

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 999, Statutory Provisions as to Revocation.

Part 7

Office of Trustee

General Comment

This article contains a series of default rules dealing with the office of trustee. Sections 62‑7‑701 and 62‑7‑702 address the process for getting a trustee into office, including the procedures for indicating an acceptance and whether bond will be required. Section 62‑7‑703 addresses cotrustees, permitting the cotrustees to act by majority action and specifying the extent to which one trustee may delegate to another. Sections 62‑7‑704 through 62‑7‑707 address changes in the office of trustee, specifying the circumstances when a vacancy must be filled, the procedure for resignation, the grounds for removal, and the process for appointing a successor. Sections 62‑7‑708 and 62‑7‑709 prescribe the standards for determining trustee compensation and reimbursement for expenses advanced.

Except for the court’s authority to order bond, all of the provisions of this article are subject to modification in the terms of the trust. See Section 62‑7‑105.

**SECTION 62‑7‑701.** 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:

(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.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section, which specifies the requirements for a valid acceptance of the trusteeship, implicates many of the same issues that arise in determining whether a trust has been revoked. Consequently, the two provisions track each other closely. Compare Section 62‑7‑701(a), with Section 62‑7‑602(c) (procedure for revoking or modifying trust). Procedures specified in the terms of the trust are recognized, but only substantial, not literal compliance is required. A failure to meet technical requirements, such as notarization of the trustee’s signature, does not result in a failure to accept. Ordinarily, the trustee will indicate acceptance by signing the trust instrument or signing a separate written instrument. However, this section validates any other method demonstrating the necessary intent, such as by knowingly exercising trustee powers, unless the terms of the trust make the specified method exclusive. This section also does not preclude an acceptance by estoppel. For general background on issues relating to trustee acceptance and rejection, see Restatement (Third) of Trusts Section 35 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 102 (1959). Consistent with Section 62‑7‑201(b), which emphasizes that continuing judicial supervision of a trust is the rare exception, not the rule, the SCTC does not require that a trustee qualify in court.

To avoid the inaction that can result if the person designated as trustee fails to communicate a decision either to accept or to reject the trusteeship, subsection (b) provides that a failure to accept within a reasonable time constitutes a rejection of the trusteeship. What will constitute a reasonable time depends on the facts and circumstances of the particular case. A major consideration is possible harm that might occur if a vacancy in a trusteeship is not filled in a timely manner. A trustee’s rejection normally precludes a later acceptance but does not cause the trust to fail. See Restatement (Third) of Trusts Section 35 cmt. c (Tentative Draft No. 2, approved 1999). Regarding the filling of a vacancy in the event of a rejection, see Section 62‑7‑704.

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

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

Because of the potential liability that can inhere in trusteeship, subsection (c)(2) allows a person designated as trustee to inspect the trust property without accepting the trusteeship. The condition of real property is a particular concern, including possible tort liability for the condition of the premises or liability for violation of state or federal environmental laws such as CERCLA, 42 U.S.C. Section 9607. For a provision limiting a trustee’s personal liability for obligations arising from ownership or control of trust property, see Section 62‑7‑1010(b).

South Carolina had no prior statutory counterpart. Generally, at common law, “in an express trust, a trustee must agree to serve as trustee because of the attendant duties and potential liability.” S. Alan Medlin, The Law of Wills and Trusts, Vol. 1, Estate Planning in South Carolina (2002) at Section 502, citing Anderson v. Earle, 9 S.C. 460 (S.C. 1878).

CROSS REFERENCES

Banks and trust companies acting as fiduciaries, see Sections 34‑15‑10 et seq.

Common law trust fund, see Sections 34‑21‑210 et seq.

Costs against certain fiduciaries, see Section 15‑37‑180.

Investments by banks, etc., doing a trust business, see Sections 34‑21‑50 et seq.

Library References

Trusts 155 to 160.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 284 to 293, 295 to 297, 300 to 301, 313 to 316, 340.

RESEARCH REFERENCES

Forms

Am. Jur. Pl. & Pr. Forms Trusts Section 83 , Introductory Comments.

Treatises and Practice Aids

Restatement (2d) of Property, Don. Trans. Section 11.3 TD 1, Rules of Construction and Constructional Preferences.

Restatement (3d) Property (Wills & Don. Trans.) Section 11.3, Rules of Construction and Constructional Preferences.

LAW REVIEW AND JOURNAL COMMENTARIES

The Impact of Significant Substantive Provisions of the South Carolina Trust Code, 57 S.C. L. Rev. 137 (Autumn 2005).

**SECTION 62‑7‑702.** Trustee’s bond.

(a) A trustee shall provide bond to secure the performance of the trustee’s duties if:

(1) the terms of the governing instrument require the trustee to provide bond;

(2) a beneficiary requests the trustee to provide bond and the court finds the request to be reasonable; or

(3) the court finds that it is necessary for the trustee to provide bond in order to protect the interests of the beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented.

However, in no event shall bond be required of a trustee, including a trustee appointed by the court, if the governing instrument directs otherwise. 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.

(b) If bond is required, it shall be filed in the court in the place in which the trust has its principal place of administration in amounts and with sureties and liabilities consistent with the requirements of South Carolina Code Sections 62‑3‑604 relating to bonds of personal representatives.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

South Carolina Trust Code Section 62‑7‑702 differs significantly from the Uniform Trust Code version of Section 702. SCTC Section 62‑7‑702 is in accord with former South Carolina Probate Code Section 62‑7‑304, providing that a trustee will not normally be required to post bond.

Library References

Trusts 161.

Westlaw Topic No. 390.

C.J.S. Trusts Section 302.

**SECTION 62‑7‑703.** Cotrustees.

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

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

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

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

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

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

(g) Each trustee shall exercise reasonable care to:

(1) prevent a cotrustee from committing a serious breach of trust; and

(2) compel a cotrustee to redress a serious breach of trust.

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

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section contains most but not all of the Code’s provisions on cotrustees. Other provisions relevant to cotrustees include Sections 62‑7‑704 (vacancy in trusteeship need not be filled if cotrustee remains in office), 62‑7‑705 (notice of resignation must be given to cotrustee), 62‑7‑706 (lack of cooperation among cotrustees as ground for removal), 62‑7‑707 (obligations of resigning or removed trustee), 62‑7‑813 (reporting requirements upon vacancy in trusteeship), and 62‑7‑1013 (authority of cotrustees to authenticate documents.

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

Cotrusteeship should not be called for without careful reflection. Division of responsibility among cotrustees is often confused, the accountability of any individual trustee is uncertain, obtaining consent of all trustees can be burdensome, and, unless an odd number of trustees is named, deadlocks requiring court resolution can occur. Potential problems can be reduced by addressing division of responsibilities in the terms of the trust. Like the other sections of this article, this section is freely subject to modification in the terms of the trust. See Section 62‑7‑105.

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

Subsection (a) is in accord with Restatement (Third) of Trusts Section 39 (Tentative Draft No. 2, approved 1999), which rejects the common law rule, followed in earlier Restatements, requiring unanimity among the trustees of a private trust. See Restatement (Second) of Trusts Section 194 (1959). This section is consistent with the prior Restatement rule applicable to charitable trusts, which allowed for action by a majority of trustees. See Restatement (Second) of Trusts Section 383 (1959). Under subsection (b), a majority of the remaining trustees may act for the trust when a vacancy occurs in a cotrusteeship. Section 62‑7‑704 provides that a vacancy in a cotrusteeship need be filled only if there is no trustee remaining in office.

Subsections (b) and (d) provide for the proper administration of the trust in the event a cotrustee is unavailable or temporarily incapacitated. Subsection (c) compels a cotrustee to participate in the trustee’s function or delegate such a duty unless excused by “absence, illness, disqualification under the law, or other temporary incapacity.” Other laws under which a cotrustee might be disqualified include federal securities law and the ERISA prohibited transactions rules.

Subsection (e) addresses the extent to which a trustee may delegate the performance of functions to a cotrustee. The standard differs from the standard for delegation to an agent as provided in Section 62‑7‑807 because the two situations are different. Section 62‑7‑807, which is identical to Section 9 of the Uniform Prudent Investor Act, recognizes that many trustees are not professionals. Consequently, trustees should be encouraged to delegate functions they are not competent to perform. Subsection (e) is premised on the assumption that the settlor selected cotrustees for a specific reason and that this reason ought to control the scope of a permitted delegation to a cotrustee. Subsection (e) prohibits a trustee from delegating to another trustee functions the settlor reasonably expected the trustees to perform jointly. The exact extent to which a trustee may delegate functions to another trustee in a particular case will vary depending on the reasons the settlor decided to appoint cotrustees. The better practice is to address the division of functions in the terms of the trust, as allowed by Section 62‑7‑105. Subsection (e) is based on language derived from Restatement (Second) of Trusts Section 171 (1959). This section of the Restatement Second, which applied to delegations to both agents and cotrustees, was superseded, as to delegation to agents, by Restatement (Third) of Trusts: Prudent Investor Rule Section 171 (1992).

By permitting the trustees to act by a majority, this section contemplates that there may be a trustee or trustees who might dissent. The safeguard for a dissenting cotrustee is sprinkled throughout subsections (f), (g) and (h), Subsection (f) provides for a limitation on liability for a non‑joining co‑trustee, but that limitation on liability is tempered in subsection (g) by providing that a trustee must exercise “reasonable care”. Under subsection (g), a trustee may not passively dissent to an improper action by a cotrustee. Subsection (h) protects a dissenting cotrustee who joins in an action at the direction of the majority and notifies any cotrustee of his dissent. Subsection (h) does not require the dissent to be in writing. Further, under subsections (g) and (h) together, a cotrustee cannot dissent and thereafter remain passive for actions by the majority of cotrustees amounting to a “serious breach of trust.” The dissenting trustee must exercise “reasonable care” to correct the conduct of the cotrustee(s). The responsibility to take action against a breaching cotrustee codifies the substance of Sections 184 and 224 of the Restatement (Second) of Trusts (1959).

Library References

Trusts 157, 169, 238.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 288 to 294, 298 to 299, 345 to 346.

**SECTION 62‑7‑704.** 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 cotrustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustee.

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

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

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

(3) by a person appointed by the court.

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

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

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

(3) by a person appointed by the court.

(e) Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust. The procedure for such appointment and the notice requirement shall be the same as set forth for special administrators under South Carolina Code Section 62‑3‑614.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section provides a definition for a vacancy in a trusteeship and the procedure for appointment of a successor trustee if no provisions for dealing with these matters are set forth in the trust. See also Sections 62‑7‑701 (accepting or declining trusteeship), 62‑7‑705 (resignation), and 62‑7‑706 (removal). Good drafting practice suggests that the terms of the trust deal expressly with the problem of vacancies, naming successors and specifying the procedure for filling vacancies. This section applies only if the terms of the trust fail to specify a procedure.

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

Subsection (b) grants authority to the remaining trustee(s) for the administration of the trust following a vacancy. If a vacancy in the cotrusteeship is not filled, Section 62‑7‑703 authorizes the remaining cotrustees to continue to administer the trust. However, as provided in subsection (e), the court, exercising its inherent equity authority, may always appoint additional trustees if the appointment would promote better administration of the trust. See Restatement (Third) of Trusts Section 34 cmt. a (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 108 cmt. a (1959).

Subsection (c) provides a procedure for filling a vacancy in trusteeship if such a vacancy is required to be filled. Vacancies in this context could arise when the sole remaining trustee no longer is available to serve or the trust requires cotrustees and only one is named in the trust. Subsection (c) provides priority of succession of trustees in a non‑charitable trust. Absent an effective provision in the terms of the trust, subsection (c)(2) permits a vacancy in the trusteeship to be filled, without the need for court approval, by a person selected by unanimous agreement of the qualified beneficiaries. An effective provision in the terms of the trust for the designation of a successor trustee includes a procedure under which the successor trustee is selected by a person designated in those terms. Pursuant to Section 62‑7‑705(a)(1), the qualified beneficiaries may also receive the trustee’s resignation. If a trustee resigns following notice as provided in Section 62‑7‑705, the trust may be transferred to a successor appointed pursuant to subsection (c)(2) of this section, all without court involvement. A nonqualified beneficiary who is displeased with the choice of the qualified beneficiaries may petition the court for removal of the trustee under Section 62‑7‑706.

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

Subsection (d) provides for priority of succession in a charitable trust. These sections provide a method for the vacancy to be filled without court approval. Subsection (d) includes the language added by the 2004 Amendments to the UTC, dealing with the concurrence of the Attorney General. If the attorney general does not concur in the selection, however, or if the trust does not designate a charitable organization to receive distributions, the vacancy may be filled only by the court.

Subsection (e) provides for a court appointed special trustee or “special fiduciary” if necessary for the “administration of the trust.” The provisions of subsection (e) are unqualified and provide “whether or not a vacancy in a trusteeship exists or is required to be filled” the court has authority to appoint such an additional trustee. Such a trustee would have the authority provided by the court in its order of appointment. If the order of appointment contains no limitations, the additional trustee would succeed to the full powers of a trustee under the trust.

In the case of a revocable trust, the appointment of a successor will normally be made directly by the settlor. As to the duties of a successor trustee with respect to the actions of a predecessor, see Section 62‑7‑812.

Library References

Charities 33.

Trusts 169.

Westlaw Topic Nos. 75, 390.

C.J.S. Charities Sections 14 to 16.

C.J.S. Trusts Sections 288 to 294, 298 to 299.

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 763, Power Granted the Court by Statute.

Will Contests Section 12:21, Settlement Agreements.

**SECTION 62‑7‑705.** Resignation of trustee.

(a) A trustee may resign:

(1) upon at least 30 days notice in writing to the qualified beneficiaries, the settlor, if living, and all cotrustees; or

(2) with the approval of the court.

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

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

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

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

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

Regarding the residual responsibilities of a resigning trustee until the trust property is delivered to a successor trustee, see Section 62‑7‑707.

In the case of a revocable trust, because the rights of the qualified beneficiaries are subject to the settlor’s control (see Section 62‑7‑603), resignation of the trustee is accomplished by giving notice to the settlor instead of the beneficiaries.

Section 62‑7‑705(a)(1) adds to the Uniform Trust Code version of Section 705 the words “in writing” after “notice” for clarification, as a writing is the reasonable and customary choice for notification.

This Section incorporates some of the provisions of former South Carolina Probate Code Section 62‑7‑705, except that this Section introduces a thirty (30) day written notice provision for resignation. The former South Carolina statute allowed the Trustee to resign if the document so provided, all beneficiaries consented, or the court approved the resignation. Subsection (c) makes clear that a mere resignation does not terminate a trustee’s liability.

Library References

Trusts 162.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 303 to 305.

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 511, Resignation by Act of the Trustee.

**SECTION 62‑7‑706.** Removal of trustee.

(a) For the reasons set forth in subsection (b), the settlor, a cotrustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.

(b) The court may remove a trustee if:

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

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

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

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

(c) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under Section 62‑7‑1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section sets forth the grounds for removal of a trustee.

Subsection (a), contrary to the common law, grants the settlor of The right to petition for removal does not give the settlor of an irrevocable trust any other rights, such as the right to an annual report or to receive other information concerning administration of the trust. The right of a beneficiary to petition for removal does not apply to a revocable trust while the settlor has capacity. Pursuant to Section 62‑7‑603(a), while a trust is revocable and the settlor has capacity, the rights of the beneficiaries are subject to the settlor’s exclusive control.

For clarification, Section 62‑7‑706(a) adds to the Uniform Trust Code version the words “for the reasons set forth in subsection (b).” The UTC Comment makes clear that a beneficiary’s rights under a revocable trust are subject to those of the settlor.

Trustee removal may be regulated by the terms of the trust. See Section 62‑7‑105. In fashioning a removal provision for an irrevocable trust, the drafter should be cognizant of the danger that the trust may be included in the settlor’s federal gross estate if the settlor retains the power to be appointed as trustee or to appoint someone who is not independent. See Rev. Rul. 95‑58, 1995‑2 C.B. 191.

Subsection (b) lists the grounds for removal of the trustee. The grounds for removal are similar to those found in Restatement (Third) of Trusts Section 37 cmt. a (Tentative Draft No. 2, approved 1999). A trustee may be removed for untoward action, such as for a serious breach of trust, but the section is not so limited. A trustee may also be removed under a variety of circumstances in which the court concludes that the trustee is not best serving the interests of the beneficiaries. The term “interests of the beneficiaries” means the beneficial interests as provided in the terms of the trust, not as defined by the beneficiaries. See Section 62‑7‑103(7). Removal for conduct detrimental to the interests of the beneficiaries is a well‑established standard for removal of a trustee. See Restatement (Third) of Trusts Section 37 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 107 cmt. a (1959).

Subsection (b)(1), consistent with Restatement (Third) of Trusts Section 37 cmt. a and g (Tentative Draft No. 2, approved 1999), makes clear that not every breach of trust justifies removal of the trustee. The breach must be “serious.” A serious breach of trust may consist of a single act that causes significant harm or involves flagrant misconduct. A serious breach of trust may also consist of a series of smaller breaches, none of which individually justify removal when considered alone, but which do so when considered together. A particularly appropriate circumstance justifying removal of the trustee is a serious breach of the trustee’s duty to keep the beneficiaries reasonably informed of the administration of the trust or to comply with a beneficiary’s request for information as required by Section 62‑7‑813. Failure to comply with this duty may make it impossible for the beneficiaries to protect their interests. It may also mask more serious violations by the trustee. “Serious breach of trust” is defined in SCTC Subsection 62‑7‑103(24).

The lack of cooperation among trustees justifying removal under subsection (b)(2) need not involve a breach of trust. The key factor is whether the administration of the trust is significantly impaired by the trustees’ failure to agree. Removal is particularly appropriate if the naming of an even number of trustees, combined with their failure to agree, has resulted in deadlock requiring court resolution. The court may remove one or more or all of the trustees. If a cotrustee remains in office following the removal, under Section 62‑7‑704 appointment of a successor trustee is not required.

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

Subsection (b)(3) authorizes removal for a variety of grounds, including unfitness, unwillingness, or persistent failure to administer the trust effectively. Removal in any of these cases is allowed only if it best serves the interests of the beneficiaries. For the definition of “interests of the beneficiaries,” see Section 62‑7‑103(7). “Unfitness” may include not only mental incapacity but also lack of basic ability to administer the trust. Before removing a trustee for unfitness the court should consider the extent to which the problem might be cured by a delegation of functions the trustee is personally incapable of performing. “Unwillingness” includes not only cases where the trustee refuses to act but also a pattern of indifference to some or all of the beneficiaries. See Restatement (Third) of Trusts Section 37 cmt. a (Tentative Draft No. 2, approved 1999). A “persistent failure to administer the trust effectively” might include a long‑term pattern of mediocre performance, such as consistently poor investment results when compared to comparable trusts.

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

Subsection (b)(4) also contains a specific but more limited application of Section 62‑7‑411. Section 62‑7‑411 allows the beneficiaries by unanimous agreement to compel modification of a trust if the court concludes that the particular modification is not inconsistent with a material purpose of the trust. Subsection (b)(4) of this section similarly allows the qualified beneficiaries to request removal of the trustee if the designation of the trustee was not a material purpose of the trust. Before removing the trustee the court must also find that removal will best serve the interests of the beneficiaries and that a suitable cotrustee or successor trustee is available.

Subsection (c) authorizes the court to intervene pending a final decision on a request to remove a trustee. Among the relief that the court may order under Section 62‑7‑1001(b) is an injunction prohibiting the trustee from performing certain acts and the appointment of a special fiduciary to perform some or all of the trustee’s functions. Pursuant to Section 62‑7‑1004, the court may also award attorney’s fees as justice and equity may require.

Library References

Trusts 162, 164.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 303 to 310.

**SECTION 62‑7‑707.** Delivery of property by former trustee.

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

(b) A trustee who has resigned or been removed shall proceed expeditiously to deliver the trust property within the trustee’s possession to the cotrustee, successor trustee, or other person entitled to it.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section addresses the continuing authority and duty of a resigning or removed trustee. This section is comparable to South Carolina Probate Code Sections 62‑3‑608 through 62‑3‑611 concerning the termination of a personal representative. Subject to the power of the court to make other arrangements or unless a cotrustee remains in office, a resigning or removed trustee has continuing authority until the trust property is delivered to a successor. If a cotrustee remains in office, there is no reason to grant a resigning or removed trustee any continuing authority, and none is granted under this section. In addition, if a cotrustee remains in office, the former trustee need not submit a final trustee’s report. See Section 62‑7‑813(c).

There is ample authority in the SCTC for the appointment of a special fiduciary, an appointment which can avoid the need for a resigning or removed trustee to exercise residual powers until a successor can take office. See Sections 62‑7‑704(e) (court may appoint additional trustee or special fiduciary whenever court considers appointment necessary for administration of trust), 62‑7‑705(b) (in approving resignation, court may impose conditions necessary for protection of trust property), 62‑7‑706(c) (pending decision on petition for removal, court may order appropriate relief), and 62‑7‑1001(b)(5) (to remedy breach of trust, court may appoint special fiduciary as necessary to protect trust property or interests of beneficiary).

If the former trustee has died, the SCTC does not require that the trustee’s personal representative wind up the deceased trustee’s administration. Nor is a trustee’s conservator or guardian required to complete the former trustee’s administration if the trustee’s authority terminated due to an adjudication of incapacity. However, to limit the former trustee’s liability, the personal representative, conservator or guardian may submit a trustee’s report on the former trustee’s behalf as authorized by Section 62‑7‑813(c). Otherwise, the former trustee remains liable for actions taken during the trustee’s term of office until liability is otherwise barred.

Library References

Trusts 162, 164.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 303 to 310.

**SECTION 62‑7‑708.** 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.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section incorporates and clarifies the provisions of current South Carolina law for determination of trustee fees. Former South Carolina Probate Code Section 62‑7‑205 required the trustee to return the excess part of any fee determined to be unreasonable by the court.

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

In setting compensation, the services actually performed and responsibilities assumed by the trustee should be closely examined. A downward adjustment of fees may be appropriate if a trustee has delegated significant duties to agents, such as the delegation of investment authority to outside managers. See Section 62‑7‑807 (delegation by trustee). On the other hand, a trustee with special skills, such as those of a real estate agent, may be entitled to extra compensation for performing services that would ordinarily be delegated. See Restatement (Third) of Trusts Section 38 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 242 cmt. d (1959).

Because “trustee” as defined in Section 62‑7‑103(19) includes not only an individual trustee but also cotrustees, each trustee, including a cotrustee, is entitled to reasonable compensation under the circumstances. The fact that a trust has more than one trustee does not mean that the trustees together are entitled to more compensation than had either acted alone. Nor does the appointment of more than one trustee mean that the trustees are eligible to receive the compensation in equal shares. The total amount of the compensation to be paid and how it will be divided depend on the totality of the circumstances. Factors to be considered include the settlor’s reasons for naming more than one trustee and the level of responsibility assumed and exact services performed by each trustee. Often the fees of cotrustees will be in the aggregate higher than the fees for a single trustee because of the duty of each trustee to participate in administration and not delegate to a cotrustee duties the settlor expected the trustees to perform jointly. See Restatement (Third) of Trusts Section 38 cmt. i (Tentative Draft No. 2, approved 1999). The trust may benefit in such cases from the enhanced quality of decision‑making resulting from the collective deliberations of the trustees.

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

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

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

Compensation may be set by agreement. A trustee may enter into an agreement with the beneficiaries for lesser or increased compensation, although an agreement increasing compensation is not binding on a nonconsenting beneficiary. See Section 62‑7‑111(b) (matters that may be the resolved by nonjudicial settlement). See also Restatement (Third) of Trusts Section 38 cmt. f (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 242 cmt. i (1959). A trustee may also agree to waive compensation and should do so prior to rendering significant services if concerned about possible gift and income taxation of the compensation accrued prior to the waiver. See Rev. Rul. 66‑167, 1966‑1 C.B. 20. See also Restatement (Third) of Trusts Section 38 cmt. g (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 242 cmt. j (1959).

Section 62‑7‑816(15) grants the trustee authority to fix and pay its compensation without the necessity of prior court review, subject to the right of a beneficiary to object to the compensation in a later judicial proceeding. Allowing the trustee to pay its compensation without prior court approval promotes efficient trust administration but does place a significant burden on a beneficiary who believes the compensation is unreasonable. To provide a beneficiary with time to take action, and because of the importance of trustee’s fees to the beneficiaries’ interests, Section 62‑7‑813(b)(4) requires a trustee to provide the qualified beneficiaries with advance notice of any change in the method or rate of the trustee’s compensation. Failure to provide such advance notice constitutes a breach of trust, which, if sufficiently serious, would justify the trustee’s removal under Section 62‑7‑706.

Under Sections 62‑7‑925 and 62‑7‑926 of the South Carolina Uniform Principal and Income Act, one‑half of a trustee’s regular compensation is charged to income and the other half to principal. Chargeable to principal are fees for acceptance, distribution, or termination of the trust, and fees charged on disbursements made to prepare property for sale.

Library References

Trusts 314.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 606 to 634.

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 975, Compensation of Trustees.

**SECTION 62‑7‑709.** Reimbursement of expenses.

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

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

(2) to the extent necessary to prevent unjust enrichment of the trust, 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.

(c) A prospective trustee is entitled to be reimbursed from trust property for expenses reasonably incurred by the prospective trustee pursuant to Section 62‑7‑701(c) to protect or investigate the trust assets before deciding whether or not to accept the trusteeship.

HISTORY: 2005 Act No. 66, Section 1; 2010 Act No. 244, Section 52, eff June 7, 2010; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

A trustee has the authority to expend trust funds as necessary in the administration of the trust, including expenses incurred in the hiring of agents. See Sections 62‑7‑807 (delegation by trustee) and 62‑7‑816(15) (trustee to pay expenses of administration from trust).

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

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

Subsection (b) implements Section 62‑7‑802(h)(5), which creates an exception to the duty of loyalty for advances by the trustee for the protection of the trust if the transaction is fair to the beneficiaries. Former South Carolina Probate Code Section 62‑7‑704(18) empowered the trustee “to advance money for the protection of the trust, and for all expenses, losses, and liability sustained in the administration of the trust or because of the holding or ownership of any trust assets, for which advances with any interest the trustee has a lien on the trust assets as against the beneficiary ...”

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

Effect of Amendment

The 2010 amendment added subsection (c) relating to reimbursement of prospective trustees for certain expenses.

Library References

Trusts 224, 315.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 383, 388 to 390, 393 to 400, 606 to 607, 612, 614 to 629, 633 to 634.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Compromise and Settlement Section 10, Minors’ Settlements‑ Appropriate Procedure for Approval.

S.C. Jur. Gifts Section 24, Pay on Death Accounts.

S.C. Jur. Lis Pendens Section 24, Estate Administration.

Part 8

Duties and Powers of Trustee

General Comment

This article states the fundamental duties of a trustee and lists the trustee’s powers. The duties listed are not new, but how the particular duties are formulated and applied has changed over the years. This Part was drafted where possible to conform with the South Carolina Uniform Prudent Investor Act. The South Carolina Prudent Investor Act prescribes a trustee’s responsibilities with respect to the management and investment of trust property. The SCTC also addresses a trustee’s duties with respect to distribution to beneficiaries.

Because of the widespread adoption of the Uniform Prudent Investor Act, it was decided not to disassemble and fully integrate the Prudent Investor Act into the Uniform Trust Code. Instead, states enacting the Uniform Trust Code were encouraged to recodify their version of the Prudent Investor Act by reenacting it as Part 9 of this Code rather than leaving it elsewhere in their statutes. Where the Uniform Trust Code and Uniform Prudent Investor Act overlap, states were advised to enact the provisions of this Part and not enact the duplicative provisions of the Prudent Investor Act. Sections of this article which overlap with the Prudent Investor Act are Sections 62‑7‑802 (duty of loyalty), 62‑7‑803 (impartiality), 62‑7‑805 (costs of administration), 62‑7‑806 (trustee’s skills), and 62‑7‑807 (delegation). For more complete instructions on how states were advised to enact the Uniform Prudent Investor Act as part of this Code, see the General Comment to Article 9. South Carolina followed the advice of the Uniform Code drafters by including the South Carolina Prudent Investor Act as Sections 62‑7‑901 through 62‑7‑932 of the SCTC.

All of the provisions of this Part may be overridden in the terms of the trust except for certain aspects of the trustee’s duty to act in good faith, in accordance with the purposes of the trust, and for the benefit of the beneficiaries (see Section 62‑7‑105(b)(2)‑(3)).

**SECTION 62‑7‑801.** 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 article.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section confirms that a primary duty of a trustee is to follow the terms and purposes of the trust and to do so in good faith.

This section describes a trustee’s broad and general duty of good faith and establishes that a nominated or proposed trustee owes no duty to the beneficiary unless and until the trusteeship is accepted. See former South Carolina Probate Code Section 62‑7‑301 (a trustee has a general duty to administer the trust expeditiously for the benefit of the beneficiaries) and Section 62‑7‑305 (a trustee is under a continuing duty to administer the trust according to the objectives of the trustor); Sarlin v. Sarlin, 312 S.C. 27, 430 S.E.2d 530 (S.C. Ct. App. 1993) (a trustee’s discretion must be exercised in good faith, consistent with the primary purpose(s) of the trust).

There was no prior South Carolina case law regarding the principle that there is no duty owed to beneficiaries without acceptance of the trust by the proposed trustee; however, there is general common law to that effect. Restatement, Second, Trusts Section 169.

CROSS REFERENCES

Banks and trust companies acting as fiduciaries, see Sections 34‑15‑10 et seq.

Costs against certain fiduciaries, see Section 15‑37‑180.

Library References

Trusts 173, 179, 270.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 318 to 324, 326, 330 to 331, 338 to 339.

LAW REVIEW AND JOURNAL COMMENTARIES

The Impact of Significant Substantive Provisions of the South Carolina Trust Code, 57 S.C. L. Rev. 137 (Autumn 2005).

**SECTION 62‑7‑802.** 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 62‑7‑1012, 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 62‑7‑1005;

(4) the beneficiary consented to the trustee’s conduct, ratified the transaction, or released the trustee in compliance with Section 62‑7‑1009; or

(5) the transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.

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

(1) the trustee’s spouse;

(2) the trustee’s descendants, siblings, parents, or their spouses;

(3) an agent or attorney of the trustee;

(4) a corporation or other person or enterprise in which the trustee has such a substantial interest that it might affect the trustee’s best judgment; and

(5) a corporation or other person or enterprise which has such a substantial interest in the trustee that it might affect the trustee’s best judgment.

(d) A transaction between a trustee and a beneficiary that does not concern trust property but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary and from which the trustee obtains an advantage is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.

(e) A transaction not concerning trust property in which the trustee engages in the trustee’s individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.

(f) An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the prudent investor rule of Part 9. 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 at least annually notifies the persons entitled under Section 62‑7‑813 to receive a copy of the trustee’s annual report of the rate and method by which the compensation was determined.

(g) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.

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

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

(2) payment of reasonable compensation to the trustee;

(3) a transaction between a trust and another trust, decedent’s estate, or conservatorship of which the trustee is a fiduciary or in which a beneficiary has an interest;

(4) a deposit of trust money in a regulated financial‑service institution operated by the trustee; or

(5) an advance by the trustee of money for the protection of the trust.

(i) The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑7‑802(a) sets forth the Trustee’s particular duty of loyalty owed to beneficiaries. See former South Carolina Probate Code Section 62‑7‑301, which states that a trustee has a general duty to administer the trust “for the benefit of the beneficiaries ...” South Carolina case law provided similarly. See McNeil v. Morrow, 30 S.C. Eq. (9 Rich.Cas.) 172 (S.C. 1832); Cartee v. Lesley, 290 S.C. 333, 350 S.E.2d 388 (S.C. 1986); Yates v. Yates, 292 S.C. 49, 354 S.E.2d 800 (S.C. Ct. App. 1987).

Section 62‑7‑802(b) states the general rule governing trust property transactions affected by the trustee’s conflict of interest. Such a transaction is voidable by a beneficiary unless one of the stated exceptions is shown to apply.

Regarding the general power of a beneficiary to void a conflict of interest transaction, see former SCPC Section 62‑7‑706, which implied such a power. In the analogous situation of a personal representative’s conflict of interest transaction, SCPC Section 62‑3‑713 provides that any transaction affected by “a substantial conflict of interest” is voidable unless (1) the decedent’s will or contract expressly authorized the transaction, or (2) the transaction is approved by the court after notice.

In general, transactions involving trustee self dealing (selling trust property to trustee individually or buying property, as trustee, from himself individually) are voidable by beneficiaries without regard to good faith and fair consideration. See Zimmerman v. Harmon, 25 S.C. Eq. (4 Rich. Eq.)165 (S.C.1851) and McCants v. Bee, 6 S.C. Eq. (1 McCord Eq.) 383 (S.C. 18). Also, see Restatement, Second, Trusts Section 170, comments b. and h. on subsection (1).

In subsection (b)(1), the first exception to the “voidable” rule provides that a beneficiary may not automatically void a conflict of interest transaction if the transaction is authorized by the terms of the trust. Former SCPC Section 62‑7‑706 implicitly provided for that exception. If the transaction was authorized by the trust agreement, it could be assumed that the court would approve the transaction. There is no prior South Carolina case law directly on point regarding authorization in the trust agreement for the conflict of interest transaction. However, there is general common law to that effect. The most commonly recognized exception to the duty of loyalty rule is where the settlor expressly or impliedly approved of the conflict of interest position or transaction. George Gleason Bogert and George Taylor Bogert, The Law of Trusts and Trustees, Section 543 (Rev. 2d ed. 1993) (where the testator/settlor created the conflict situation when his will or trust was drawn, by naming a particular person as personal representative/trustee who, after the opening of the estate/trust, would be exposed to a conflict between personal and representational interests, there is an implied exemption from the duty of loyalty, absent fraud or bad faith on the party of the fiduciary.)

Subsection (b)(2) provides the second exception to the “voidable” rule: a beneficiary may not automatically void a conflict of interest transaction if the transaction is approved by the court. Former SCPC Section 62‑7‑706 provided that conflict of interest transactions could be approved by the court. Prior South Carolina case law provided similarly. Sollee v. Croft, 28 S.C. Eq. (7 Rich. Eq.) (S.C. 1854) (the court may permit a conflict of interest transaction.) Also, see Restatement, Second, Trusts Section 170, comment f. on subsection (1); Honeywell v. Dominick, 223 S. C. 365, 75 S.E.2d 59 (S.C. 1953) (notwithstanding the general rule prohibiting a trustee from buying trust property at his own sale, the court may approve such a transaction upon finding a justifiable exception).

Subsection (b)(3), the third exception to the “voidable” rule, provides that a beneficiary’s right to void a conflict of interest transaction is subject to the limitation periods in SCTC Section 62‑7‑1005. Former SCPC Section 62‑7‑307 provided that claims against a trustee for breach of trust could be commenced within one year after receipt of final account disclosing the matter (actual disclosure) and in no event more than three years after a beneficiary’s receipt of a final account or statement, regardless of disclosure (constructive disclosure). See Moyer v. M.S. Bailey & Son, 347 S.C. 353, 555 S.E.2d 406 (S.C. Ct. App. 2001) (applying the provisions of former SCPC Section 62‑7‑307). See also Rembert v. Gressette, 318 S.C. 519, 458 S.E.2d 552 (S.C. Ct. App. 1995) (beneficiaries may lose claims against trustees due to laches).

Subsection (b)(4) containsthe fourth exception to the “voidable” rule, providing that the transaction is not voidable by the beneficiary if the beneficiary consents to, ratifies, or releases the trustee with regard to the transaction as set forth in SCTC Section 62‑7‑1009. Former SCPC Section 62‑7‑307 implied that beneficiaries could consent to a breach; see also SCPC Section 62‑3‑713, governing personal representatives, which provides that a beneficiary’s right to void a conflict transaction may be lost by consent. See Byrd v. King, 245 S.C. 247, 140 S.E.2d 158 (S.C. 1965), applying Restatement, Second, Trusts Section 216, holding that a beneficiary may not hold the trustee liable for breach of trust if the beneficiary consented to the trustee’s act or omission. The comments to Restatement Section 216 set forth numerous fact‑sensitive applications of the rule.

Subsection (b)(5), the fifth exception to the “voidable” rule, provides that a transaction contracted for prior to the person becoming trustee or before he contemplated becoming trustee is not automatically voidable by a beneficiary. There was no prior SC statutory or case law counterpart.

Whereas Section 62‑7‑802(b) applies an irrebuttable presumption to void certain conflict of interest transactions, Section 62‑7‑802(c) applies a rebuttable presumption of voidability for transactions involving trust property entered into with persons who have close business or personal ties with the trustee. There was no prior South Carolina statutory counterpart. See Scottish‑American Mtg. Co. v. Clowney, 70 S.C. 229, 49 S.E. 569 (S.C. 1904) (sale of trust property by trustee to trustee’s spouse is voidable at the option of the beneficiary). Restatement, Second, Trusts Section 170 provides that a transaction with the trustee’s spouse can be set aside as though it was made with the trustee himself. Id., comment, e. to subsection (4). A transaction with a non‑spouse person who “is related to the trustee” makes the transaction suspicious but not ipso facto improper. Id.

SCTC subsection (c)(4) substitutes certain language for that in the UTC version and adds subsection (c)(5), not found in UTC Section 802, to clarify that the “interest,” either “of” or “in” the trustee, must be “substantial” in order that such “interest” “might affect the best judgment of the trustee.” This is consistent with Scott on Trusts, Secs. 170.10—13 and the corresponding sections of the Restatement of Trusts.

Subsection (d) addresses transactions between the trustee and a beneficiary that do not involve trust property. Subsection (d) creates a presumption that the trustee abused the confidential relationship, thereby requiring the trustee to rebut the presumption with evidence that the transaction was fair to the beneficiary. There was no South Carolina statutory counterpart. See Guinyard v. Atkins, 282 S.C. 61, 317 S.E.2d 137 (S.C. Ct. App. 1984) (transactions between a trustee and beneficiaries may be sustained where there is clear affirmative proof of fair consideration, perfect candor, and absence of advantage.) Guinyard involved a trust property transaction, but arguably would also apply to a non‑trust property transaction between trustee and beneficiary. Restatement, Second, Trusts Section 170(2) permits transactions of the type described in subsection (d) only if the trustee satisfies the heightened standard of fairness and full disclosure.

Subsection (e) allows a beneficiary to void a transaction involving nontrust property entered into by the trustee personally if the transaction constituted an opportunity belonging to the trust. There was no South Carolina statutory or case law counterpart. See, however, Restatement, Second, Trusts Section 170, comment k. to subsection (1).

Subsection (f) creates an exception to the no‑further‑inquiry rule for trustee investments in mutual funds, and allows trustees to take additional compensation for services provided to the investment company, subject to a duty of disclosure and subject to the duties imposed by the Prudent Investor Act. See Part 9. There was no prior South Carolina case law counterpart. Subsection (f) includes the word “otherwise” found in the 2004 Amendments to UTC Section 802.

Subsection (g) makes share voting or other exercise of entity control by a trustee a fiduciary function. Former SCPC Section 62‑7‑704(c)(3), (13), (14), (15), and (26) provides for trustee powers with respect to entity control. The exercise of said powers was subject to the prudent man rule and had to be exercised in the best interest of the beneficiary and consistent with the purposes of the trust. See Weston v. Weston, 210 S.C. 1, 41 S.E.2d 372 (S.C. 1947) (it is the duty of the trustee in voting shares of corporate stock to act in the best interests of the beneficiary).

Subsection (h) sets forth exceptions to the duty of loyalty, which apply if the transaction was fair to the beneficiary.

Subsection (h)(1) and (2) provides that a trustee is free to contract with the beneficiary about the terms of appointment and compensation. Subsection (h)(3) permits transactions involving the trust with other fiduciary estates in which the trustee is also the fiduciary or in which the beneficiary of the trust has an interest. Subsection (h)(4) permits the trustee to deposit trust assets in a financial institution operated by the trustee. Subsection (h)(5) permits the trustee to advance money for the protection of the trust. There was no prior South Carolina statute on the subject of a trustee’s ability to contract with a beneficiary about terms of appointment and compensation. Former SCPC Section 62‑7‑205 permitted a trustee to fix his own fees (if not governed by the trust instrument) subject to the right of the beneficiary to object. Former SCPC Section 62‑7‑704(c)(4) permitted transactions of the type described in subsection (h)(3). Former SCPC Section 67‑7‑704 (6) permitted transactions of the type described in subsection (h)(4). Former SCPC Section 67‑7‑704(c)(18) permitted transactions of the type described in subsection (h)(5). There was no South Carolina case law counterpart.

Subsection (i) confirms that the court may appoint a special fiduciary to act with respect to any transaction that might violate the duty of loyalty if entered into by the trustee. There was no South Carolina statutory or case law counterpart.

Library References

Trusts 173, 179, 231.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 318 to 327, 330 to 339.

**SECTION 62‑7‑803.** 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.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

The duty of impartiality is an important aspect of the duty of loyalty. Former SCPC Section 62‑7‑302(F)(2), retained and incorporated in Part 9, provided similarly. Former SCPC Sections 62‑7‑301 and 62‑7‑305 set forth the general duties of administering the trust for the benefit of the beneficiaries and according to the objectives of the settlor. In Johnson v. Thornton, 264 S.C. 252, 214 S.E.2d 124 (S.C. 1975), the court recognized the existence of a trustee’s duty to deal impartially with two or more beneficiaries. See also Restatement, Second, Trusts Section 183.

Library References

Trusts 173.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 318 to 324, 330 to 331, 338 to 339.

**SECTION 62‑7‑804.** Prudent administration.

A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

The duty to administer a trust with prudence is a fundamental duty of the trustee. Former SCPC Section 62‑7‑702(2) defined a prudent man as a trustee whose exercise of judgment and care complies with the requirements of former Section 62‑7‑302, which is retained and incorporated in Part 9.

A settlor who wishes to modify the standard of care specified in this section is free to do so, but there is a limit. Section 62‑7‑1008 prohibits a settlor from exculpating a trustee from liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or to the interests of the beneficiaries.

Library References

Trusts 179.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 321 to 324, 326.

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 686, Statutes Affecting the Duty to Sell Nonlegals.

**SECTION 62‑7‑805.** Costs of administration.

In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section is consistent with the South Carolina Prudent Investor Act, Section 62‑7‑933, and is consistent with the rules concerning costs in Restatement (Third) of Trusts: Prudent Investor Rule Section 227(c)(3) (1992). For related rules concerning compensation and reimbursement of trustees, see Sections 62‑7‑708 and 62‑7‑709. The duty not to incur unreasonable costs applies when a trustee decides whether and how to delegate to agents, as well as to other aspects of trust administration. In deciding whether and how to delegate, the trustee must be alert to balancing projected benefits against the likely costs. To protect the beneficiary against excessive costs, the trustee should also be alert to adjusting compensation for functions which the trustee has delegated to others. The obligation to incur only necessary or appropriate costs of administration has long been part of the law of trusts. See Restatement (Second) of Trusts Section 188 (1959).

Former SCPC Section 62‑7‑302(F)(3), retained and incorporated in Part 9, provided similarly.

Library References

Trusts 224.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 383, 388 to 390, 393 to 400.

**SECTION 62‑7‑806.** Trustee’s skills.

A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee’s representation that the trustee has special skills or expertise, shall use those special skills or expertise.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section is similar to Restatement (Second) of Trusts Section 174 (1959), and consistent with the South Carolina Prudent Investor Act, Section 62‑7‑933.

Former SCPC Section62‑7‑302(C)(6), retained and incorporated in Part 9, provided similarly.

Library References

Trusts 179.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 321 to 324, 326.

**SECTION 62‑7‑807.** Delegation by trustee.

(a) A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

(1) selecting an agent;

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

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

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

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

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

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section permits trustees to delegate various aspects of trust administration to agents, subject to the standards of the section. Former SCPC Section 62‑7‑302(H)(1), retained and incorporated in Part 9, provided similarly. The language is derived from Section 9 of the Uniform Prudent Investor Act. See also John H. Langbein, Reversing the Nondelegation Rule of Trust Investment Law, 59 Mo. L. Rev. 105 (1994) (discussing prior law).

This section encourages and protects the trustee in making delegations appropriate to the facts and circumstances of the particular trust. Whether a particular function is delegable is based on whether it is a function that a prudent trustee might delegate under similar circumstances. For example, delegating some administrative and reporting duties might be prudent for a family trustee but unnecessary for a corporate trustee.

This section applies only to delegation to agents, not to delegation to a cotrustee. For the provision regulating delegation to a cotrustee, see Section 62‑7‑703.

Library References

Trusts 176.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 343 to 344.

**SECTION 62‑7‑808.** 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) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

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

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Subsection (a) is an application of Section 62‑7‑603(a), which provides that a revocable trust is subject to the settlor’s exclusive control. Because of the settlor’s degree of control, subsection (a) of this section authorizes a trustee to rely on a direction from the settlor even if it is contrary to the terms of the trust. The direction of the settlor might be regarded as an amendment of the trust.

Subsections (b)‑(d) ratify the use of trust protectors and advisers. Subsections (b) and (d) are based in part on Restatement (Second) of Trusts Section 185 (1959). Subsection (c) is similar to Restatement (Third) of Trusts Section 64(2) (Tentative Draft No. 3, approved 2001). “Advisers” have long been used for certain trustee functions, such as the power to direct investments or manage a closely‑held business. “Trust protector,” a term largely associated with offshore trust practice, is more recent and usually connotes the grant of greater powers, sometimes including the power to amend or terminate the trust. Subsection (c) ratifies the recent trend to grant third persons such broader powers. See SCTC Sections 62‑7‑818 and 62‑7‑819.

A power to direct must be distinguished from a veto power. A power to direct involves action initiated and within the control of a third party. The trustee usually has no responsibility other than to carry out the direction when made. But if a third party holds a veto power, the trustee is responsible for initiating the decision, subject to the third party’s approval. A trustee who administers a trust subject to a veto power occupies a position akin to that of a cotrustee and is responsible for taking appropriate action if the third party’s refusal to consent would result in a serious breach of trust. See Restatement (Second) of Trusts Section 185 cmt. g (1959); Section 703(g) (duties of cotrustees).

Frequently, the person holding the power is directing the investment of the holder’s own beneficial interest. Such self‑directed accounts are particularly prevalent among trusts holding interests in employee benefit plans or individual retirement accounts. See ERISA Section 404(c) (29 U.S.C. Section 1104(c)). But for the type of donative trust which is the primary focus of this Code, the holder of the power to direct is frequently acting on behalf of others. In that event and as provided in subsection (d), the holder is presumptively acting in a fiduciary capacity with respect to the powers granted and can be held liable if the holder’s conduct constitutes a breach of trust, whether through action or inaction. Like a trustee, liability cannot be imposed if the holder has not accepted the grant of the power either expressly or informally through exercise of the power. See Section 62‑7‑701.

Powers to direct are most effective when the trustee is not deterred from exercising the power by fear of possible liability. On the other hand, the trustee does have overall responsibility for seeing that the terms of the trust are honored. For this reason, subsection (b) imposes only minimal oversight responsibility on the trustee. A trustee must generally act in accordance with the direction. A trustee may refuse the direction only if the attempted exercise would be manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty owed by the holder of the power to the beneficiaries of the trust.

The provisions of this section may be altered in the terms of the trust. See Section 62‑7‑105. A settlor can provide that the trustee must accept the decision of the power holder without question. Or a settlor could provide that the holder of the power is not to be held to the standards of a fiduciary. A common technique for assuring that a settlor continues to be taxed on all of the income of an irrevocable trust is for the settlor to retain a nonfiduciary power of administration. See I.R.C. Section 675(4).

There was no prior South Carolina statutory or case law counterpart.

Library References

Trusts 58, 59(2), 172.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 96 to 116, 318 to 320.

**SECTION 62‑7‑809.** Control and protection of trust property.

A trustee shall take reasonable steps to take control of and protect the trust property.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section codifies the substance of Sections 175 and 176 of the Restatement (Second) of Trusts (1959). The duty to take control of and safeguard trust property is an aspect of the trustee’s duty of prudent administration as provided in Section 62‑7‑804. See also Sections 62‑7‑816(1) (power to collect trust property), 62‑7‑816(11) (power to insure trust property), and 62‑7‑816(12) (power to abandon trust property). The duty to take control normally means that the trustee must take physical possession of tangible personal property and securities belonging to the trust, and must secure payment of any choses in action. See Restatement (Second) of Trusts Section 175 cmt. a, c & d (1959). This section, like the other sections in this article, is subject to alteration by the terms of the trust. See Section 62‑7‑105. For example, the settlor may provide that the spouse may occupy the settlor’s former residence rent free, in which event the spouse’s occupancy would prevent the trustee from taking possession.

There was no prior South Carolina statutory or case law counterpart.

Library References

Trusts 182.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 369 to 372, 374 to 378.

**SECTION 62‑7‑810.** Recordkeeping and identification of trust property.

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

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

(c) Except as otherwise provided in subsection (d), a trustee shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.

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

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

The duty to keep adequate records stated in subsection (a) is implicit in the duty to act with prudence (Section 62‑7‑804) and the duty to report to beneficiaries (Section 62‑7‑813). For an application, see Green v. Lombard, 343 A. 2d 905, 911 (Md. Ct. Spec. App. 1975). See also Restatement (Second) of Trusts Sections 172, 174 (1959). This Section is related to Section 62‑7‑813, which requires the trustee to keep the beneficiaries reasonably informed about the administration of the trust.

Subsection (c) allows the trustee to maintain assets in nominee name rather than holding individual assets in the name of the trustee.

Subsection (d) allows a trustee to use the property of two or more trusts to make joint investments. This allows the use of common trust funds or mutual funds which can be an economical method of managing assets of the trust.

Library References

Trusts 231(1), 270, 351.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 321 to 324, 330 to 337, 669, 674 to 678.

**SECTION 62‑7‑811.** Enforcement and defense of claims.

A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section does not impose any new duties upon trustees. It has been held in South Carolina that a trustee who fails to collect upon a debt owed the trust, or to make an effort to do so, is liable to the trust. Neely v. Peoples Bank of Anderson, 133 S.C. 43, 130 S.E. 550 (S.C. 1925). See also former SCPC Section 62‑7‑704(c)(19), which provided that a trustee had the power to pay or contest claims, settle claims by or against the trust, and to release claims owned by the trust, which is similar to Section 62‑7‑816(14).

Library References

Trusts 249.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 555, 557 to 561.

**SECTION 62‑7‑812.** Exercise of powers by successor trustees; liability.

Unless directed otherwise by the court or by the trust instrument, a successor trustee appointed by the court or by the trust instrument succeeds to all the powers, duties, and discretionary authority given to the predecessor trustee. Upon reasonable request, a successor trustee is entitled to a statement of the accounts of the trust from a predecessor trustee. A successor trustee may accept the account rendered and shall be under no duty to examine the acts or omissions of the predecessor trustee and shall not be liable for failure to seek redress for any act or omission of the predecessor trustee. The trustee of a testamentary trust may accept the account rendered by a personal representative and shall be under no duty to examine the acts or omissions of the predecessor personal representative and shall not be liable for failure to seek redress for any act or omission of the predecessor personal representative.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑7‑812 does not adopt Uniform Trust Code Section 812. Instead, Section 62‑7‑812 retains and incorporates former SCPC Section 62‑7‑707(c). Section 62‑7‑703 has provisions similar to former SCPC Section 62‑7‑707(a), (b), and (d).

Library References

Trusts 238, 243.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 341, 345 to 346.

**SECTION 62‑7‑813.** Duty to inform and report.

(a) Unless the terms of a trust expressly provide otherwise, while a trust is revocable the trustee’s duties under this section are owed exclusively to the settlor.

(b) Unless the terms of a trust expressly provide otherwise, a trustee who accepts a trusteeship or undertakes the administration of an irrevocable trust created on or after the effective date of this article, or of a revocable trust which becomes irrevocable whether by the death of the settlor or by the terms of the trust on or after the effective date of this article, shall:

(1) within ninety days after the trustee accepts a trusteeship or undertakes administration of an irrevocable trust or a revocable trust that has become irrevocable whether by the death of the settlor or by the terms of the trust, notify the qualified beneficiaries, as defined in Section 62‑7‑103(12), of:

(A) the existence of the trust;

(B) the identity of the settlor or settlors;

(C) the trustee’s name, address and telephone number;

(D) the right to request in writing a copy of the trust instrument; and

(E) the right to request in writing a copy of any trustee’s report described in (c)(1) below;

(2) throughout the administration of the trust, keep the distributees and the permissible distributees, as defined in Section 62‑7‑103(21) and (25), reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests, provided that the attorney‑client privilege between the trustee and the trustee’s attorney is not violated;

(3) upon the reasonable written request of a beneficiary, other than a qualified beneficiary, unless unreasonable under the circumstances, provide to the beneficiary a copy of the trust instrument redacted to include only those provisions of the trust that are relevant to the beneficiary’s interest in the trust, as the trustee determines and, unless unreasonable under the circumstances, respond to a beneficiary’s written request for information related to the administration of the trust;

(4) notify the distributees and permissible distributees in advance of any change in the method or rate of the trustee’s compensation; and

(5) notwithstanding any of the above, not be required to notify any beneficiary in advance of transactions relating to the trust property.

(c) Unless the terms of a trust expressly provide otherwise, a trustee who accepts a trusteeship or undertakes the administration of an irrevocable trust created on or after the effective date of this article, or of a revocable trust which becomes irrevocable on or after the effective date of this article, shall:

(1) have a continuing duty to:

(A) keep the distributees and permissible distributees, or other qualified beneficiaries who request information in writing, reasonably informed as to the administration of the trust; and

(B) send annually, and upon the termination of the trust, a written report of the trust property which may be in any format which provides the distributees and permissible distributees, or other qualified beneficiaries who have requested in writing, with information necessary to protect their interests. The report may include a copy of the fiduciary income tax return, or copies of bank or brokerage statements, or an informal list of assets and if feasible, the market values of those assets, the liabilities, the receipts and the disbursements, including the source and amount of the trustee’s compensation;

(2) upon resignation of the trustee and unless a cotrustee remains in office, send a written report as described in (c)(1) to the distributees and permissible distributees; and in the case of the death or incapacity of a trustee, the report may be sent by the trustee’s personal representative, conservator or guardian.

(d) To the extent that there is no conflict of interest, the trustee’s duties to inform and report under subsections (b) and (c) are deemed satisfied if the information and report are given to the beneficiary’s representative as described in Sections 62‑7‑302 through 62‑7‑305.

(e) Any distributee or permissible distributee may waive the right to a trustee’s report and other information described under this section and, with respect to future reports and other information, withdraw a waiver previously given.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

The 2013 Amendments completely revise the previous version of 62‑7‑813 and more clearly define the duties of the trustee to inform and report as well as the classes of beneficiaries to whom initial duty to inform, qualified beneficiaries are entitled to receive information as provided in subsection (b)(1); thereafter, only distributees and permissible distributees have the right to receive information as provided in subsections (b)(2) and (b)(4); and under (b)(3) a nonqualified beneficiary may receive only a redacted copy of a trust agreement and only upon request. In regard to the duty to report, subsection (c)(1) provides that the distributees and permissible distributees have the right to receive a report as described therein. Other qualified beneficiaries may receive the report only upon written request and nonqualified beneficiaries are not entitled to a report.

Library References

Trusts 173.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 318 to 324, 330 to 331, 338 to 339.

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 962, Duty to Furnish Information and Permit Inspection.

Bogert ‑ the Law of Trusts and Trustees Section 963, Duty to Furnish Reports to Beneficiaries.

**SECTION 62‑7‑814.** 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) A power whose exercise is limited or prohibited by subsection (c) 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.

(c) Subject to subsection (d), and unless the application of this section is clearly and convincingly negated in the will, the trust document, terms of the trust, or a written instrument appointing a fiduciary, expressly indicating that a rule in this subsection does not apply, any power conferred upon the fiduciary, in his capacity as a fiduciary (and not including any power conferred upon him in his capacity as a beneficiary), which would, except for this section, constitute, in whole or in part, a general power of appointment cannot be exercised by him in favor of himself, his estate, his creditors, or the creditors of his estate.

(1) The fiduciary can, however, exercise the power in favor of someone other than himself, his estate, his creditors and the creditors of his estate.

(2) If a power comes within subsection (c) and the power is conferred upon two or more fiduciaries, it can be exercised by the fiduciary or the fiduciaries who are not disqualified from exercising the power as if they were the only fiduciary or fiduciaries.

(3) If all of the serving fiduciaries are disqualified from exercising a power, the court that would have jurisdiction to appoint a fiduciary under the instrument, if there were no fiduciary currently serving, shall exercise, or shall appoint a special fiduciary whose only power is to exercise the power that cannot be exercised by the other fiduciaries by reason of subsection (c).

(4) 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.

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

(1) a power held by the settlor’s spouse who is the trustee of a trust for which a marital deduction, as defined in Section 2056(b)(5) or 2523(e) of the Internal Revenue Code, as amended, was previously allowed;

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

(3) a trust if contributions to the trust qualify for the annual exclusion under Section 2503(c) of the Internal Revenue Code as amended.

HISTORY: 2005 Act No. 66, Section 1; 2010 Act No. 244, Section 53, eff June 7, 2010; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

The corresponding statute under the former South Carolina law was SCPC Section 62‑7‑603. The intent of both former SCPC Section 62‑7‑603 and current SCTC Section 62‑7‑814 is to avoid inadvertent income tax and estate tax consequences that might result under certain circumstances where a beneficiary is also serving as a trustee.

The introductory language to subsection (A) of former SCPC Section 62‑7‑603 appears to be more demonstrative than the corresponding language of Uniform Trust Code Section 814(b). Consequently, current SCTC Section 62‑7‑814 incorporates that introductory clause from former SCPC Section 62‑7‑603(A) that current SCTC Section 62‑7‑814 does not limit the intent and protection of former SCPC Section 62‑7‑603.

Former SCPC Section 62‑7‑603 also limited certain fiduciary powers so that the trustee was not deemed to have a general power of appointment. A corresponding clause was not expressly contained in the UTC version of Section 814. Thus, the appropriate language from former SCPC Section 62‑7‑603 is included at current SCTC Section 62‑7‑814(c).

Despite the breadth of discretion purportedly granted by the wording of a trust, no grant of discretion to a trustee, whether with respect to management or distribution, is ever absolute. A grant of discretion establishes a range within which the trustee may act. The greater the grant of discretion, the broader the range. Pursuant to subsection (a), a trustee’s action must always be in good faith, with regard to the purposes of the trust, and in accordance with the trustee’s other duties, including the obligation to exercise reasonable skill, care and caution. See Sections 62‑7‑801 (duty to administer trust) and 62‑7‑804 (duty to act with prudence). The standard stated in subsection (a) applies only to powers which are to be exercised in a fiduciary as opposed to a nonfiduciary capacity. Regarding the standards for exercising discretion and construing particular language of discretion, see Restatement (Third) of Trusts Section 50 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 187 (1959). See also Edward C. Halbach, Jr., Problems of Discretion in Discretionary Trusts, 61 Colum. L. Rev. 1425 (1961). An abuse by the trustee of the discretion granted in the terms of the trust is a breach of trust that can result in surcharge. See Section 62‑7‑1001(b) (remedies for breach of trust).

Subsections (b) through (d) rewrite the terms of a trust that might otherwise result in adverse estate and gift tax consequences to a beneficiary‑trustee. This Trust Code does not generally address the subject of tax curative provisions. These are provisions that automatically rewrite the terms of trusts that might otherwise fail to qualify for probable intended tax benefits. Such provisions, because they apply to all trusts using or failing to use specified language, are often overbroad, applying not only to trusts intended to qualify for tax benefits but also to smaller trust situations where taxes are not a concern. Enacting tax‑curative provisions also requires special diligence by state legislatures to make certain that these provisions are periodically amended to account for the frequent changes in federal tax law. Furthermore, many failures to draft with sufficient care may be correctable by including a tax savings clause in the terms of the trust or by seeking modification of the trust using one or more of the methods authorized by Sections 62‑7‑411 through 62‑7‑417. Notwithstanding these reasons, the unintended inclusion of the trust in the beneficiary‑trustee’s gross estate is a frequent enough occurrence that this Code addresses it. It is also a topic on which numerous states have enacted corrective statutes.

A tax curative provision differs from a statute such as Section 62‑7‑416 of this Code, which allows a court to modify a trust to achieve an intended tax benefit. Absent Congressional or regulatory authority authorizing the specific modification, a lower court decree in state court modifying a trust is controlling for federal estate tax purposes only if the decree was issued before the taxing event, which in the case of the estate tax would be the decedent’s death. See Rev. Rul. 73‑142, 1973‑1 C.B. 405. There is specific federal authority authorizing modification of trusts for a number of reasons (see Comment to UTC Section 416) but not on the specific issues addressed in this section. Subsections (b) through (d), by interpreting the original language of the trust instrument in a way that qualifies for intended tax benefits, obviates the need to seek a later modification of the trust.

QTIP marital trusts are subject to this section. QTIP trusts qualify for the marital deduction only if so elected on the federal estate tax return. Excluding a QTIP for which an election has been made from the operation of this section would allow the terms of the trust to be modified after the settlor’s death. By not making the QTIP election, an otherwise unascertainable standard would be limited. By making the QTIP election, the trustee’s discretion would not be curtailed. This ability to modify a trust depending on elections made on the federal estate tax return could itself constitute a taxable power of appointment resulting in inclusion of the trust in the surviving spouse’s gross estate.

The exclusion of the Section 2503(c) minors trust is necessary to avoid loss of gift tax benefits. While preventing a trustee from distributing trust funds in discharge of a legal obligation of support would keep the trust out of the trustee’s gross estate, such a restriction might result in loss of the gift tax annual exclusion for contributions to the trust, even if the trustee were otherwise granted unlimited discretion. See Rev. Rul. 69‑345, 1969‑1 C.B. 226.

Effect of Amendment

The 2010 amendment substituted “(c)” for “(d)” following “subsection” in the first sentence.

CROSS REFERENCES

Proceeding to determine decedent’s intent regarding application of certain federal tax formulas, see Section 62‑2‑612.

Library References

Trusts 171, 177.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 318 to 320, 347 to 348, 350 to 360.

**SECTION 62‑7‑815.** General powers of trustee.

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

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

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

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

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

(C) any other powers conferred by this part.

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

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section is intended to grant trustees the broadest possible powers, but to be exercised always in accordance with the duties of the trustee and any limitations stated in the terms of the trust. This broad authority is denoted by granting the trustee the powers of an unmarried competent owner of individually owned property, unlimited by restrictions that might be placed on it by marriage, disability, or cotenancy.

A power differs from a duty. A duty imposes an obligation or a mandatory prohibition. A power, on the other hand, is a discretion, the exercise of which is not obligatory. The existence of a power, however created or granted, does not speak to the question of whether it is prudent under the circumstances to exercise the power.

Former SCPC Section 62‑7‑704 contained the default powers that were available to all trustees when the trust instrument did not provide specific powers. Former SCPC Section 62‑7‑704 granted general powers that a prudent person would perform incident to the collection, preservation, management, use and distribution of the trust estate, and it also contained various specific powers. SCTC Section 62‑7‑815 broadens the former SCPC list of powers that apply to all trustees by stating that a trustee has all of the powers over trust property that an individual has over his own property.

Library References

Trusts 171, 172.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 318 to 320.

**SECTION 62‑7‑816.** Specific powers of trustee.

Without limiting the authority conferred by Section 62‑7‑815, 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 accounts—all types including margin accounts—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, create and/or continue a 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 depositary 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, including by way of example qualified conservation and façade 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 agent under a Power of Attorney, to the beneficiary’s conservator or, if the beneficiary does not have a conservator, to the beneficiary’s guardian;

(B) paying it to the beneficiary’s custodian under the Uniform Gifts or Transfers to Minors Act or custodial trustee under the Uniform Custodial Trust Act, and, for that purpose, creating a custodianship or custodial trust;

(C) if the trustee does not know of an agent under a Power of Attorney, 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; and

(26) on termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it.

(27) allocate items of income or expense to either trust income or principal, as permitted or provided by the trust instrument and applicable law, but this power shall not be construed as prescribing the method of accounting for principal and income;

(28) to divide any trust into separate shares or separate trusts or to create separate trusts if the trustee reasonably deems it appropriate and the division or creation is consistent with the settlor’s intent and facilitates the trust’s administration without defeating or impairing the interests of the beneficiaries.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section enumerates specific powers commonly included in trust instruments and in trustee powers legislation. All the powers listed are subject to alteration in the terms of the trust. See Section 62‑7‑105. The powers listed are also subsumed under the general authority granted in Section 62‑7‑815(a)(2) to exercise all powers over the trust property which an unmarried competent owner has over individually owned property, and any other powers appropriate to achieve the proper management, investment, and distribution of the trust property. The powers listed add little of substance not already granted by Section 62‑7‑815 and powers conferred elsewhere in the Code. While the Committee drafting the Uniform Trust Code discussed dropping the list of specific powers, it concluded that the demand of third parties to see language expressly authorizing specific transactions justified retention of a detailed list.

As provided in Section 62‑7‑815(b), the exercise of a power is subject to fiduciary duties except as modified in the terms of the trust. The fact that the trustee has a power does not imply a duty that the power must be exercised.

Many of the powers listed in this section are similar to the powers listed in Section 3 of the Uniform Trustees’ Powers Act (1964). Several are new, however, and other powers drawn from that Act have been updated. The powers enumerated in this section may be divided into categories. Certain powers, such as the powers to acquire or sell property, borrow money, and deal with real estate, securities, and business interests, are powers that any individual can exercise. Other powers, such as the power to collect trust property, are by their very nature only applicable to trustees. Other specific powers, particularly those listed in other sections of the SCTC, modify a trustee duty that would otherwise apply. See, e.g., Sections 62‑7‑802(h) (exceptions to duty of loyalty) and 62‑7‑810(d) (joint investments as exception to earmarking requirement).

Paragraph (1) authorizes a trustee to collect trust property and collect or decline additions to the trust property. The power to collect trust property is an incident of the trustee’s duty to administer the trust as provided in Section 62‑7‑801. The trustee has a duty to enforce claims as provided in Section 62‑7‑811, the successful prosecution of which can result in collection of trust property. Pursuant to Section 62‑7‑812, the trustee also has a duty to collect trust property from a former trustee or other person holding trust property. For an application of the power to reject additions to the trust property, see Section 62‑7‑816(13) (power to decline property with possible environmental liability).

Paragraph (2) authorizes a trustee to sell trust property, for cash or on credit, at public or private sale. Under the Restatement, a power of sale is implied unless limited in the terms of the trust. Restatement (Third) of Trusts: Prudent Investor Rule Section 190 (1992). In arranging a sale, a trustee must comply with the duty to act prudently as provided in Section 62‑7‑804. This duty may dictate that the sale be made with security.

Paragraph (4) authorizes a trustee to deposit funds in an account in a regulated financial‑service institution. This includes the right of a financial institution trustee to deposit funds in its own banking department as authorized by Section 62‑7‑802(h)(4). South Carolina Trust Code Section 62‑7‑816 subsection (4) added “in accounts” to the UTC version and expressly provides for the deposit of money in “all types” of accounts, and specifically references the inclusion of “margin accounts.”

Paragraph (5) authorizes a trustee to borrow money. Under the Restatement, the sole limitation on such borrowing is the general obligation to invest prudently. See Restatement (Third) of Trusts: Prudent Investor Rule Section 191 (1992). Language clarifying that the loan may extend beyond the duration of the trust was added to negate an older view that the trustee only had power to encumber the trust property for the period that the trust was in existence.

Paragraph (6) authorizes the trustee to continue, contribute additional capital to, or change the form of a business. Any such decision by the trustee must be made in light of the standards of prudent investment stated in Section 62‑7‑933. SCTC Section 62‑7‑816 subsection (6) added language to the UTC version which authorizes a trustee to “create” a business.

Paragraph (7), regarding powers with respect to securities, codifies and amplifies the principles of Restatement (Second) of Trusts Section 193 (1959).

Paragraph (9), authorizing the leasing of property, negates the older view, reflected in Restatement (Second) of Trusts Section 189 cmt. c (1959), that a trustee could not lease property beyond the duration of the trust. Whether a longer term lease is appropriate is judged by the standards of prudence applicable to all investments.

Paragraph (10), authorizing a trustee to grant options with respect to sales, leases or other dispositions of property, negates the older view, reflected in Restatement (Second) of Trusts Section 190 cmt. k (1959), that a trustee could not grant another person an option to purchase trust property. Like any other investment decision, whether the granting of an option is appropriate is a question of prudence under the standards of Part 9.

Paragraph (11), authorizing a trustee to purchase insurance, empowers a trustee to implement the duty to protect trust property. See Section 62‑7‑809. The trustee may also insure beneficiaries, agents, and the trustee against liability, including liability for breach of trust.

Paragraph (13) is one of several provisions in the SCTC designed to address trustee concerns about possible liability for violations of environmental law. This paragraph collects all the powers relating to environmental concerns in one place even though some of the powers, such as the powers to pay expenses, compromise claims, and decline property, overlap with other paragraphs of this section (decline property, paragraph (1); compromise claims, paragraph (14); pay expenses, paragraph (15)). See Sections 62‑7‑701(c)(2) (designated trustee may inspect property to determine potential violation of environmental or other law or for any purpose) and 62‑7‑1010(b) (trustee not personally liable for violation of environmental law arising from ownership or control of trust property).

Paragraph (14) authorizes a trustee to pay, contest, settle, or release claims. Section 62‑7‑811 requires that a trustee need take only “reasonable” steps to enforce claims, meaning that a trustee may release a claim not only when it is uncollectible, but also when collection would be uneconomic. See Restatement (Second) of Trusts Section 192 (1959) (power to compromise, arbitrate and abandon claims).

Paragraph (15), among other things, authorizes a trustee to pay compensation to the trustee and agents without prior approval of court. Regarding the standard for setting trustee compensation, see Section 62‑7‑708. See also Section 62‑7‑709 (repayment of trustee expenditures).

Paragraph (16) authorizes a trustee to make elections with respect to taxes. The SCTC leaves to other law the issue of whether the trustee, in making such elections, must make compensating adjustments in the beneficiaries’ interests.

Paragraph (17) authorizes a trustee to take action with respect to employee benefit or retirement plans, or annuities or life insurance payable to the trustee. Typically, these will be beneficiary designations which the settlor has made payable to the trustee, but this Code also allows the trustee to acquire ownership of annuities or life insurance.

Paragraphs (18) and (19) allow a trustee to make loans to a beneficiary or to guarantee loans of a beneficiary upon such terms and conditions as the trustee considers fair and reasonable. The determination of what is fair and reasonable must be made in light of the fiduciary duties of the trustee and the purposes of the trust. Frequently, a trustee will make loans to a beneficiary which might be considered less than prudent in an ordinary commercial sense although of great benefit to the beneficiary and which help carry out the trust purposes. If the trustee requires security for the loan to the beneficiary, adequate security under this paragraph may consist of a charge on the beneficiary’s interest in the trust. See Restatement (Second) of Trusts Section 255 (1959). However, the interest of a beneficiary subject to a spendthrift restraint may not be pledged as security for a loan. See Section 62‑7‑502.

Paragraph (20) authorizes the appointment of ancillary trustees in jurisdictions in which the regularly appointed trustee is unable or unwilling to act. Normally, an ancillary trustee will be appointed only when there is a need to manage real estate located in another jurisdiction. This paragraph allows the regularly appointed trustee to select the ancillary trustee and to confer on the ancillary trustee such powers and duties as may be necessary. The appointment of ancillary trustees is a topic which a settlor may wish to address in the terms of the trust.

Paragraph (21) authorizes a trustee to make payments to another person for the use or benefit of a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated. Although an adult relative or other person receiving funds is required to spend it on the beneficiary’s behalf, it is preferable that the trustee make the distribution to a person having more formal fiduciary responsibilities. For this reason, payment may be made to an adult relative only if the trustee does not know of a conservator, guardian, custodian, or custodial trustee capable of acting for the beneficiary. South Carolina Trust Code Section 62‑7‑816 subsections (21) (A) & (C) added the phrase “agent under a power of attorney” to the UTC version. It is important for the practioner to be cautious of SCPC Section 62‑5‑501, which may provide for a priority payee under these subsections.

Paragraph (22) authorizes a trustee to make non‑pro‑rata distributions and allocate particular assets in proportionate or disproportionate shares. This power provides needed flexibility and lessens the risk that a non‑pro‑rata distribution will be treated as a taxable sale.

Paragraph (23) authorizes a trustee to resolve disputes through mediation or arbitration. In representing beneficiaries and others in connection with arbitration or mediation, the representation principles of Part 3 may be applied. Settlors wishing to encourage use of alternate dispute resolution may draft to provide it. For sample language, see American Arbitration Association, Arbitration Rules for Wills and Trusts (1995).

Paragraph (24) authorizes a trustee to prosecute or defend an action. As to the propriety of reimbursement for attorney’s fees and other expenses of an action or judicial proceeding, see Section 62‑7‑709 and Comment. See also Section 62‑7‑811 (duty to defend actions).

Paragraph (26), which is similar to Section 344 of the Restatement (Second) of Trusts (1959), clarifies that even though the trust has terminated, the trustee retains the powers needed to wind up the administration of the trust and distribute the remaining trust property.

South Carolina Trust Code Section 62‑7‑816 added to the UTC version subsections (27) and (28) to retain and incorporate specific powers the trustee had under former South Carolina law but which were not specifically included in the Uniform Trust Code version.

Library References

Trusts 171 to 229.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 318 to 324, 326 to 327, 330 to 331, 338 to 339, 343 to 344, 347 to 348, 350 to 400, 404 to 524.

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 743, Statutes Regarding Court or Trustee’s Sales.

NOTES OF DECISIONS

In general 1

1. In general

For purposes of statute allowing competent persons having beneficial interests to enter into written, court‑approved settlements in probate proceedings, testator’s joint revocable trust, not residual beneficiary of trust, was person that held beneficial interest, and thus residual beneficiary’s signature was not required on compromise agreement between trustee and testator’s niece and nephew, who alleged that will and trust were products of undue influence; trust was considered the devisee under statute, order binding trustee would be binding on trust beneficiaries in probate proceeding, and trustee had fiduciary obligation to administer trust in best interests of beneficiaries. University of Southern California v. Moran (S.C.App. 2005) 365 S.C. 270, 617 S.E.2d 135. Trusts 140(1); Wills 212

**SECTION 62‑7‑816A.** Authority to appoint the property of original trust to second trust.

(a) Unless the terms of the instrument expressly provide otherwise, a trustee with the discretion to make distributions of principal or income to or for the benefit of one or more beneficiaries of a trust, the original trust, may exercise that discretion by appointing all or part of the property subject to that discretion in favor of another trust for the benefit of one or more of those beneficiaries, the second trust. This power may be exercised without the approval of a court, but court approval is necessary if the terms of the original trust expressly prohibit the exercise of such power or require court approval.

(b) The trustee of the original trust may exercise this power whether or not there is a current need to distribute principal or income under any standard provided in the original trust. The trustee’s special power to appoint trust principal or income in further trust under this section includes the power to create the second trust.

(c) The second trust may be a trust created under the same trust instrument as the original trust or under a different trust instrument, and the trustee of the second trust may be either the trustee of the original trust or another trustee.

(d) The terms of the second trust are subject to the following requirements:

(1) The beneficiaries of the second trust may include only beneficiaries of the original trust.

(2) A beneficiary who has only a future beneficial interest, vested or contingent, in the original trust cannot have the future beneficial interest accelerated to a present interest in the second trust.

(3) The terms of the second trust may not contain any provision nor reduce any fixed income, annuity, or unitrust interest of a beneficiary in the assets of an original trust document if the inclusion of the provision or reduction in the original trust document would have disqualified any assets of the original trust for any federal or state income, estate, or gift tax deduction received on account of any assets of the original trust, or if the inclusion of the provision or reduction in the original trust would have reduced the amount of any federal or state income, estate, or gift tax deduction received. In addition, the terms of the second trust may not reduce any retained interest of a beneficiary of the original trust if the interest is a qualified interest under Internal Revenue Code Section 2702.

(4) If contributions to the original trust have been excluded from the gift tax by the application of Internal Revenue Code Section 2503(b) and Section 2503(c), then the second trust shall provide that the beneficiary’s remainder interest in the contributions shall vest and become distributable no later than the date upon which the interest would have vested and become distributable under the terms of the original trust.

(5) If a beneficiary of the original trust has a power of withdrawal over trust property, then either:

(A) the terms of the second trust must provide a power of withdrawal in the second trust identical to the power of withdrawal in the original trust; or

(B) sufficient trust property must remain in the original trust to satisfy the outstanding power of withdrawal.

(6) If the power to distribute principal or income in the original trust is subject to an ascertainable standard, then the power to distribute income or principal in the second trust must be subject to the same ascertainable standard as in the original trust and must be exercisable in favor of the same beneficiaries as in the original trust.

(7) The second trust may confer a power of appointment upon a beneficiary of the original trust to whom or for the benefit of whom the trustee has the power to distribute principal or income of the original trust. The permissible appointees of the power of appointment conferred upon a beneficiary may include persons who are not beneficiaries of the original or second trust.

(e) A trustee may not exercise the power to appoint principal or income under subsection (a) of this section if the trustee is a beneficiary of the original trust, but the remaining cotrustee or a majority of the remaining cotrustees may act for the trust. If all the trustees are beneficiaries of the original trust, then the court may appoint a special fiduciary with authority to exercise the power to appoint principal or income under subsection (a) of this section.

(f) The exercise of the power to appoint principal or income under subsection (a) of this section:

(1) is considered the exercise of a power of appointment, other than a power to appoint to the trustee, the trustee’s creditors, the trustee’s estate or the creditors of the trustee’s estate;

(2) does not result in the trustee or cotrustees of the original trust being considered the settlor of the second trust;

(3) is not prohibited by a spendthrift provision or by a provision in the trust instrument that prohibits amendment or revocation of the trust.

(g) To effect the exercise of the power to appoint principal or income under subsection (a) of this section, all of the following apply:

(1) The exercise of the power to appoint must be made by an instrument in writing, signed and acknowledged by the trustee, setting forth the manner of the exercise of the power, including the terms of the second trust, and the effective date of the exercise of the power. The instrument must be filed with the records of the original trust.

(2) The trustee shall give written notice to all qualified beneficiaries of the original trust, at least ninety days prior to the effective date of the exercise of the power to appoint, of the trustee’s intention to exercise the power. The notice must include a copy of the instrument described in item (1) of this subsection.

(3) If all qualified beneficiaries waive the notice period by a signed written instrument delivered to the trustee, the trustee’s power to appoint principal or income is exercisable after notice is waived by all qualified beneficiaries, notwithstanding the effective date of the exercise of the power.

(h) The provisions of this section shall not be construed to create or imply a duty of the trustee to exercise the power to distribute principal or income, or to create an inference of impropriety made as a result of a trustee not exercising the power to appoint principal or income conferred under subsection (a) of this section. The provisions of this section shall not be construed to abridge the right of any trustee who has a power to appoint property in further trust that arises under the terms of the original trust or under any other section of this article or under another provision of law or under common law. The terms of an original trust may modify or waive the notice requirements under subsection (g), reduce or increase restrictions on altering the interests of beneficiaries under subsection (d), and may otherwise contain provisions that are inconsistent with the requirements of this section.

(i) A trustee or beneficiary may commence a proceeding to approve or disapprove a proposed exercise of the trustee’s special power to appoint to another trust pursuant to subsection (a) of this section.

(j) The provisions of Section 62‑7‑109 regarding notices and the sending of documents to persons under this article apply for the purposes of notices and the sending of documents under this section.

HISTORY: 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Providing decanting authority to a trustee, authority to appoint the property of an original trust to a second trust, provides a nonjudicial method for modifying an irrevocable trust when doing so would be in the best interests of the beneficiaries or in furtherance of the purposes of the trust. Some examples of how decanting authority might be used by a trustee include: modifying the administrative or substantive provisions of a trust to account for a change in law, combining trusts to reduce administrative costs, limiting the authority of interested trustees, correcting scrivener’s errors, and conforming the distribution provisions of a trust to the requirements of a special needs trust.

Subsection (a) authorizes a trustee with discretion to make distributions of principal or income to or for the benefit of one or more beneficiaries of the original trust to exercise that discretion by appointing all or part of such property to a second trust. This authority may be exercised whether the original trust grants the trustee absolute discretion over distributions or whether the trustee’s discretion is limited by an ascertainable standard.

Subsections (b) and (c) affirm the broad decanting authority intended to be afforded to trustees to eliminate the uncertainty that was faced by trustees exercising decanting authority in reliance solely on common law principles. Subsection (b) provides that the trustee may exercise the power to decant whether or not there is a current need to distribute property under any standard provided in the original trust, for example, by decanting property from an original trust that limits distributions to an ascertainable standard to a second trust to promote administration of the trust or preservation of trust property. But see subdivision (d)(6), which prevents a trustee from exercising decanting authority to eliminate an ascertainable standard limiting the trustee’s discretion in the original trust document.

Subsection (d) provides certain requirements for the terms of the second trust. Subdivisions (d)(1) and (d)(2) prevent a trustee from exercising decanting authority to add beneficiaries to the second trust who were not beneficiaries of the original trust or accelerate the interest of a beneficiary with only a future interest in the original trust to a present interest under the second trust. Subdivision (d)(3) and (d)(4) restrict a trustee’s ability to modify terms of an original trust or a beneficiary’s fixed interest in the trust if the original trust qualified for certain tax benefits. Under subdivision (d)(5), a trustee is required to preserve a beneficiary’s power of withdrawal over trust property; the trustee may do so by either maintaining sufficient trust property in the original trust to satisfy the beneficiary’s power of withdrawal, or by providing the beneficiary with an identical power of withdrawal under the terms of the second trust. Subdivision (d)(6) prevents a trustee from modifying any ascertainable standard governing the trustee’s power to make distributions under the terms of the original trust. Subdivision (d)(7) provides that the terms of the second trust may grant a power of appointment to a beneficiary of the original trust exercisable in favor of persons who are not beneficiaries of the original or second trust.

The remaining provisions of the statute address procedural concerns, including notice requirements and the procedure for decanting if the trustee is a beneficiary of the original trust. Subsection (e) prevents a trustee with a beneficial interest in the original trust from exercising the authority to decant, while preserving the ability to decant in circumstances where all trustees have an interest in the trust. Subsection (f) provides that the trustee’s power to decant is considered the exercise of a special power of appointment, does not result in the trustee being treated as the settlor of the second trust, and is not prohibited by a spendthrift provision or a provision prohibiting amendment or revocation of the original trust. Subsection (g) provides the procedural requirements for effecting a decanting, including the requisite notice and the beneficiaries’ ability to waive the notice period. Subsection (h) affirms that the provisions of section 62‑7‑816A do not create an affirmative duty in the trustee to exercise the special power to appoint, limit the trustee’s decanting authority derived from some other source, or nullify any decanting provisions included in an original trust that are inconsistent with the provisions of this section. Subsection (i) allows either a trustee or beneficiary to seek court approval or disapproval of a proposed exercise of the decanting power, and subsection (j) incorporates the notice provisions of SCTC section 62‑7‑109.

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 567, Power to Transfer Trust Assets to Another Trust (“Decanting”).

**SECTION 62‑7‑817.** 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 informed the beneficiary of the right to object and of the time allowed for objection.

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

(c) A release by a beneficiary of a trustee from liability for breach of trust is invalid to the extent:

(1) it was induced by improper conduct of the trustee; or

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

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

SCPC Section 62‑3‑906(b), which provides for a proposal for distribution by a personal representative, is analogous to this SCTC Section 62‑7‑817(a).

This section contains several provisions governing distribution upon termination. Other provisions of the SCTC relevant to distribution upon termination include Section 62‑7‑816(26) (powers upon termination to windup administration and distribution), and 62‑7‑1005 (limitation of action against trustee).

Subsection (a) addresses the dilemma that sometimes arises when the trustee is reluctant to make distribution until the beneficiary approves but the beneficiary is reluctant to approve until the assets are in hand. The procedure made available under subsection (a) facilitates the making of non‑pro‑rata distributions. However, whenever practicable it is normally better practice to obtain the advance written consent of the beneficiaries to a proposed plan of distribution.

Subsection (b) recognizes that upon an event terminating or partially terminating a trust, expeditious distribution should be encouraged to the extent reasonable under the circumstances. However, a trustee is entitled to retain a reasonable reserve for payment of debts, expenses, and taxes. Sometimes these reserves must be quite large, for example, upon the death of the beneficiary of a QTIP trust that is subject to federal estate tax in the beneficiary’s estate. Not infrequently, a substantial reserve must be retained until the estate tax audit is concluded several years after the beneficiary’s death.

Subsection (c) is an application of Section 62‑7‑1009. Section 62‑7‑1009 addresses the validity of any type of release that a beneficiary might give. Subsection (c) is more limited, dealing only with releases given upon termination of the trust. Factors affecting the validity of a release include adequacy of disclosure, whether the beneficiary had a legal incapacity, and whether the trustee engaged in any improper conduct. See Restatement (Second) of Trusts Section 216 (1959).

CROSS REFERENCES

Proceeding to determine decedent’s intent regarding application of certain federal tax formulas, see Section 62‑2‑612.

Library References

Trusts 276 to 282, 284.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 324, 525 to 527, 529, 531 to 537, 539 to 541, 544 to 550.

**SECTION 62‑7‑818.** Powers and discretions of a trust protector.

The powers and discretions of a trust protector are as provided in the governing instrument and may be exercised or not exercised, in the best interests of the trust, in the sole and absolute discretion of the trust protector and are binding on all other persons. These powers and discretion may include, but are not limited to, the following:

(1) modify or amend the trust instrument to achieve favorable tax status or respond to changes in the Internal Revenue Code, state law, or the rulings and regulations thereunder;

(2) increase or decrease the interests of any beneficiaries to the trust;

(3) modify the terms of any power of appointment granted by the trust. However, a modification or amendment may not grant a beneficial interest to any individual or class of individuals not specifically provided for under the trust instrument;

(4) remove and appoint a trustee, trust advisor, investment committee member, or distribution committee member;

(5) terminate the trust;

(6) veto or direct trust distributions;

(7) change situs or governing law of the trust, or both;

(8) appoint a successor trust protector;

(9) interpret terms of the trust instrument at the request of the trustee;

(10) advise the trustee on matters concerning a beneficiary; and

(11) amend or modify the trust instrument to take advantage of laws governing restraints on alienation, distribution of trust property, or the administration of the trust.

The powers referenced in items (5), (6) and (11) may be granted notwithstanding the provisions of Sections 62‑7‑410 through 62‑7‑412, inclusive.

HISTORY: 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

There was no prior South Carolina statutory case law counterpart to this section. This section expands and defines the powers of the trust protector. See comments to SCTC Section 62‑7‑808 (b)—(d).

**SECTION 62‑7‑819.** Powers of a trust investment advisor.

(a) Whenever a trust instrument provides that a trustee is to follow the direction of a trust investment advisor with respect to investment decisions or distribution decisions, then, except to the extent that the trust instrument provides otherwise, the trustee has no duty to:

(1) monitor the conduct of the trust investment advisor;

(2) provide advice to the trust investment advisor; or

(3) communicate with or warn or apprise any beneficiary or third party concerning instances in which the trustee would or might have exercised the trustee’s own discretion in a manner different from the manner directed by the advisor.

(b) Absent clear and convincing evidence to the contrary, the actions of the trustee pertaining to matters within the scope of the trust investment advisor’s authority, such as confirming that the trust investment advisor’s directions have been carried out and recording and reporting actions taken at the trust investment advisor’s direction, are presumed to be administrative actions taken by the trustee solely to allow the trustee to perform those duties assigned to the trustee under the governing instrument and these administrative actions are not deemed to constitute an undertaking by the trustee to monitor the trust investment advisor or otherwise participate in actions within the scope of the trust investment advisor’s authority.

(c) For purposes of this section, “investment decision” means, with respect to any investment, the retention, purchase, sale, exchange, tender or other transaction affecting the ownership thereof, or rights therein.

HISTORY: 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

There was no prior South Carolina statutory case law counterpart to this section. This section defines the powers of a trust investment advisor.

Part 9

South Carolina Uniform Principal and Income Act

PREFATORY NOTE

In 2001 South Carolina enacted as part of its version of the Uniform Probate Code (“the South Carolina Probate Code or SCPC”) the South Carolina Uniform Principal and Income Act, Sections 62‑7‑401 through 62‑7‑432 (SCUP &IA). This is South Carolina’s version of the Uniform Principal and Income Act which had been recommended in 1997 by the Uniform Law Commissioners (ULC) for enactment in all the states. ULC’s 1997 Uniform Principal and Income Act revised its original 1931 Uniform Principal and Income act (the 1931 Act) and its 1962 Revised Uniform Principal and Income Act (the 1962 Act). Likewise, 2001 SCUP&IA revised South Carolina’s 1963 “Revised Uniform Principal and Income Act”, Sections 62‑7‑401 through 62‑7‑421 (the 1963 SC Act). South Carolina did not enact ULC’s 1931 Act. When in 2005 South Carolina enacted its version of ULC’s recommended 2000 Uniform Trust Code as the South Carolina Trust Code, SC Code Title 62, Article 7 (SCTC), SCUP&IA was retained, re‑numbered and incorporated at SCTC Sections 62‑7‑901 through 932. Any reference elsewhere in the South Carolina Code to former SCPC Sections 62‑7‑401 through 432 should now refer to SCTC Sections 62‑7‑901 through 932.

The 1997 revision by ULC of its original 1931 Uniform Principal and Income Act (the 1931 Act) and its 1962 Revised Uniform Principal and Income Act (the 1962 Act) and the subsequent 2001 revision by South Carolina of its 1963 Revised Uniform Principal and Income Act (1963 SC Act) had two purposes:

(1) One purpose was to revise the 1931 and 1962 Acts and the 1963 SC Act, respectively. Revision was needed to support the now widespread use of the revocable living trust as a will substitute by the 1990s, to change the rules in those Acts that experience had shown needed to be changed, and to establish new rules to cover situations not provided for in the old Acts, including rules that apply to financial instruments invented since 1962.

(2) The other purpose was to provide a means for implementing the transition to an investment regime based on principles embodied in the Uniform Prudent Investor Act, especially the principle of investing for total return rather than a certain level of “income” as traditionally perceived in terms of interest, dividends, and rents.

Revision of the 1931 and 1962 Acts and the corresponding 1963 SC Act.

The prior Acts and revision of those Acts dealt with four questions affecting the rights of beneficiaries:

(1) How is income earned during the probate of an estate to be distributed to trusts and to persons who receive outright bequests of specific property, pecuniary gifts, and the residue?

(2) When an income interest in a trust begins (i.e., when a person who creates the trust dies or when she transfers property to a trust during life), what property is principal that will eventually go to the remainder beneficiaries and what is income?

(3) When an income interest ends, who gets the income that has been received but not distributed, or that is due but not yet collected, or that has accrued but is not yet due?

(4) After an income interest begins and before it ends, how should its receipts and disbursements be allocated to or between principal and income?

Changes in the traditional sections are of three types: new rules that deal with situations not covered by the prior Acts, clarification of provisions in the 1962 Act, and changes to rules in the prior Acts.

New rules. Issues addressed by some of the more significant new rules include:

(1) The application of the probate administration rules to revocable living trusts after the settlor’s death and to other terminating trusts. Sections 62‑7‑905 through 909.

(2) The payment of interest or some other amount on the delayed payment of an outright pecuniary gift that is made pursuant to a trust agreement instead of a will when the agreement does not provide for such a payment. Section 62‑7‑905(3).

(3) The allocation of net income from partnership interests acquired by the trustee other than from a decedent (the old Acts deal only with partnership interests acquired from a decedent). Section 62‑7‑910.

(4) An “unincorporated entity” concept has been introduced to deal with businesses operated by a trustee, including farming and livestock operations, and investment activities in rental real estate, natural resources, timber, and derivatives. Section 62‑7‑912.

(5) The allocation of receipts from discount obligations such as zero‑coupon bonds. Section 62‑7‑915(B).

(6) The allocation of net income from harvesting and selling timber between principal and income. Section 62‑7‑921.

(7) The allocation between principal and income of receipts from derivatives, options, and asset‑backed securities. Sections 62‑7‑923 and 924.

(8) Disbursements made because of environmental laws. Section 62‑7‑926(A)(7).

(9) Income tax obligations resulting from the ownership of S corporation stock and interests in partnerships. Section 62‑7‑929.

(10) The power to make adjustments between principal and income to correct inequities caused by tax elections or peculiarities in the way the fiduciary income tax rules apply. Section 62‑7‑930.

Clarifications and changes in existing rules. A number of matters provided for in the prior Acts have been changed or clarified in this revision, including the following:

(1) An income beneficiary’s estate will be entitled to receive only net income actually received by a trust before the beneficiary’s death and not items of accrued income. Section 62‑7‑909.

(2) Income from a partnership is based on actual distributions from the partnership, in the same manner as corporate distributions. Section 62‑7‑910.

(3) Distributions from corporations and partnerships that exceed 20% of the entity’s gross assets will be principal whether or not intended by the entity to be a partial liquidation. Section 62‑7‑910 (D)(2).

(4) Deferred compensation is dealt with in greater detail in a separate section. Section 62‑7‑918.

(5) The 1962 Act rule for “property subject to depletion,” (patents, copyrights, royalties, and the like), which provides that a trustee may allocate up to 5% of the asset’s inventory value to income and the balance to principal, has been replaced by a rule that allocates 90% of the amounts received to principal and the balance to income. Section 62‑7‑919.

(6) The percentage used to allocate amounts received from oil and gas has been changed—90% of those receipts are allocated to principal and the balance to income. Section 62‑7‑920.

(7) The unproductive property rule has been eliminated for trusts other than marital deduction trusts. Section 62‑7‑922.

(8) Charging depreciation against income is no longer mandatory, and is left to the discretion of the trustee. Section 62‑7‑927.

Coordination with the Uniform Prudent Investor Act

The law of trust investment has been modernized. See Uniform Prudent Investor Act (1994); Restatement (Third) of Trusts: Prudent Investor Rule (1992) (hereinafter Restatement of Trusts 3d: Prudent Investor Rule). Now it is time to update the principal and income allocation rules so the two bodies of doctrine can work well together. This revision deals conservatively with the tension between modern investment theory and traditional income allocation. The starting point is to use the traditional system. If prudent investing of all the assets in a trust viewed as a portfolio and traditional allocation effectuate the intent of the settlor, then nothing need be done. The Act, however, helps the trustee who has made a prudent, modern portfolio‑based investment decision that has the initial effect of skewing return from all the assets under management, viewed as a portfolio, as between income and principal beneficiaries. The Act gives that trustee a power to reallocate the portfolio return suitably. To leave a trustee constrained by the traditional system would inhibit the trustee’s ability to fully implement modern portfolio theory. [Since the early 1990s when this Prefatory Note and the following Comments were prepared by ULC, Restatement of Trusts 3d has progressed significantly as reported in the Forenote to Chapter 17 of what is now cited as “Restatement Third, Trusts”:

The contents of this Chapter (Introduction and Sections 90‑92) were approved at the American Law Institute’s 1990 Annual Meeting and were originally published as Sections 227‑229 of Restatement Third, Trusts (Prudent Investor Rule) in 1992 [referred to throughout this SCUP&IA Prefatory Note and the following Comments as either “Restatement of Trusts 3d; Prudent Investor Rule” or simply “1992 Restatement”]

Therefore, appropriate reference to Chapter 17 (Introduction and Sections 90‑92) of Restatement Third, Trusts is suggested.]

As to modern investing see, e.g., the Preface to, terms of, and Comments to the Uniform Prudent Investor Act (1994); the discussion and reporter’s note by Edward C. Halbach, Jr. in Restatement of Trusts 3d: Prudent Investor Rule; John H. Langbein, The Uniform Prudent Investor Act and the Future of Trust Investing, 81 Iowa L. Rev. 641 (1996); Bevis Longstreth, Modern Investment Management and the Prudent Man Rule (1986); John H. Langbein & Richard A. Posner, The Revolution in Trust Investment Law, 62 A.B. A.J. 887 (1976); and Jeffrey N. Gordon, The Puzzling Persistence of the Constrained Prudent Man Rule, 62 N.Y.U. L. Rev. 52 (1987). See also R.A. Brearly, An Introduction to Risk and Return from Common Stocks (2d ed. 1983); Jonathan R. Macey, An Introduction to Modern Financial Theory (2d ed. 1998). As to the need for principal and income reform see, e.g., Joel C. Dobris, Real Return, Modern Portfolio Theory and College, University and Foundation Decisions on Annual Spending From Endowments: A Visit to the World of Spending Rules, 28 Real Prop., Prob., & Tr. J. 49 (1993); Joel C. Dobris, The Probate World at the End of the Century: Is a New Principal and Income Act in Your Future?, 28 Real Prop., Prob., & Tr. J. 393 (1993); and Kenneth L. Hirsch, Inflation and the Law of Trusts, 18 Real Prop., Prob., & Tr. J. 601 (1983). See also, Jerold I. Horn, The Prudent Investor Rule B, Impact on Drafting and Administration of Trusts, 20 ACTEC Notes 26 (Summer 1994).

**SECTION 62‑7‑901.** Short title.

This part may be cited as the South Carolina Uniform Principal and Income Act.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

Effect of Amendment

The 2013 amendment substituted “This part” for “Sections 62‑7‑901 through 62‑7‑932 of”.

LAW REVIEW AND JOURNAL COMMENTARIES

The Impact of Significant Substantive Provisions of the South Carolina Trust Code, 57 S.C. L. Rev. 137 (Autumn 2005).

**SECTION 62‑7‑902.** Definitions.

As used in the South Carolina Uniform Principal and Income Act:

(1) “Accounting period” means a calendar year unless another twelve‑month period is selected by a fiduciary. The term includes a portion of a calendar year or other twelve‑month period that begins when an income interest begins or ends when an income interest ends.

(2) “Beneficiary” includes, in the case of a decedent’s estate, an heir, legatee, and devisee and, in the case of a trust, an income beneficiary and a remainder beneficiary.

(3) “Fiduciary” means a personal representative or a trustee. The term includes an executor, administrator, successor personal representative, special administrator, and a person performing substantially the same function.

(4) “Income” means money or property that a fiduciary receives as current return from a principal asset. The term includes a portion of receipts from a sale, exchange, or liquidation of a principal asset, to the extent provided in Section 62‑7‑910 through Section 62‑7‑924.

(5) “Income beneficiary” means a person to whom net income of a trust is or may be payable.

(6) “Income interest” means the right of an income beneficiary to receive all or part of net income, whether the terms of the trust require it to be distributed or authorize it to be distributed in the trustee’s discretion.

(7) “Mandatory income interest” means the right of an income beneficiary to receive net income that the terms of the trust require the fiduciary to distribute.

(8) “Net income” means the total receipts allocated to income during an accounting period minus the disbursements made from income during the period, plus or minus transfers under the South Carolina Uniform Principal and Income Act to or from income during the period.

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

(10) “Principal” means property held in trust for distribution to a remainder beneficiary when the trust terminates.

(11) “Remainder beneficiary” means a person entitled to receive principal when an income interest ends.

(12) “Terms of a trust” means the manifestation of the intent of a settlor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct.

(13) “Trustee” includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court.

HISTORY: 2005 Act No. 66, Section 1; 2010 Act No. 244, Section 54, eff June 7, 2010; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

“Income beneficiary.” The definitions of income beneficiary (Section 62‑7‑902(5)) and income interest (Section 62‑7‑902(6)) cover both mandatory and discretionary beneficiaries and interests. There are no definitions for “discretionary income beneficiary” or “discretionary income interest” because those terms are not used in the Act.

“Inventory value.” There is no definition for inventory value in this Act because the provisions in which that term was used in the 1962 Act and the 1963 SC Act have either been eliminated (in the case of the underproductive property provision) or changed in a way that eliminates the need for the term (in the case of bonds and other money obligations, property subject to depletion, and the method for determining entitlement to income distributed from a probate estate).

“Net income.” The reference to “transfers under this Act to or from income” means transfers made under Sections 62‑7‑904(A), 921(A), 926(B), 927(B), 904(A) and 930.

“Terms of a trust.” This term was chosen in preference to “terms of the trust instrument” (the phrase used in the 1962 Act and the 1963 SC Act) to make it clear that the Act applies to oral trusts as well as those whose terms are expressed in written documents. The definition is based on the (1959) and the Restatement (Second) of Trusts Sec. 4 (Tent. Draft No. 1, 1996). Constructional preferences or rules would also apply, if necessary, to determine the terms of the trust.

Effect of Amendment

The 2010 amendment made nonsubstantive changes to the definition of “Person”.

The 2013 amendment, in the introductory paragraph and in subsection (8), the definition of “Net income”, substituted “the South Carolina Uniform Principal and Income Act” for “this part”.

**SECTION 62‑7‑903.** Allocation of receipts and disbursements.

(A) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of Sections 62‑7‑905 through 62‑7‑909, a fiduciary:

(1) shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in the South Carolina Uniform Principal and Income Act;

(2) may administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by the South Carolina Uniform Principal and Income Act;

(3) shall administer a trust or estate in accordance with the South Carolina Uniform Principal and Income Act if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and

(4) shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust and the South Carolina Uniform Principal and Income Act do not provide a rule for allocating the receipt or disbursement to or between principal and income.

(B) In exercising:

(1) the power to adjust pursuant to Section 62‑7‑904(A);

(2) a discretionary power in connection with the conversion or administration of a unitrust under Sections 62‑7‑904B through Section 62‑7‑904P; or

(3) a discretionary power of administration regarding a matter within the scope of the South Carolina Uniform Principal and Income Act, whether granted by the terms of a trust, a will, or the South Carolina Uniform Principal and Income Act,

a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with the South Carolina Uniform Principal and Income Act is presumed to be fair and reasonable to all of the beneficiaries.

HISTORY: 2005 Act No. 66, Section 1; 2010 Act No. 244, Section 55, eff June 7, 2010; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Prior Act. The rule in Section 62‑7‑404(1) of the 1963 SC Act is restated in Section 62‑7‑903(a), without changing its substance, to emphasize that this Act contains only default rules and that provisions in the terms of the trust are paramount. However, Section 62‑7‑404(a) of the 1963 SC Act applied only to the allocation of receipts and disbursements to or between principal and income. In this Act, the first sentence of Section 62‑7‑903(A) states that it also applies to matters within the scope of Sections 62‑7‑905 through 62‑7‑909. Section 62‑7‑903(A)(2) incorporates the rule in Section 62‑7‑404(b) of the 1963 SC Act that a discretionary allocation made by the trustee that is contrary to a rule in the Act should not give rise to an inference of imprudence or partiality by the trustee.

The Act deletes the language that appears at the end of 1963 SC Act Section 62‑7‑404(a)(3)—”and in view of the manner in which men of ordinary prudence, discretion and judgment would act in the management of their affairs”—because persons of ordinary prudence, discretion and judgment, acting in the management of their own affairs do not normally think in terms of the interests of successive beneficiaries. If there is an analogy to an individual’s decision‑making process, it is probably the individual’s decision to spend or to save, but this is not a useful guideline for trust administration. No case has been found in which a court has relied on the “prudent man” rule of the 1963 SC Act.

Fiduciary discretion. The general rule is that if a discretionary power is conferred upon a trustee, the exercise of that power is not subject to control by a court except to prevent an abuse of discretion. Restatement (Second) of Trusts Sec 187. The situations in which a court will control will control the exercise of a trustee’s discretion are discussed in the comments to Sec 187. See also id. Sec 233 Comment p.

Questions for which there is no provision. Section 62‑7‑903(A)(4) allocates receipts and disbursements to principal when there is no provision for a different allocation in the terms of the trust, the will, or the Act. This may occur because money is received from a financial instrument not available at the present time (inflation‑indexed bonds might have fallen into this category had they been announced after the Uniform Act was approved by the Commissioners on Uniform State Laws) or because a transaction is of a type or occurs in a manner not anticipated by the Drafting Committee for the Uniform Act or the drafter of the trust instrument.

Allocating to principal a disbursement for which there is no provision in the Act or the terms of the trust preserves the income beneficiary’s level of income in the year it is allocated to principal, but thereafter will reduce the amount of income produced by the principal. Allocating to principal a receipt for which there is no provision will increase the income received by the income beneficiary in subsequent years, and will eventually, upon termination of the trust, also favor the remainder beneficiary. Allocating these items to principal implements the rule that requires a trustee to administer the trust impartially, based on what is fair and reasonable to both income and remainder beneficiaries. However, if the trustee decides that an adjustment between principal and income is needed to enable the trustee to comply with Section 62‑7‑903(B) after considering the return from the portfolio as a whole, the trustee may make an appropriate adjustment under Section 62‑7‑904(A).

Duty of impartiality. Whenever there are two or more beneficiaries, a trustee is under a duty to deal impartially with them. Restatement of Trusts 3d: Prudent Investor Rule Sec 183 (1992). This rule applies whether the beneficiaries’ interests in the trust are concurrent or successive. If the terms of the trust give the trustee discretion to favor one beneficiary over another, a court will not control the exercise of such discretion except to prevent the trustee from abusing it. Id. Sec 183, Comment a. “The precise meaning of the trustee’s duty of impartiality and the balancing of competing interests and objectives inevitably are matters of judgment and interpretation. Thus, the duty and balancing are affected by the purposes, terms, distribution requirements, and other circumstances of the trust, not only at the outset but as they may change from time to time.” Id. Sec 232, Comment c.

The terms of a trust may provide that the trustee, or an accountant engaged by the trustee, or a committee of persons who may be family members or business associates, shall have the power to determine what is income and what is principal. If the terms of a trust provide that this Act specifically or principal and income legislation in general does not apply to the trust but fail to provide a rule to deal with a matter provided for in this Act, the trustee has an implied grant of discretion to decide the question. Section 62‑7‑903(B) provides that the rule of impartiality applies in the exercise of such a discretionary power to the extent that the terms of the trust do not provide that one or more of the beneficiaries are to be favored. The fact that a person is named an income beneficiary or a remainder beneficiary is not by itself an indication of partiality for that beneficiary.

Effect of Amendment

The 2010 amendment in subsection (A) substituted “through” for “and” following “62‑7‑905”.

The 2013 amendment substituted “the South Carolina Uniform Principal and Income Act” for “this part” throughout; and rewrote subsection (B).

Library References

Executors and Administrators 101.

Trusts 272.

Wills 684.3.

Westlaw Topic Nos. 162, 390, 409.

C.J.S. Executors and Administrators Sections 223 to 225.

C.J.S. Trusts Sections 551 to 554.

C.J.S. Wills Sections 1463, 1465 to 1479.

**SECTION 62‑7‑904.** Adjustments between principal and income.

(A) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust’s income, and the trustee determines, after applying the provisions in Section 62‑7‑903(A), that the trustee is unable to comply with Section 62‑7‑903(B). In lieu of exercising the power to adjust, the trustee may convert the trust to a unitrust as permitted under Sections 62‑7‑904A through 62‑7‑904P, in which case the unitrust amount becomes the net income of the trust.

(B) In deciding whether and to what extent to exercise the power to adjust in subsection (A), a trustee shall consider all factors relevant to the trust and its beneficiaries, including, but not limited to:

(1) the nature, purpose, and expected duration of the trust;

(2) the intent of the settlor;

(3) the identity and circumstances of the beneficiaries;

(4) the needs for liquidity, regularity of income, and preservation and appreciation of capital;

(5) the assets held in the trust and the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property and the extent to which an asset is used by a beneficiary, and whether an asset was purchased by the trustee or received from the settlor;

(6) the net amount otherwise allocated to income under other sections of the South Carolina Uniform Principal and Income Act and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;

(7) whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;

(8) the actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and

(9) the anticipated tax consequences of an adjustment.

(C) A trustee may not make an adjustment:

(1) that diminishes the income interest in a trust that requires all of the income to be paid at least annually to a surviving spouse and for which an estate tax or gift tax marital deduction is allowed, in whole or in part, if the trustee did not have the power to make the adjustment, but only to the extent that making such an adjustment would cause adverse tax consequences under applicable tax laws and regulations;

(2) that reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;

(3) that changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(4) from any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside, but only to the extent that making such an adjustment would cause adverse tax consequences under applicable tax laws and regulations;

(5) if possessing or exercising the power to make an adjustment is determinative in causing an individual to be treated as the owner of all or part of the trust for income tax purposes and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(6) if possessing or exercising the power to make an adjustment is determinative in causing all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;

(7) if the trustee is a beneficiary of the trust;

(8) if the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly, except that a trustee may make an adjustment that also benefits a beneficiary even if the terms of the trust provide for trustee compensation as a percentage of the trust’s income; or

(9) if the trust has been converted to, and is then operating as a unitrust under Sections 62‑7‑904B through 62‑7‑904P.

(D) If subsection (C)(5), (6), (7), or (8) applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

(E) A trustee may release the entire power of adjustment in subsection (A) or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power causes a result described in subsections (C)(1) through (6) or subsection (C)(8) or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not contemplated in subsection (C). The release may be permanent or for a specified period, including a period measured by the life of an individual.

(F) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power to adjust in subsection (A).

HISTORY: 2005 Act No. 66, Section 1; 2010 Act No. 244, Section 56, eff June 7, 2010; 2013 Act No. 100, Section 2, eff January 1, 2014.

SOUTH CAROLINA REPORTER’S COMMENTS (2010 REVISION)

The 2010 amendment, in subsection (B)(7), corrected a typographical error by deleting the phrase “, or prohibit him from,”. (2011 Act No. 2, Section 2.)

REPORTER’S COMMENTS

Purpose and Scope of Provision. The purpose of Section 62‑7‑904 is to enable a trustee to select investments using the standards of a prudent investor without having to realize a particular portion of the portfolio’s total return in the form of traditional trust accounting income such as interest, dividends, and rents. Section 62‑7‑904(A) authorizes a trustee to make adjustments between principal and income if three conditions are met: (1) the trustee must be managing the trust assets under the prudent investor rule; (2) the terms of the trust must express the income beneficiary’s distribution rights in terms of the right to receive “income” in the sense of traditional trust accounting income; and (3) the trustee must determine, after applying the rules in Section 62‑7‑903(A) that he is unable to comply with Section 62‑7‑903(B). In deciding whether and to what extent to exercise the power to adjust, the trustee is required to consider the factors described in Section 62‑7‑904(B) but the trustee may not make an adjustment in circumstances described in Section 62‑7‑904(C).

Section 62‑7‑904 does not empower a trustee to increase or decrease the degree of beneficial enjoyment to which a beneficiary is entitled under the terms of the trust; rather, it authorizes the trustee to make adjustments between principal and income that may be necessary if the income component of a portfolio’s total return is too small or too large because of investment decisions made by the trustee under the prudent investor rule. The paramount consideration in applying Section 62‑7‑904(A) is the requirement in Section 62‑7‑903(B) that “a fiduciary must administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries.” The power to adjust is subject to control by the court to prevent an abuse of discretion. Restatement (Second) of Trusts Sec.187 (1959). See also id. Sections 183, 232, 233, Comment p (1959).

Section 62‑7‑904 will be important for trusts that are irrevocable when a State adopts the prudent investor rule by statute or judicial approval of the rule in Restatement of Trusts 3d: Prudent Investor Rule. Wills and trust instruments executed after the rule is adopted can be drafted to describe a beneficiary’s distribution rights in terms that do not depend upon the amount of trust accounting income, but to the extent that drafters of trust documents continue to describe an income beneficiary’s distribution rights by referring to trust accounting income, Section 62‑7‑904 will be an important tool in trust administration.

Three conditions to the exercise of the power to adjust. The first of the three conditions that must be met before a trustee can exercise the power to adjust—that the trustee invest and manage trust assets as a prudent investor—is expressed in this Act by language derived from the Uniform Prudent Investor Act (UPIA), but the condition will be met whether the prudent investor rule applies because the UPIA or other prudent investor legislation has been enacted, the prudent investor rule has been approved by the courts, or the terms of the trust require it. Even if a State’s legislature or courts have not formally adopted the prudent investor rule, the Restatement establishes the prudent investor rule as an authoritative interpretation of the common law prudent man rule, referring to the prudent investor rule as a “modest reformulation of the Harvard College dictum and the basic rule of prior Restatements.” Restatement of Trusts 3d: Prudent Investor Rule, Introduction, at 5. As a result, there is a basis for concluding that the first condition is satisfied in virtually all States except those in which a trustee is permitted to invest only in assets set forth in a statutory “legal list.”

The second condition will be met when the terms of the trust require all of the “income” to be distributed at regular intervals; or when the terms of the trust require a trustee to distribute all of the income, but permit the trustee to decide how much to distribute to each member of a class of beneficiaries; or when the terms of a trust provide that the beneficiary shall receive the greater of the trust accounting income and a fixed dollar amount (an annuity), or of trust accounting income and a fractional share of the value of the trust assets (a unitrust amount). If the trust authorizes the trustee in its discretion to distribute the trust’s income to the beneficiary or to accumulate some or all of the income, the condition will be met because the terms of the trust do not permit the trustee to distribute more than the trust accounting income.

To meet the third condition, the trustee must first meet the requirements of Section 62‑7‑903(A), i.e., he must apply the terms of the trust, decide whether to exercise the discretionary powers given to the trustee under the terms of the trust, and must apply the provisions of the Act if the terms of the trust do not contain a different provision or give the trustee discretion. Second, the trustee must determine the extent to which the terms of the trust clearly manifest an intention by the settlor that the trustee may or must favor one or more of the beneficiaries. To the extent that the terms of the trust do not require partiality, the trustee must conclude that he is unable to comply with the duty to administer the trust impartially. To the extent that the terms of the trust do require or permit the trustee to favor the income beneficiary or the remainder beneficiary, the trustee must conclude that he is unable to achieve the degree of partiality required or permitted. If the trustee comes to either conclusion—that he is unable to administer the trust impartially or that he is unable to achieve the degree of partiality required or permitted—he may exercise the power to adjust under Section 62‑7‑904(A).

Impartiality and productivity of income. The duty of impartiality between income and remainder beneficiaries is linked to the trustee’s duty to make the portfolio productive of trust accounting income whenever the distribution requirements are expressed in terms of distributing the trust’s “income.” The 1962 Act and the 1963 SC Act imply that the duty to produce income applies on an asset by asset basis because the right of an income beneficiary to receive “delayed income” from the sale proceeds of underproductive property under Section 62‑7‑415 of that Act arises if “any part of principal ... has not produced an average net income of a least one percent per year of its inventory value for more than a year ... .” Under the prudent investor rule, “[t]o whatever extent a requirement of income productivity exists, ... the requirement applies not investment by investment but to the portfolio as a whole.” Restatement of Trusts 3d: Prudent Investor Rule Sec 227, Comment i, at 34. The power to adjust under Section 62‑7‑904(A) is also to be exercised by considering net income from the portfolio as a whole and not investment by investment. Section 62‑7‑922(B) of this Act eliminates the underproductive property rule in all cases other than trusts for which a marital deduction is allowed; the rule applies to a marital deduction trust if the trust’s assets “consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets ...”—in other words, the section applies by reference to the portfolio as a whole.

While the purpose of the power to adjust in Section 62‑7‑904(A) is to eliminate the need for a trustee who operates under the prudent investor rule to be concerned about the income component of the portfolio’s total return, the trustee must still determine the extent to which a distribution must be made to an income beneficiary and the adequacy of the portfolio’s liquidity as a whole to make that distribution.

For a discussion of investment considerations involving specific investments and techniques under the prudent investor rule, see Restatement of Trusts 3d: Prudent Investor Rule Sec 227, Comments k‑p.

Factors to consider in exercising the power to adjust. Section 62‑7‑904(B) requires a trustee to consider factors relevant to the trust and its beneficiaries in deciding whether and to what extent the power to adjust should be exercised. Section 62‑7‑933(C)(3) of the South Carolina Uniform Prudent Investor Act (SCUPIA) sets forth circumstances that a trustee is to consider in investing and managing trust assets. The circumstances in Section 62‑7‑933(C)(3) of the SCUPIA are the source of the factors in paragraphs (3) through (6) and (8) of Section 62‑7‑904(B) (modified where necessary to adapt them to the purposes of this Act) so that, to the extent possible, comparable factors will apply to investment decisions and decisions involving the power to adjust. If a trustee who is operating under the prudent investor rule decides that the portfolio should be composed of financial assets whose total return will result primarily from capital appreciation rather than dividends, interest, and rents, the trustee can decide at the same time the extent to which an adjustment from principal to income may be necessary under Section 62‑7‑904. On the other hand, if a trustee decides that the risk and return objectives for the trust are best achieved by a portfolio whose total return includes interest and dividend income that is sufficient to provide the income beneficiary with the beneficial interest to which the beneficiary is entitled under the terms of the trust, the trustee can decide that it is unnecessary to exercise the power to adjust.

Assets received from the settlor. Section 62‑7‑933(D) of SCUPIA provides that “[a] trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.” The special circumstances may include the wish to retain a family business, the benefit derived from deferring liquidation of the asset in order to defer payment of income taxes, or the anticipated capital appreciation from retaining an asset such as undeveloped real estate for a long period. To the extent the trustee retains assets received from the settlor because of special circumstances that overcome the duty to diversify, the trustee may take these circumstances into account in determining whether and to what extent the power to adjust should be exercised to change the results produced by other provisions of this Act that apply to the retained assets. See Section 62‑7‑904(B)(5); Uniform Prudent Investor Act Sec 3, Comment, 7B U.L.A. 18, at 25‑26 (Supp. 1997); Restatement of Trusts 3d: Prudent Investor Rule Sec 229 and Comments a‑e.

Limitations on Section 62‑7‑904 power to adjust. The purpose of subsections (C)(1) through (4) is to preserve tax benefits that may have been an important purpose for creating the trust. Subsections (C)(5), (6), and (8) deny the power to adjust in the circumstances described in those subsections in order to prevent adverse tax consequences, and subsection (C)(7) denies the power to adjust to any beneficiary, whether or not possession of the power may have adverse tax consequences.

Under subsection (C)(1), a trustee cannot make an adjustment that diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction is allowed; but this subsection does not prevent the trustee from making an adjustment that increases the amount of income paid from a marital deduction trust to the spouse. Subsection (C)(1) applies to a trust that qualifies for the marital deduction because the spouse has a general power of appointment over the trust, but it applies to a qualified terminable interest property (QTIP) trust only if and to the extent that the fiduciary makes the election required to obtain the tax deduction. Subsection (C)(1) does not apply to a so‑called “estate” trust. This type of trust qualifies for the marital deduction because the terms of the trust require the principal and undistributed income to be paid to the surviving spouse’s estate when the spouse dies; it is not necessary for the terms of an estate trust to require the income to be distributed annually. Reg. Sec 20.2056(c)‑2(b)(1)(iii).

Subsection (C)(3) applies to annuity trusts and unitrusts with no charitable beneficiaries as well as to trusts with charitable income or remainder beneficiaries; its purpose is to make it clear that a beneficiary’s right to receive a fixed annuity or a fixed fraction of the value of a trust’s assets is not subject to adjustment under Section 62‑7‑904(A). Subsection (C)(3) does not apply to any additional amount to which the beneficiary may be entitled that is expressed in terms of a right to receive income from the trust. For example, if a beneficiary is to receive a fixed annuity or the trust’s income, whichever is greater, subsection (C)(3) does not prevent a trustee from making an adjustment under Section 62‑7‑904(A) in determining the amount of the trust’s income.

If subsection (C)(5), (6), (7), or (8), prevents a trustee from exercising the power to adjust, subsection (D) permits a cotrustee who is not subject to the provision to exercise the power unless the terms of the trust do not permit the cotrustee to do so.

Release of the power to adjust. Section 62‑7‑904(E) permits a trustee to release all or part of the power to adjust in circumstances in which the possession or exercise of the power might deprive the trust of a tax benefit or impose a tax burden. For example, if possessing the power would diminish the actuarial value of the income interest in a trust for which the income beneficiary’s estate may be eligible to claim a credit for property previously taxed if the beneficiary dies within ten years after the death of the person creating the trust, the trustee is permitted under subsection to release (E) to release just the power to adjust from income to principal.

Trust terms that limit a power to adjust. Section 62‑7‑904(F) applies to trust provisions that limit a trustee’s power to adjust. Since the power is intended to enable trustees to employ the prudent investor rule without being constrained by traditional principal and income rules, an instrument executed before the adoption of this Act whose terms describe the amount that may or must be distributed to a beneficiary by referring to the trust’s income or that prohibit the invasion of principal or that prohibit equitable adjustments in general should not be construed as forbidding the use of the power to adjust under Section 62‑7‑904(A) if the need for adjustment arises because the trustee is operating under the prudent investor rule. Instruments containing such provisions that are executed after the adoption of this Act should specifically refer to the power to adjust if the settlor intends to forbid its use. See generally, Joel C. Dobris, Limits on the Doctrine of Equitable Adjustment in Sophisticated Postmortem Tax Planning, 66 Iowa L. Rev. 273 (1981).

Examples. The following examples illustrate the application of Section 62‑7‑904:

Example (1) T is the successor trustee of a trust that provides income to A for life, remainder to B. T has received from the prior trustee a portfolio of financial assets invested 20% in stocks and 80% in bonds. Following the prudent investor rule, T determines that a strategy of investing the portfolio 50% in stocks and 50% in bonds has risk and return objectives that are reasonably suited to the trust, but T also determines that adopting this approach will cause the trust to receive a smaller amount of dividend and interest income. After considering the factors in Section 62‑7‑904(B) T may transfer cash from principal to income to the extent T considers it necessary to increase the amount distributed to the income beneficiary.

Example (2) T is the trustee of a trust that requires the income to be paid to the settlor’s son C for life, remainder to C’s daughter D. In a period of very high inflation, T purchases bonds that pay double‑digit interest and determines that a portion of the interest, which is allocated to income under Section 62‑7‑915 of this Act, is a return of capital. In consideration of the loss of value of principal due to inflation and other factors that T considers relevant, T may transfer part of the interest to principal.

Example (3) T is the trustee of a trust that requires the income to be paid to the settlor’s sister E for life, remainder to charity F. E is a retired schoolteacher who is single and has no children. E’s income from her social security, pension, and savings exceeds the amount required to provide for her accustomed standard of living. The terms of the trust permit T to invade principal to provide for E’s health and to support her in her accustomed manner of living, but do not otherwise indicate that T should favor E or F. Applying the prudent investor rule, T determines that the trust assets should be invested entirely in growth stocks that produce very little dividend income. Even though it is not necessary to invade principal to maintain E’s accustomed standard of living, she is entitled to receive from the trust the degree of beneficial enjoyment normally accorded a person who is the sole income beneficiary of a trust, and T may transfer cash from principal to income to provide her with that degree of enjoyment.

Example (4) T is the trustee of a trust that is governed by the law of State X. The trust became irrevocable before State X adopted the prudent investor rule. The terms of the trust require all of the income to be paid to G for life, remainder to H, and also give T the power to invade principal for the benefit of G for “dire emergencies only.” The terms of the trust limit the aggregate amount that T can distribute to G from principal during G’s life to 6% of the trust’s value at its inception. The trust’s portfolio is invested initially 50% in stocks and 50% in bonds, but after State X adopts the prudent investor rule T determines that, to achieve suitable risk and return objectives for the trust, the assets should be invested 90% in stocks and 10% in bonds. This change increases the total return from the portfolio and decreases the dividend and interest income. Thereafter, even though G does not experience a dire emergency, T may exercise the power to adjust under Section 62‑7‑904(A) to the extent that T determines that the adjustment is from only the capital appreciation resulting from the change in the portfolio’s asset allocation. If T is unable to determine the extent to which capital appreciation resulted from the change in asset allocation or is unable to maintain adequate records to determine the extent to which principal distributions to G for dire emergencies do not exceed the 6% limitation, T may not exercise the power to adjust. See Joel C. Dobris, Limits on the Doctrine of Equitable Adjustment in Sophisticated Postmortem Tax Planning, 66 Iowa L. Rev. 273 (1981).

Example (5) T is the trustee of a trust for the settlor’s child. The trust owns a diversified portfolio of marketable financial assets with a value of $600,000, and is also the sole beneficiary of the settlor’s IRA, which holds a diversified portfolio of marketable financial assets with a value of $900,000. The trust receives a distribution from the IRA that is the minimum amount required to be distributed under the Internal Revenue Code, and T allocates 10% of the distribution to income under Section 62‑7‑918(C) of this Act. The total return on the IRA’s assets exceeds the amount distributed to the trust, and the value of the IRA at the end of the year is more than its value at the beginning of the year. Relevant factors that T may consider in determining whether to exercise the power to adjust and the extent to which an adjustment should be made to comply with Section 62‑7‑903(B) include the total return from all of the trust’s assets, those owned directly as well as its interest in the IRA, the extent to which the trust will be subject to income tax on the portion of the IRA distribution that is allocated to principal, and the extent to which the income beneficiary will be subject to income tax on the amount that T distributes to the income beneficiary.

Example (6) T is the trustee of a trust whose portfolio includes a large parcel of undeveloped real estate. T pays real property taxes on the undeveloped parcel from income each year pursuant to Section 62‑7‑925(3). After considering the return from the trust’s portfolio as a whole and other relevant factors described in Section 62‑7‑904(B), T may exercise the power to adjust under Section 62‑7‑904(A) to transfer cash from principal to income in order to distribute to the income beneficiary an amount that T considers necessary to comply with Section 62‑7‑903(B).

Example (7) T is the trustee of a trust whose portfolio includes an interest in a mutual fund that is sponsored by T. As the manager of the mutual fund, T charges the fund a management fee that reduces the amount available to distribute to the trust by $2,000. If the fee had been paid directly by the trust, one‑half of the fee would have been paid from income under Section 62‑7‑925(1) and the other one‑half would have been paid from principal under Section 62‑7‑926(A)(1). After considering the total return from the portfolio as a whole and other relevant factors described in Section 62‑7‑904(B), T may exercise its power to adjust under Section 62‑7‑904(A) by transferring $1,000, or half of the trust’s proportionate share of the fee, from principal to income.

Effect of Amendment

The 2010 amendment in subsection (B)(7) deleted “, or prohibit him from,” following “give the trustee the power to”.

The 2013 amendment rewrote subsections (A), (B), and (C), and made nonsubstantive changes in subsections (E) and (F).

CROSS REFERENCES

Trustee considerations for unitrust amount paid, see Section 62‑7‑904A.

Library References

Trusts 272 to 288.

Wills 684.

Westlaw Topic Nos. 390, 409.

C.J.S. Trusts Sections 324, 326, 347 to 360, 391 to 400, 510 to 511, 525 to 554.

C.J.S. Wills Sections 1463 to 1484, 1486 to 1496.

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 554, Powers of Trustees Usually Joint, Not Several.

Bogert ‑ the Law of Trusts and Trustees Section 611, Duty to Make Trust Property Productive.

Bogert ‑ the Law of Trusts and Trustees Section 612, Skill and Prudence Demanded of Trustee in Investing.

Bogert ‑ the Law of Trusts and Trustees Section 802, Source from Which Expenses Are Payable.

**SECTION 62‑7‑904A.** Judicial Control of Discretionary Power.

(A) A court may not change a fiduciary’s decision, or order a fiduciary to change its decision, to exercise or not to exercise a discretionary power conferred by the South Carolina Uniform Principal and Income Act unless it determines that the decision was an abuse of the fiduciary’s discretion. A fiduciary’s decision is not an abuse of discretion merely because the court would have exercised the power in a different manner or would not have exercised the power.

(B) The decisions subject to subsection (A) include, but are not limited to, a determination:

(1) pursuant to Section 62‑7‑904(A) of whether and to what extent an amount should be transferred from principal to income or from income to principal; and

(2) of the factors that are relevant to the trust and its beneficiaries, the extent to which they are relevant, and the weight, if any, to be given to the relevant factors, in deciding whether and to what extent to exercise the power in Section 62‑7‑904(A).

(C) If a court determines that a fiduciary has abused its discretion, the court may place the income and remainder beneficiaries in the positions they would have occupied if the fiduciary had not abused its discretion, according to the following rules:

(1) to the extent that the abuse of discretion has resulted in no distribution to a beneficiary or in a distribution that is too small, the court must order the fiduciary to distribute from the trust to the beneficiary an amount that the court determines will restore the beneficiary, in whole or in part, to the beneficiary’s appropriate position;

(2) to the extent that the abuse of discretion has resulted in a distribution to a beneficiary that is too large, the court must place the beneficiaries, the trust, or both, in whole or in part, in their appropriate positions by ordering the fiduciary to withhold an amount from one or more future distributions to the beneficiary who received the distribution that was too large or ordering that beneficiary to return some or all of the distribution to the trust;

(3) to the extent that the court is unable, after applying items (1) and (2), to place the beneficiaries, the trust, or both, in the positions they would have occupied if the fiduciary had not abused its discretion, the court may order the fiduciary to pay an appropriate amount from its own funds to one or more of the beneficiaries or the trust, or both.

(D) Upon a petition by the fiduciary, the court having jurisdiction over the trust or estate must determine whether a proposed exercise or nonexercise by the fiduciary of a discretionary power in the South Carolina Uniform Principal and Income Act would result in an abuse of the fiduciary’s discretion. If the petition describes the proposed exercise or nonexercise of the power and contains sufficient information to inform the beneficiaries of the reasons for the proposal, the facts upon which the fiduciary relies, and an explanation of how the income and remainder beneficiaries would be affected by the proposed exercise or nonexercise of the power, a beneficiary who challenges the proposed exercise or nonexercise has the burden of establishing that it will result in an abuse of discretion.

HISTORY: 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENTS

General. All of the discretionary powers in this 1997 Act are subject to the normal rules that govern a fiduciary’s exercise of discretion. Section 62‑7‑904A codifies those rules for purposes of the Act so that they will be readily apparent and accessible to fiduciaries, beneficiaries, their counsel and the courts if and when questions concerning such powers arise.

Section 62‑7‑904A also makes clear that the normal rules governing the exercise of a fiduciary’s powers apply to the discretionary power to adjust conferred upon a trustee by Section 62‑7‑904(A). Discretionary provisions authorizing trustees to determine what is income and what is principal have been used in governing instruments for years; Section 2 of the 1931 Uniform Principal and Income Act recognized that practice by providing that “the person establishing the principal may himself direct the manner of ascertainment of income and principal...or grant discretion to the trustee or other person to do so...” Section 62‑7‑903(A)(2) also recognizes the power of a settlor to grant such discretion to the trustee. Section 62‑7‑904A applies to a discretionary power granted by the terms of a trust or a will as well as the power to adjust in Section 62‑7‑904A.

Power to Adjust. The exercise of the power to adjust is governed by a trustee’s duty of impartiality, which requires the trustee to strike an appropriate balance between the interests of the income and remainder beneficiaries. Section 62‑7‑903(B) expresses this duty by requiring the trustee to “administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries.” Because this involves the exercise of judgment in circumstances rarely capable of perfect resolution, trustees are not expected to achieve perfection; they are, however, required to make conscious decisions in good faith and with proper motives.

In seeking the proper balance between the interests of the beneficiaries in matters involving principal and income, a trustee’s traditional approach has been to determine the settlor’s objectives from the terms of the trust, gather the information needed to ascertain the financial circumstances of the beneficiaries, determine the extent to which the settlor’s objectives can be achieved with the resources available in the trust, and then allocate the trust’s assets between stocks and fixed‑income securities in a way that will produce a particular level or range of income for the income beneficiary. The key element in this process has been to determine the appropriate level or range of income for the income beneficiary, and that will continue to be the key element in deciding whether and to what extent to exercise the discretionary power conferred by Section 62‑7‑904(A). If it becomes necessary for a court to determine whether an abuse of the discretionary power to adjust between principal and income has occurred, the criteria should be the same as those that courts have used in the past to determine whether a trustee has abused its discretion in allocating the trust’s assets between stocks and fixed‑income securities.

A fiduciary has broad latitude in choosing the methods and criteria to use in deciding whether and to what extent to exercise the power to adjust in order to achieve impartiality between income beneficiaries and remainder beneficiaries or the degree of partiality for one or the other that is provided for by the terms of the trust or the will. For example, in deciding what the appropriate level or range of income should be for the income beneficiary and whether to exercise the power, a trustee may use the methods employed prior to the enactment of SCUP&IA in 2001 in deciding how to allocate trust assets between stocks and fixed‑income securities; or may consider the amount that would be distributed each year based on a percentage of the portfolio’s value at the beginning or end of an accounting period, or the average portfolio value for several accounting periods, in a manner similar to a unitrust, and may select a percentage that the trustee believes is appropriate for this purpose and use the same percentage or different percentages in subsequent years. The trustee may also use hypothetical portfolios of marketable securities to determine an appropriate level or range of income within which a distribution might fall.

An adjustment may be made prospectively at the beginning of an accounting period, based on a projected return or range of returns for a trust’s portfolio, or retrospectively after the fiduciary knows the total realized or unrealized return for the period; and instead of an annual adjustment, the trustee may distribute a fixed dollar amount for several years, in a manner similar to an annuity, and may change the fixed dollar amount periodically. No inference of abuse is to be drawn if a fiduciary uses different methods or criteria for the same trust from time to time, or uses different methods or criteria for different trusts for the same accounting period.

While a trustee must consider the portfolio as a whole in deciding whether and to what extent to exercise the power to adjust, a trustee may apply different criteria in considering the portion of the portfolio that is composed of marketable securities and the portion whose market value cannot be determined readily, and may take into account a beneficiary’s use or possession of a trust asset.

Under the prudent investor rule, a trustee is to incur costs that are appropriate and reasonable in relation to the assets and the purposes of the trust, and the same consideration applies in determining whether and to what extent to exercise the power to adjust. In making investment decisions under the prudent investor rule, the trustee will have considered the purposes, terms, distribution requirements, and other circumstances of the trust for the purpose of adopting an overall investment strategy having risk and return objectives reasonably suited to the trust. A trustee is not required to duplicate that work for principal and income purposes, and in many cases the decision about whether and to what extent to exercise the power to adjust may be made at the same time as the investment decisions. To help achieve the objective of reasonable investment costs, a trustee may also adopt policies that apply to all trusts or to individual trusts or classes of trusts, based on their size or other criteria, stating whether and under what circumstances the power to adjust will be exercised and the method of making adjustments; no inference of abuse is to be drawn if a trustee adopts such policies.

General rule. The first sentence of Section 62‑7‑904A(A) is from Restatement (Second) of Trusts Section 187 and Restatement (Third) of Trusts (Tentative Draft No. 2, 1999) Sec 50(1). The second sentence of Section 62‑7‑904A(A) derives from Comment e to Sec 187 of the Second Restatement and Comment b to Sec 50 of the Third Restatement.

The reference in Section 62‑7‑904A(A) to a fiduciary’s decision to exercise or not to exercise a discretionary power underscores a fundamental precept, which is that a fiduciary has a duty to make a conscious decision about exercising or not exercising a discretionary power. Comment b to Section 50 of the Third Restatement states:

A court will intervene where the exercise of a power is left to the judgment of a trustee who improperly fails to exercise that judgment. Thus, even where a trustee has discretion whether or not to make any payments to a particular beneficiary, the court will interpose if the trustee, arbitrarily or without knowledge of or inquiry into relevant circumstances, fails to exercise the discretion.

Section 62‑7‑904A(B) makes clear that the rule of subsection (B) applies not only to the power conferred by Section 62‑7‑904A but also to the evaluation process required by Section 62‑7‑904A(B) in deciding whether and to what extent to exercise the power to adjust. Under Section 62‑7‑904A(B) a trustee is to consider all of the factors that are relevant to the trust and its beneficiaries, including, to the extent the trustee determines they are relevant, the nine factors enumerated in Section 62‑7‑904A(B). Section 62‑7‑904A(B) derives from Section 62‑7‑933(C)(3) of SCUPIA which lists eight circumstances that a trustee shall consider, to the extent they are relevant, in investing and managing assets. The trustee’s decisions about what factors are relevant for purposes of Section 62‑7‑904A(B) and the weight to be accorded each of the relevant factors are part of the discretionary decision‑making process. As such, these decisions are not subject to change for the purpose of changing the trustee’s ultimate decision unless the court determines that there has been an abuse of discretion in determining the relevancy and weight of these factors.

Remedy. The exercise or nonexercise of a discretionary power under the act normally affects the amount or timing of a distribution to the income or remainder beneficiaries. The primary remedy under Section 62‑7‑904A(C) for abuse of discretion is the restoration of the beneficiaries and the trust to the positions they would have occupied if the abuse had not occurred. It draws on a basic principle of restitution that if a person pays money to someone who is not intended to receive it (and in a case to which this act applies, not intended by the settlor to receive it in the absence of an abuse of discretion by the trustee), that person is entitled to restitution on the ground that the payee would be unjustly enriched if he were permitted to retain the payment. See Restatement of Restitution Section 22 (1937). The objective is to accomplish the restoration initially by making adjustments between the beneficiaries and the trust to the extent possible; to the extent that restoration is not possible by such adjustments, a court may order the trustee to pay an amount to one or more of the beneficiaries, the trust, or both the beneficiaries and the trust. If the court determines that it is not possible in the circumstances to restore them to their appropriate positions, the court may provide other remedies appropriate to the circumstances. The approach of Section 105(c) is supported by Comment b to Section 50 of the Third Restatement of Trusts:

When judicial intervention is required, a court may direct the trustee to make or refrain from making certain payments; issue instructions to clarify the standards or guidelines applicable to the exercise of the power; or rescind the trustee’s payment decisions, usually directing the trustee to recover amounts improperly distributed and holding the trustee liable for failure or inability to do so.

Advance determinations. Section 62‑7‑904A(D) employs the familiar remedy of the trustee’s petition to the court for instructions. It requires the court to determine, upon a petition by the fiduciary, whether a proposed exercise or nonexercise of a discretionary power by the fiduciary of a power conferred by the Act would be an abuse of discretion under the general rule of Section 62‑7‑904A. If the petition contains the information prescribed in the second sentence of subsection (D) the proposed action or inaction is presumed not to result in an abuse, and a beneficiary who challenges the proposal must establish that it will.

Subsection (D) is intended to provide a fiduciary the opportunity to obtain an assurance of finality in a judicial proceeding before proceeding with a proposed exercise or nonexercise of a discretionary power. Its purpose is not, however, to have the court instruct the fiduciary how to exercise the discretion.

A fiduciary may also obtain the consent of the beneficiaries to a proposed act or an omission to act, and a beneficiary cannot hold the fiduciary liable for that act or omission unless:

(a) the beneficiary was under an incapacity at the time of such consent or of such act or omission; or

(b) the beneficiary, when he gave his consent, did not know of his rights and of the material facts which the trustee knew or should have known and which the trustee did not reasonably believe that the beneficiary knew; or

(c) the consent of the beneficiary was induced by improper conduct of the trustee.

Restatement (Second) of Trusts Sec 216.

If there are many beneficiaries, including some who are incapacitated or unascertained, the fiduciary may prefer the greater assurance of finality provided by a judicial proceeding that will bind all persons who have an interest in the trust.

CROSS REFERENCES

Adjustments between principal and income, see Section 62‑7‑904.

**SECTION 62‑7‑904B.** Definitions for Sections 62‑7‑904C through 62‑7‑904P.

The definitions in this section apply to Sections 62‑7‑904C through 62‑7‑904P.

(1) “Code” means the Internal Revenue Code of 1986, as amended from time to time, and any statutory enactment successor to the Code; reference to a specific section of the code in Sections 62‑7‑904B through 62‑7‑904P are considered a reference also to any successor provision dealing with the subject matter of that section of the Code.

(2) “Disinterested person” means a person who is not a related or subordinate party with respect to the person then acting as trustee of the trust and excludes the settlor of the trust and any interested trustee.

(3) “Express total return unitrust” means a trust created by the terms of a governing instrument requiring the distribution at least annually of a unitrust amount equal to a fixed percentage of not less than three percent nor more than five percent a year of the net fair market value of the amounts of the trust, valued at least annually.

(4) “Income trust” means a trust, created by either an inter vivos or a testamentary instrument, which directs or permits the trustee to distribute the net income of the trust to one or more persons, either in fixed proportions or in amounts or proportions determined by the trustee, and regardless of whether the trust directs or permits the trustee to distribute principal of the trust to one or more of those persons.

(5) “Interested distributee” means a living beneficiary who is a distributee or permissible distributee of trust income or principal who has the power to remove the existing trustee and designate as successor a person who may be a related or subordinate party with respect to that distributee.

(6) “Interested trustee” means any of the following:

(a) an individual trustee who is a qualified beneficiary;

(b) a trustee who may be removed and replaced by an interested distributee;

(c) an individual trustee whose legal obligation to support a beneficiary may be satisfied by distributions of income and principal of the trust.

(7) “Legal disability” means a person under a legal disability who is a minor, an incompetent or incapacitated person, or an unborn individual, or whose identity or location is unknown.

(8) “Qualified beneficiary” means a qualified beneficiary as defined in Section 62‑7‑103(12).

(9) “Related or subordinate party” means a related or subordinate party as defined in Section 672(c) of the Code.

(10) “Representative” means a person who may represent and bind another as provided in Part 3 of this article, the provisions of which apply for purposes of this section and Sections 62‑7‑904C through 62‑7‑904P.

(11) “Settlor” means an individual, including a testator, who creates a trust.

(12) “Total return unitrust” means an income trust that has been converted under and meets the provisions of this section and Section 62‑7‑904C through 62‑7‑904P.

(13) “Treasury regulations” means the regulations, rulings, procedures, notices, or other administrative pronouncements issued by the Internal Revenue Service, as amended from time to time.

(14) “Trustee” means a person acting as trustee of the trust, except as otherwise expressly provided in this section and Sections 62‑7‑904C through 62‑7‑904P whether acting in that person’s discretion or on the direction of one or more persons acting in a fiduciary capacity.

(15) “Unitrust amount” means an amount computed as a percentage of the fair market value of the assets of the trust.

HISTORY: 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENTS

See comments after Section 62‑7‑904P.

CROSS REFERENCES

Adjustments between principal and income, see Section 62‑7‑904.

Allocation of receipts and disbursements, see Section 62‑7‑903.

**SECTION 62‑7‑904C.** Trustee’s power to convert an income trust to a total return unitrust, reconvert a total return unitrust to an income trust, or change the percentage used to calculate the unitrust amount.

(A) A trustee, other than an interested trustee, or, where two or more persons are acting as trustees, a majority of the trustees who are not interested trustees (in either case hereafter “trustee”) in the trustee’s sole discretion and without court approval, may:

(1) convert an income trust to a total return unitrust;

(2) reconvert a total return unitrust to an income trust; or

(3) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if all of the following apply:

(a) The trustee adopts a written policy for the trust providing:

(i) in the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income as determined pursuant to the South Carolina Uniform Principal and Income Act;

(ii) in the case of a trust being administered as a total return unitrust, that future distributions from the trust will be net income rather than unitrust amounts; or

(iii) that the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy.

(b) The trustee gives written notice of its intention to take the action, including copies of the written policy and Sections 62‑7‑904B through 62‑7‑904P, to:

(i) the settlor of the trust, if living; and

(ii) all persons who are the qualified beneficiaries of the trust at the time the notice is given. If a qualified beneficiary is under a legal disability, notice shall be given to the representative of the qualified beneficiary if a representative is available without court order.

(c) There is at least:

(i) one qualified beneficiary described in Section 62‑7‑103(12)(A) or (B) who is not under a legal disability or a representative of a qualified beneficiary so described; or

(ii) one qualified beneficiary described in Section 62‑7‑103(12)(C) who is not under a legal disability or a representative of a qualified beneficiary so described.

(d) No person receiving notice of the trustee’s intention to take the proposed action objects to the action within ninety days after notice has been given. The objection must be by written notice to the trustee.

(B) If there is no trustee of the trust other than an interested trustee, the interested trustee or, where two or more persons are acting as trustee and are interested trustees, a majority of the interested trustees may, in its sole discretion and without court approval:

(1) convert an income trust to a total return unitrust;

(2) reconvert a total return unitrust to an income trust; or

(3) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if all of the following apply:

(a) The trustee adopts a written policy for the trust providing:

(i) in the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income as determined pursuant to the South Carolina Uniform Principal and Income Act;

(ii) in the case of a trust being administered as a total return unitrust, that future distributions from the trust will be net income as determined pursuant to the South Carolina Uniform Principal and Income Act rather than unitrust amounts, or

(iii) that the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy.

(b) The trustee appoints a disinterested person who, in its sole discretion but acting in a fiduciary capacity, determines for the trustee:

(i) the percentage to be used to calculate the unitrust amount;

(ii) the method to be used in determining the fair market value of the trust; and

(iii) which assets, if any, are to be excluded in determining the unitrust amount.

(c) The trustee gives written notice of its intention to take the action, including copies of the written policy and Sections 62‑7‑904B through 62‑7‑904P and the determinations of the disinterested person to:

(i) the settlor of the trust, if living; and

(ii) all persons who are the qualified beneficiaries of the trust at the time of the giving of the notice. If a qualified beneficiary is under a legal disability, notice must be given to the representative of the qualified beneficiary if a representative is available without court order.

(d) There is at least:

(i) one qualified beneficiary described in Section 62‑7‑103(12)(A) or (B) or a representative of a beneficiary so described; or

(ii) one qualified beneficiary described in Section 62‑7‑103(12)(C) or a representative of a qualified beneficiary so described.

(e) No person receiving notice of the trustee’s intention to take the proposed action of the trustee objects to the action or to the determination of the disinterested person within ninety days after notice has been given. The objection must be by written instrument delivered to the trustee.

(C) A trustee may act under subsection (A) or (B) of this section with respect to a trust for which both income and principal have been set aside permanently for charitable purposes under the governing instrument and for which a federal estate or gift tax deduction has been taken, if all of the following apply:

(1) Instead of sending written notice to the persons described in subsection (A)(3)(b) or subsection (B)(3)(b), as the case may be, the trustee shall send written notice to each charitable organization expressly designated to receive the income of the trust under the governing instrument and, if no charitable organization is expressly designated to receive all of the income of the trust under the governing instrument, to the Attorney General of this State.

(2) Subsection (A)(3)(d) or subsection (B)(3)(d) of this subsection, as the case may be, does not apply to this action.

(3) In each taxable year, the trustee shall distribute the greater of the unitrust amount or the amount required by Section 4942 of the Code.

(D) The provisions of Section 62‑7‑109 regarding notices and the sending of documents to persons under this article shall apply for purposes of notices and the sending of documents under this section.

HISTORY: 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENTS

See comments after Section 62‑7‑904P.

CROSS REFERENCES

Adjustments between principal and income, see Section 62‑7‑904.

Allocation of receipts and disbursements, see Section 62‑7‑903.

Express total return unitrust governing instrument provision for changing the unitrust percentage, for converting from a unitrust to an income trust, or for a reconversion of an income trust to a unitrust, see Section 62‑7‑904O.

Petition by trustee or qualified beneficiary to convert an income trust, reconvert a total return unitrust, or change the percentage used to calculate the unitrust amount, see Section 62‑7‑904D.

**SECTION 62‑7‑904D.** Petition by trustee or qualified beneficiary to convert an income trust, reconvert a total return unitrust, or change the percentage used to calculate the unitrust amount.

(A) If a trustee desires to:

(1) convert an income trust to a total return unitrust;

(2) reconvert a total return unitrust to an income trust; or

(3) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust assets but does not have the ability to or elects not to do it under Section 62‑7‑904C, the trustee may petition the court for an order as the trustee considers appropriate. If there is only one trustee of the trust and the trustee is an interested trustee or if there are two or more trustees of the trust and a majority of them are interested trustees, the court, in its own discretion or on the petition of the trustee or trustees or any person interested in the trust, may appoint a disinterested person who, acting in a fiduciary capacity, shall present information to the court as necessary to enable the court to make its determinations under Sections 62‑7‑904B through 62‑7‑904P.

(B) A qualified beneficiary or a representative of a qualified beneficiary may request the trustee to:

(1) convert an income trust to a total return unitrust;

(2) reconvert a total return unitrust to an income trust; or

(3) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust. If the trustee does not take the action requested, the qualified beneficiary or a representative of the qualified beneficiary may petition the court to order the trustee to take the action.

(C) All proceedings under this section must be conducted as provided in Part 2 of this article.

HISTORY: 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENTS

See comments after Section 62‑7‑904P.

CROSS REFERENCES

Adjustments between principal and income, see Section 62‑7‑904.

Allocation of receipts and disbursements, see Section 62‑7‑903.

**SECTION 62‑7‑904E.** Fair market value of trust assets.

(A) The fair market value of the trust assets must be determined at least annually, using a valuation date selected by the trustee in its discretion. The trustee, in its discretion, may use an average of the fair market value on the same valuation date for the current fiscal year and not more than three preceding fiscal years, if the use of this average appears desirable to the trustee to reduce the impact of fluctuations in market value on the unitrust amount. Assets for which a fair market value cannot be readily ascertained must be valued using valuation methods as are considered reasonable and appropriate by the trustee. Assets, such as a residence or tangible personal property, used by the trust beneficiary may be excluded by the trustee from the fair market value for computing the unitrust amount.

(B) The percentage to be used by the trustee in determining the unitrust amount must be a reasonable current return from the trust, but not less than three percent nor more than five percent, taking into account the intentions of the settlor of the trust as expressed in the terms of the trust, the needs of the beneficiaries, general economic conditions, projected current earnings and appreciation for the trust assets, and projected inflation and its impact on the trust.

(C) Following the conversion of an income trust to a total return unitrust, the trustee:

(1) shall consider the unitrust amount as paid from net accounting income determined as if the trust were not a unitrust;

(2) shall then consider the unitrust amount as paid from ordinary income not allocable to net accounting income;

(3) may, in the trustee’s discretion, consider the unitrust amount as paid from net short‑term gain described in Section 1222(5) of the Code and then from net long‑term capital gain described in Section 1222(7) of the Code so long as the discretionary power is exercised consistently and in a reasonable and impartial manner, but the amount so paid from net capital gains may not be greater than the excess of the unitrust amount over the amount of distributable net income as defined in Section 643(a) of the Code without regard to Section 1.643(a)‑3(b) of the Treasury Regulations, as amended from time to time; and

(4) shall then consider the unitrust amount as coming from the principal of the trust.

HISTORY: 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENTS

See comments after Section 62‑7‑904P.

CROSS REFERENCES

Adjustments between principal and income, see Section 62‑7‑904.

Allocation of receipts and disbursements, see Section 62‑7‑903.

**SECTION 62‑7‑904F.** Administration of a total return unitrust.

In administering a total return unitrust, the trustee may, in its sole discretion but subject to the terms of the trust, determine:

(1) the effective date of the conversion;

(2) the timing of distributions, including provisions for prorating a distribution for a short year in which a beneficiary’s right to payments commences or ceases;

(3) whether distributions are to be made in cash or in kind or partly in cash and partly in kind;

(4) if the trust is reconverted to an income trust, the effective date of the reconversion; and

(5) any other administrative issues as may be necessary or appropriate to carry out the purposes of Sections 62‑7‑904B through 62‑7‑904P.

HISTORY: 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENTS

See comments after Section 62‑7‑904P.

CROSS REFERENCES

Adjustments between principal and income, see Section 62‑7‑904.

Allocation of receipts and disbursements, see Section 62‑7‑903.

**SECTION 62‑7‑904G.** Distribution of unitrust amount considered distribution of income and not of principal.

Conversion to a total return unitrust under Sections 62‑7‑904B through 62‑7‑904P does not affect any other provision of the terms of the trust, if any, regarding distributions of principal. For purposes of Sections 62‑7‑904B through 62‑7‑904P, the distribution of a unitrust amount is considered a distribution of income and not of principal.

HISTORY: 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENTS

See comments after Section 62‑7‑904P.

CROSS REFERENCES

Adjustments between principal and income, see Section 62‑7‑904.

Allocation of receipts and disbursements, see Section 62‑7‑903.

**SECTION 62‑7‑904H.** Limitation of liability.

No trustee or disinterested person who in good faith takes or fails to take any action under Sections 62‑7‑904B through 62‑7‑904P is liable to any person affected by the action or inaction, regardless of whether the person received written notice as provided in Sections 62‑7‑904B through 62‑7‑904P and regardless of whether the person was under a legal disability at the time of the delivery of the notice. The exclusive remedy for any person affected by such action or inaction is to obtain an order of the court directing the trustee to:

(1) convert an income trust to a total return unitrust;

(2) reconvert from a total return unitrust to an income trust; or

(3) change the percentage used to calculate the unitrust amount.

HISTORY: 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENTS

See comments after Section 62‑7‑904P.

CROSS REFERENCES

Adjustments between principal and income, see Section 62‑7‑904.

Allocation of receipts and disbursements, see Section 62‑7‑903.

**SECTION 62‑7‑904I.** Applicability of Sections 62‑7‑904B through 62‑7‑904P.

Sections 62‑7‑904B through 62‑7‑904P apply to all trusts in existence on, or created after the effective date of Sections 62‑7‑904A through 62‑7‑904P unless:

(1) the governing instrument contains a provision clearly expressing the settlor’s intention that the current beneficiary or beneficiaries are to receive an amount other than a reasonable current return from the trust;

(2) the trust is a trust described in Section 170(f)(2)(B), Section 664(d), Section 2702(a)(3), or Section 2702(b) of the Code;

(3) the trust is a trust under which any amount is, or has been in the past, set aside permanently for charitable purposes unless the income from the trust also is devoted permanently to charitable purposes; or

(4) the governing instrument expressly prohibits use of Sections 62‑7‑904B through 62‑7‑904P by specific reference to Sections 62‑7‑904B through 62‑7‑904P or expressly states the settlor’s intent that net income not be calculated as a unitrust amount.

A provision in the terms of the trust that “the provisions of Sections 62‑7‑904B through 62‑7‑904P of this part or any corresponding provision of future law, must not be used in the administration of this trust,” or “the trustee shall not determine the distributions to the income beneficiary as a unitrust amount,” or similar words reflecting that intent is sufficient to preclude the use of Sections 62‑7‑904B through 62‑7‑904P.

HISTORY: 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENTS

See comments after Section 62‑7‑904P.

CROSS REFERENCES

Adjustments between principal and income, see Section 62‑7‑904.

Allocation of receipts and disbursements, see Section 62‑7‑903.

**SECTION 62‑7‑904J.** RESERVED.

**SECTION 62‑7‑904K.** RESERVED.

**SECTION 62‑7‑904L.** RESERVED.

**SECTION 62‑7‑904M.** Unitrust amount to be distributed by the express total return unitrust.

(A) The unitrust amount to be distributed by the express total return unitrust may be determined by the terms of the unitrust governing instrument by reference to the net fair market value of the trust’s assets determined annually or averaged on a multiple‑year basis.

(B) The terms of an express total return unitrust governing instrument may provide that:

(1) any assets of such a unitrust for which a fair market value cannot be readily ascertained must be valued using valuation methods that the trustee considers reasonable and appropriate;

(2) any assets of such a unitrust, such as a residence property or tangible personal property, used by the trust beneficiary entitled to the unitrust amount may be excluded by the trustee from the net fair market value for computing the unitrust amount.

HISTORY: 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENTS

See comments after Section 62‑7‑904P.

CROSS REFERENCES

Adjustments between principal and income, see Section 62‑7‑904.

Allocation of receipts and disbursements, see Section 62‑7‑903.

**SECTION 62‑7‑904N.** Distribution from an express total return unitrust.

The distribution from an express total return unitrust of a unitrust amount equal to a fixed percentage of not less than three percent nor more than five percent reasonably apportions between the income beneficiaries and the remainder of the total return of an express total return unitrust.

HISTORY: 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENTS

See comments after Section 62‑7‑904P.

CROSS REFERENCES

Adjustments between principal and income, see Section 62‑7‑904.

Allocation of receipts and disbursements, see Section 62‑7‑903.

**SECTION 62‑7‑904O.** Express total return unitrust governing instrument provision for changing the unitrust percentage, for converting from a unitrust to an income trust, or for a reconversion of an income trust to a unitrust.

(A) The terms of an express total return unitrust governing instrument may provide the method similar to the method provided under Section 62‑7‑904C for changing the unitrust percentage or for converting from a unitrust to an income trust or for a reconversion of an income trust to a unitrust, or for all of these actions.

(B) If the terms of an express total return unitrust governing instrument do not specifically or by reference to Section 62‑7‑904C grant a power to the trustee to change the unitrust percentage or change to an income trust, the trustee shall not have that power.

HISTORY: 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENTS

See comments after Section 62‑7‑904P.

CROSS REFERENCES

Adjustments between principal and income, see Section 62‑7‑904.

Allocation of receipts and disbursements, see Section 62‑7‑903.

**SECTION 62‑7‑904P.** Trustee considerations for unitrust amount paid.

Unless the terms of the express total return unitrust governing instrument specifically provide otherwise, the trustee:

(A) shall consider the unitrust amount as paid from net accounting income determined as if the trust were not a unitrust;

(B) shall then consider the unitrust amount as paid from ordinary income not allocable to net accounting income;

(C) may, in the trustee’s discretion, consider the unitrust amount as paid from net short‑term gain described in Section 1222(5) of the Code and then from net long‑term capital gain described in Section 1222(7) of the Code so long as this discretionary power is exercised consistently and in a reasonable and impartial manner, but the amount so paid from net capital gains may not be greater than the excess of the unitrust amount over the amount of distributable net income as defined in Section 643(a) of the Code without regard to Section 1.643(a)‑3(b) of the Treasury Regulations; and

(D) shall then consider the unitrust amount as coming from the principal of the trust.

HISTORY: 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENTS

Background. The Uniform Prudent Investor Act (UPIA), enacted in 1994 by the Uniform Law Commission (ULC), embodies basic principles for an investment regime, “especially the principle of investing for total return rather than a certain level of ‘income’ as traditionally perceived in terms of interest, dividends, and rents,” based on categories of receipts Total return investing is established by the ULC as the investment regime of a “prudent investor”, and UPIA provides that trustees “shall invest and manage trust assets as a prudent investor would” in default of contrary provisions in the terms of the trust. There is a fundamental distinction, however, between needs of trust income beneficiaries and those of trust principal or remainder beneficiaries, which affects the duty of trustees to administer trusts “impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or will clearly manifest an intention that the fiduciary [trustee] shall or may favor one or more of the beneficiaries.” These inherent conflicts could in any given situation make it problematic for the trustee to comply with the duty of impartiality. For example, in a low interest/low dividend environment, a prudent investor investing for total return would normally invest less for interest/dividend return and more for capital gains return. The result: an income beneficiary receives, for example, only a one percent return for the year while the remainder beneficiary reaps the rewards of the capital gains. Of course, the opposite would be true in a double‑digit high interest/high dividend environment. In neither case would the trustee’s conduct comply with its duty of impartiality, nor would the results be fair and reasonable for the respective beneficiaries affected. Realizing this dilemma for trustees, the ULC addressed this issue in its work on amending its 1962 Revised Uniform Principal and Income Act. This work produced ULC’s 1997 Uniform Principal and Income Act (UP&IA) which includes ULC’s approach to providing assistance to trustees: the power to adjust. South Carolina enacted versions of both UPIA (as SCUPIA) and UP&IA (as SCUP&IA), effective on the same date, July 18, 2001.

Alternate Approach. The power to adjust was not the only approach considered to provide assistance to trustees. During the late 1990s and early 2000s, some states began working independently of the ULC on various versions of unitrust powers for trustees. In the early 2000s, some states enacted unitrust versions with no power to adjust or other ULC provisions. Other states enacted versions of the UP&IA incorporating their respective unitrust versions, thereby having both the power to adjust and their respective unitrust powers as options. No unitrust approach has ever been included in the UP&IA. South Carolina did not include any such unitrust option in 2001 when it enacted SCUP&IA. In the years since 2001, however, the unitrust approach has become increasingly recognized among the states as an established alternative to the power to adjust, The 2013 South Carolina amendments adopted a unitust option, in subsections 904A through 904P.

Purpose and Scope of Unitrust Option. The purpose of Sections 62‑7‑904B through 62‑7‑904P is similar to that of Section 62‑7‑904 (power to adjust): to enable a trustee to select investments using the standards of a prudent investor without having to realize a particular portion of the portfolio’s total return in the form of traditional trust accounting income categories such as interest, dividends, and rents.

Section 62‑7‑904C(A) authorizes a trustee who meets the qualifications set forth in this section to: (1) convert an income trust to a total return unitrust; (2) convert a total return unitrust to an income trust; or (3) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if all of the following apply: (a) The trustee adopts a written policy for the trust that contains the three provisions that follow numbered (i), (ii), and (iii); (b) The trustee gives written notice of its intention to take the action, including copies of the written policy and Sections 62‑7‑904B through 62‑7‑904P, to those persons described in the two provisions that follow numbered (i) and (ii); (c) There is at least one qualified beneficiary or a representative described in the two provisions that follow numbered (i) and (ii); (d) No person receiving notice of the trustee’s intention to take the proposed action objects to the proposed action within ninety days after notice has been given. An objection must be by written notice to the trustee. Section 62‑7‑904C(B) authorizes an interested trustee or a majority of interested trustees (if there is no trustee of the trust other than an interested trustee) in its or their sole discretion and without court approval to: (1) convert an income trust to a total return unitrust; (2) convert a total return unitrust to an income trust; or (3) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if all of the following apply: (a) The trustee adopts a written policy for the trust that contains the three provisions that follow numbered (i), (ii), and (iii); (b) The trustee appoints a disinterested person who, in its sole discretion but acting in its fiduciary capacity, determines for the trustee the three items that follow numbered (i), (ii), and (iii); (c) The trustee gives written notice of its intention to take the action, include copies of the written policy and Sections 62‑7‑904B through 62‑7‑904P and the determinations of the disinterested person to those persons described in the two provisions that follow numbered (i) and (ii); (d) There is at least one qualified beneficiary or a representative described in the two provisions that follow numbered (i) and (ii); (e) No person receiving notice of the trustee’s intention to take the proposed action of the trustee objects to the action or to the determinations of the disinterested person within ninety days after notice has been given. The objection must be by written instrument delivered to the trustee. Section 62‑7‑904C(C) authorizes a trustee to act under subsection (A) or (B) of this section with respect to a trust for which both income and principal have been set aside permanently for charitable purposes under the governing instrument and for which a federal estate or gift tax deduction has been taken, if all of the provisions in the three subsections that follow numbered (1), (2), and (3) apply. Section 62‑7‑904C(D) provides that the provisions of Section 62‑7‑109 regarding notices and the sending of documents to persons under this article shall apply for purposes of notices and the sending of documents under this section.

Section 62‑7‑904D(A) provides that if a trustee desires to: (1) convert an income trust to a total return unitrust; (2) convert a total return unitrust to an income trust; or (3) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust assets, but does not have the ability to or elects not to do it under Section 62‑7‑904 C, the trustee may petition the court for an order as the trustee considers appropriate. If there is only one trustee of the trust and the trustee is an interested trustee or if there are two or more trustees of the trust and a majority of them are interested trustees, the court, in its own discretion or on the petition of the trustee or trustees or any person interested in the trust, may appoint a disinterested person who, acting in a fiduciary capacity, shall present information to the court as necessary to enable the court to make its determinations under Sections 62‑7‑904B through 62‑7‑904P. Section 62‑7‑904D(B) authorizes a qualified beneficiary or a representative of a qualified beneficiary to request the trustee to: (1) convert an income trust to a total return unitrust; (2) convert a total return unitrust to an income trust; or (3) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust assets. If the trustee does not take the action requested, the qualified beneficiary or a representative of a qualified beneficiary may petition the court to order the trustee to take the action. Section 62‑7‑904D(C) provides that all proceedings under this section must be conducted as provided in Part 2 of this article.

Section 62‑7‑904E(A) requires that the fair market value of the trust assets be determined at least annually, using a valuation date selected by the trustee in its discretion, and that assets for which a fair market value cannot be readily ascertained be valued using valuation methods considered reasonable and appropriate by the trustee. This section authorizes the trustee, in its discretion, to use an average of the fair market value on the same valuation date for the current fiscal year and not more than three preceding fiscal years, if the use of this average appears desirable to the trustee to reduce the impact of fluctuations in market value on the unitrust amount and to exclude from the fair market value for computing the unitrust amount assets such as a residence or tangible personal property used by the trust beneficiary. Section 62‑7‑904E(B) requires that the percentage used in determining the unitrust amount be a reasonable current return from the trust, in any event not less than three percent nor more than five percent, taking into account the intentions of the settlor of the trust as expressed in the terms of the trust, the needs of the beneficiaries, general economic conditions, projected current earnings and appreciation for the trust assets, and projected inflation and its impact on the trust. Section 62‑7‑904E(C) provides that, following the conversion of an income trust to a total return unitrust, the trustee: (1) must consider the unitrust amount as paid from net accounting income determined as if the trust were not a unitrust; (2) must then consider the unitrust amount as paid from ordinary income not allocable to net accounting income; (3) may, in the trustee’s discretion, consider the unitrust amount as paid from net short‑term gain described in section 1222(5) of the Code and then from net long‑term capital gain described in section 1222(7) of the Code so long as the discretionary power is exercised consistently and in a reasonable and impartial manner, but the amount so paid from net capital gains may not be greater than the excess of the unitrust amount over the amount of distributable net income as defined in section 643(a) of the Code without regard to section 1.643(a)‑3(b) of the Treasury Regulations, as amended from time to time; and (4) must then consider the unitrust amount as coming from the principal of the trust.

Section 62‑7‑904F authorizes the trustee, in administering a total return unitrust, to determine in its sole discretion but subject to the provisions of the terms of the trust: (1) the effective date of the conversion; (2) the timing of distributions, including provisions for prorating a distribution for a short year in which a beneficiary’s right to payments commences or ceases; (3) whether distributions are to be made in cash or in kind or partly in cash and partly in kind; (4) if the trust is reconverted to an income trust, the effective date of the reconversion; and (5) any other administrative issues as may be necessary or appropriate to carry out the purposes of Sections 62‑7‑904B through 62‑7‑904P.

Section 62‑7‑904G clearly establishes that conversion to a total return unitrust under Sections 62‑7‑904B through 62‑7‑904P shall not affect any other provision of the terms of the trust, if any, regarding distributions of principal. For purposes of Sections 62‑7‑904B through 62‑7‑904P, the distribution of a unitrust amount is considered a distribution of income and not of principal.

Section 62‑7‑904H purports to establish evidence of good faith by the trustee or any disinterested person who takes or fails to take any action under Sections 62‑7‑904B through 62‑7‑904P as a complete defense against liability to any person affected by such action or inaction, regardless of whether the person received written notice as provided in Sections 62‑7‑904B through 62‑7‑904P and regardless of whether the person was under a legal disability at the time of the delivery of the notice. The exclusive remedy for any person affected by an action or inaction shall be to obtain an order of the court directing the trustee (1) to convert an income trust to a total return unitrust, (2) to reconvert from a total return unitrust to an income trust, or (3) to change the percentage used to calculate the unitrust amount.

Section 62‑7‑904I addresses certain types of trusts and trust provisions or other default circumstances which cause Sections 62‑7‑904B through 62‑7‑904P not to apply to such trusts.

Section 62‑7‑904M(A) is the first of the four final sections that address the express total return unitrust as distinguished from the total return unitrust and the income trust. Each of these trusts is included in the definitions section, 62‑7‑904B where subsection (3) provides: “Express total return unitrust” means a trust created by the terms of a governing instrument requiring the distribution at least annually of a unitrust amount equal to a fixed percentage of not less than three percent nor more than five percent a year of the net fair market value of the assets of the trust, valued at least annually. Note that this Section 62‑7‑904M(A) provides in addition to “annually”: “or averaged on a multiple year basis.” Section 62‑7‑904M(B) authorizes the terms of such governing instrument to provide that: (1) any assets of such a unitrust for which a fair market value cannot be readily ascertained must be valued using valuation methods that the trustee considers reasonable and appropriate; and (2) any assets of such a unitrust, such as a residence property or tangible personal property, used by the trust beneficiary entitled to the unitrust amount may be excluded from the net fair market value for computing the unitrust amount.

Section 62‑7‑904N establishes South Carolina’s critically important position on the effect of the distribution of such a unitrust amount: “The distribution from an express total return unitrust of a unitrust amount equal to a fixed percentage of not less than three percent nor more than five percent reasonably apportions between the income beneficiaries and the remaindermen the total return of an express total return unitrust” (emphasis added).

Section 62‑7‑904O(A) authorizes the terms of an express total return unitrust governing instrument to provide the method similar to the method provided under Section 62‑7‑904C for changing the unitrust percentage or for converting from a unitrust to an income trust or for a reconversion of an income trust to a unitrust, or for all of these actions. Section 62‑7‑904O(B) denies a trustee the power to change the unitrust percentage or change to an income trust if the terms of an express total return unitrust governing instrument do not specifically or by reference to Section 62‑7‑904C grant such power to that trustee.

Section 62‑7‑904P provides that, unless the terms of the express total return unitrust governing instrument specifically provide otherwise, the trustee: (A) must consider the unitrust amount as paid from net accounting income determined as if the trust were not a unitrust; (B) must then consider the unitrust amount as paid from ordinary income not allocable to net accounting income; (C) may, in the trustee’s discretion, consider the unitrust amount as paid from net short‑term gain described in section 1222(5) of the Code and then from net long‑term capital gain described in section 1222(7) of the Code so long as this discretionary power is exercised consistently and in a reasonable and impartial manner, but the amount so paid from net capital gains may not be greater than the excess of the unitrust amount over the amount of distributable net income as defined in section 643(a) of the Code without regard to section 1.643(a)‑3(b) of the Treasury Regulations, as amended from time to time; and (D) must then consider the unitrust amount as coming from the principal of the trust.

Treasury Department and Internal Revenue Service (Treasury and Service). The promulgation by the ULC of its 1994 UPIA and 1997 UP&IA and the developing interest of the states in these two uniform laws, the 1997 UP&IA’s power to adjust, and the alternative unitrust approach garnered Treasury and Internal Revenue Service interest in the late 1990s. During that period, there was a recognition that “state statutes are in the process of changing traditional concepts of income and principal in response to investment strategies that seek total positive return on trust assets”. Considerable time and resources were devoted to addressing the various tax issues raised which culminated in the Treasury and the Service adopting 15 Treasury Regulations amendments. The effect of these amendments was to conform the regulations to the changes referred to above. These amendments were issued as final regulations generally effective January 2, 2004, and were published in 69 Federal Register No. 1, January 2, 2004, pp. 13‑22, 26 CFR Parts 1, 20, 25, and 26 [TD 9102] RIN 1545‑AX96.

The prefatory Summary, Background, and Explanation materials published with the final regulations referred to above are instructive, particularly the Service responses to many of the comments on the original proposed regulations that were published on February 15, 2001. Of the many Treasury and Service positions expressed in these materials on various issues that arose during this process, one of the more instructive of these appears on page 16 under the heading “Trusts Qualifying for Gift and Estate Tax Marital Deductions”:

The proposed regulations provide that a spouse will be treated as entitled to receive all net income from a trust, as required for the trust to qualify for the gift and estate tax marital deductions under Sec. 20.2056(b)‑5(a)(1) of the Estate Tax Regulations Sec. 25.2523(e)‑1(f)(1) of the Gift Tax Regulations, if the trust is administered under applicable state law that provides for a reasonable apportionment between the income and remainder beneficiaries of the total return of the trust and that meets the requirements of Sec. 1.643(b)‑1. Thus, a spouse who, as the income beneficiary, is entitled in accordance with the state statute and the governing instrument to a unitrust amount of no less than 3% and no more than 5% would be entitled to all the income from the trust for purposes of qualifying the trust for the marital deduction.

Several commentators suggested that a trust that provides for a unitrust payment to the spouse should satisfy the income standard even in states that have not enacted legislation defining income as a unitrust amount or providing that a right to income may be satisfied by such a payment. The income distribution requirement that must be satisfied for a trust to qualify for the gift and estate tax marital deductions ensures that the spouse receives what is traditionally considered to be income from the assets held in trust. As previously discussed, the IRS and the Treasury Department believe that only if applicable state law has authorized a departure from traditional concepts of income and principal should such a departure be respected for Federal tax purposes. A state statute specifically authorizing certain unitrust amounts in satisfaction of an income interest or certain powers to adjust in conformance with the provisions of Sec.1.643(b)‑1 would meet this standard. However, in the absence of a state statute, or, for example, a decision of the highest court of the state applicable to all trusts administered under that state’s law, the applicable state law requirement will not be satisfied.

CROSS REFERENCES

Adjustments between principal and income, see Section 62‑7‑904.

Allocation of receipts and disbursements, see Section 62‑7‑903.

**SECTION 62‑7‑905.** Determinations of income and principal; distributions upon death of decedent or end of an income interest in a trust.

After a decedent dies, in the case of an estate, or after an income interest in a trust ends, a fiduciary:

(1) of an estate or of a terminating income interest shall determine the amount of net income and net principal receipts received from property specifically given to a beneficiary pursuant to Sections 62‑7‑907 through 62‑7‑930 which apply to trustees and the provisions of item (5). The fiduciary shall distribute the net income and net principal receipts to the beneficiary who is to receive the specific property;

(2) shall determine the remaining net income of a decedent’s estate or a terminating income interest pursuant to Sections 62‑7‑907 through 62‑7‑930 which apply to trustees and by:

(a) including in net income all income from property used to discharge liabilities;

(b) paying from income or principal, in the fiduciary’s discretion, fees of attorneys, accountants, and fiduciaries, court costs and other expenses of administration, and interest on death taxes; except that the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary claims an estate tax marital or charitable deduction only to the extent that the payment of those expenses from income does not cause the reduction or loss of the deduction; and

(c) paying from principal all other disbursements made or incurred in connection with the settlement of a decedent’s estate or the winding up of a terminating income interest, including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the terms of the trust, or applicable law;

(3) shall distribute to a beneficiary who receives a pecuniary amount outright the rate of interest or other amount provided by the will or the terms of the trust. If the will or the terms of the trust provide no interest amount, the beneficiary of a pecuniary amount outright shall receive no interest or other income on the bequest for one year after the first appointment of a personal representative. Beginning one year after the first appointment of a personal representative, and notwithstanding any other provision of law to the contrary, the beneficiary of a pecuniary amount outright must be treated as any other beneficiary under item (4). If a beneficiary is to receive a pecuniary amount outright from a trust after an income interest ends and no interest or other amount is provided for by the terms of the trust, the fiduciary shall treat the pecuniary amount as if it were required to be paid under a will and as if the payment were being made beginning one year after the first appointment of a personal representative;

(4) shall distribute the net income remaining after distributions required by item (3) in the manner pursuant to Section 62‑7‑906 to all other beneficiaries, including a beneficiary who receives a pecuniary amount in trust, even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust; and

(5) may not reduce principal or income receipts from property described in item (1) because of a payment pursuant to Sections 62‑7‑924 and 62‑7‑925 to the extent that the will, the terms of the trust, or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent that the fiduciary recovers or expects to recover the payment from a third party. The net income and principal receipts from the property are determined by including all of the amounts the fiduciary receives or pays with respect to the property, whether those amounts accrued or became due before, on, or after the date of a decedent’s death or an income interest’s terminating event, and by making a reasonable provision for amounts that the fiduciary believes the estate or terminating income interest may become obligated to pay after the property is distributed.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Terminating income interests and successive income interests. A trust that provides for a single income beneficiary and an outright distribution of the remainder ends when the income interest ends. A more complex trust may have a number of income interests, either concurrent or successive, and the trust will not necessarily end when one of the income interests ends. For that reason, the Act speaks in terms of income interests ending and beginning rather than trusts ending and beginning. When an income interest in a trust ends, the trustee’s powers continue during the winding up period required to complete its administration. A terminating income interest is one that has ended but whose administration is not complete.

If two or more people are given the right to receive specified percentages or fractions of the income from a trust concurrently and one of the concurrent interests ends, e.g., when a beneficiary dies, the beneficiary’s income interest ends but the trust does not. Similarly, when a trust with only one income beneficiary ends upon the beneficiary’s death, the trust instrument may provide that part or all of the trust assets shall continue in trust for another income beneficiary. While it is common to think and speak of this (and even to characterize it in a trust instrument) as a “new” trust, it is a continuation of the original trust for a remainder beneficiary who has an income interest in the trust assets instead of the right to receive them outright. For purposes of this Act, this is a successive income interest in the same trust. The fact that a trust may or may not end when an income interest ends is not significant for purposes of this Act.

If the assets that are subject to a terminating income interest pass to another trust because the income beneficiary exercises a general power of appointment over the trust assets, the recipient trust would be a new trust; and if they pass to another trust because the beneficiary exercises a nongeneral power of appointment over the trust assets, the recipient trust might be a new trust in some States (see 5A Austin W. Scott & William F. Fratcher, The Law of Trusts Sec 640, at 483 (4th ed. 1989)); but for purposes of this Act a new trust created in these circumstances is also a successive income interest.

Gift of a pecuniary amount. Section 62‑7‑905(3) and (4) provide different rules for an outright gift of a pecuniary amount and a gift in trust of a pecuniary amount; this is the same approach used in Section 62‑7‑408(b)(2) of the 1963 SC Act.

Interest on pecuniary amounts. Section 62‑7‑905(3) provides that the beneficiary of an outright pecuniary amount is to receive the interest or other amount provided by applicable law if there is no provision in the will or the terms of the trust. Many States have no applicable law that provides for interest or some other amount to be paid on an outright pecuniary gift under an inter vivos trust; this section provides that in such a case the interest or other amount to be paid shall be the same as the interest or other amount required to be paid on testamentary pecuniary gifts. This provision is intended to accord gifts under inter vivos instruments the same treatment as testamentary gifts. The various state authorities that provide for the amount that a beneficiary of an outright pecuniary amount is entitled to receive are collected in Richard B. Covey, Marital Deduction and Credit Shelter Dispositions and the Use of Formula Provisions, App. B (4th ed. 1997).

Administration expenses and interest on death taxes. Under Section 62‑7‑905(2)(b) a fiduciary may pay administration expenses and interest on death taxes from either income or principal. An advantage of permitting the fiduciary to choose the source of the payment is that, if the fiduciary’s decision is consistent with the decision to deduct these expenses for income tax purposes or estate tax purposes, it eliminates the need to adjust between principal and income that may arise when, for example, an expense that is paid from principal is deducted for income tax purposes or an expense that is paid from income is deducted for estate tax purposes.

Interest on Estate Taxes. Under the 1963 Act, Section 62‑7‑418(5) charges interest on estate and inheritance taxes to principal. The 1931 Act has no provision. Section 62‑7‑925(3) of this Act provides that, except to the extent provided in Section 62‑7‑905(2)(b) or (c), all interest must be paid from income.

Library References

Trusts 140, 273, 276, 280, 282.

Wills 684.10.

Westlaw Topic Nos. 390, 409.

C.J.S. Trusts Sections 251, 254 to 262, 531, 539 to 550.

C.J.S. Wills Sections 1463, 1483 to 1484, 1488 to 1489, 1492 to 1496.

NOTES OF DECISIONS

In general 1

1. In general

The trial court properly ruled that any income earned during the administration of the deceased’s estate should be used to pay off the unpaid balance of the cash bequests as opposed to going to the residuary of the estate pursuant to former Section 62‑7‑408 where that ruling more closely effectuated the testator’s intent. (Decided under former law.) NationsBank of South Carolina v. Greenwood (S.C.App. 1996) 321 S.C. 386, 468 S.E.2d 658. Wills 728

Pursuant to former Section 62‑7‑408(2)(ii), the unpaid beneficiaries of the decedent’s estate were entitled to the income or interest earned on their undistributed shares beginning one year after the first appointment of a personal representative. (Decided under former law.) NationsBank of South Carolina v. Greenwood (S.C.App. 1996) 321 S.C. 386, 468 S.E.2d 658. Executors And Administrators 313

**SECTION 62‑7‑906.** Determination and distribution of net income.

(A) Each beneficiary described in Section 62‑7‑905(4) is entitled to receive a portion of the net income equal to his fractional interest in undistributed principal assets, using values as of the distribution date. If a fiduciary makes more than one distribution of assets to beneficiaries to whom this section applies, each beneficiary, including one who does not receive part of the distribution, is entitled, as of each distribution date, to the net income the fiduciary has received after the date of death or terminating event or earlier distribution date but has not distributed as of the current distribution date.

(B) In determining a beneficiary’s share of net income, the:

(1) beneficiary is entitled to receive a portion of the net income equal to his fractional interest in the undistributed principal assets immediately before the distribution date, including assets that later may be sold to meet principal obligations.

(2) fractional interest of the beneficiary in the undistributed principal assets must be calculated without regard to property specifically given to a beneficiary and property required to pay pecuniary amounts not in trust.

(3) fractional interest of the beneficiary in the undistributed principal assets must be calculated on the basis of the aggregate value of those assets as of the distribution date without reducing the value by any unpaid principal obligation; and

(4) distribution date for purposes of this section may be the date as of which the fiduciary calculates the value of the assets if that date is reasonably near the date on which assets are actually distributed.

(C) If a fiduciary does not distribute all of the collected but undistributed net income to each person as of a distribution date, the fiduciary shall maintain appropriate records showing the interest of each beneficiary in that net income.

(D) A trustee may apply the provisions of this section, to the extent that the trustee considers it appropriate, to net gain or loss realized after the date of death or terminating event or earlier distribution date from the disposition of a principal asset if this section applies to the income from the asset.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Relationship to Prior Acts. Section 62‑7‑906 retains the concept in Section 62‑7‑408(2) of the 1963 SC Act that the residuary legatees of estates are to receive net income earned during the period of administration on the basis of their proportionate interests in the undistributed assets when distributions are made. It changes the basis for determining their proportionate interests by using asset values as of a date reasonably near the time of distribution instead of inventory values; it extends the application of these rules to distributions from terminating trusts; and it extends these rules to gain or loss realized from the disposition of assets during administration, an omission in the 1962 Act that has been noted by several commentators. See, e.g., Richard B. Covey, Marital Deduction and Credit Shelter Dispositions and the Use of Formula Provisions 91 (4th ed. 1998); Thomas H. Cantrill, Fractional or Percentage Residuary Bequests: Allocation of Postmortem Income, Gain and Unrealized Appreciation, 10 Prob. Notes 322, 327 (1985).

Library References

Trusts 272, 280.

Wills 684.

Westlaw Topic Nos. 390, 409.

C.J.S. Trusts Sections 544 to 554.

C.J.S. Wills Sections 1463 to 1484, 1486 to 1496.

**SECTION 62‑7‑907.** Beginning and end of income interests.

(A) An income beneficiary is entitled to net income from the date on which the income interest begins. An income interest begins on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to a trust or successive income interest.

(B) An asset becomes subject to a trust on the date:

(1) it is transferred to the trust, in the case of an asset that is transferred to a trust during the transferor’s life;

(2) the testator dies, in the case of an asset that becomes subject to a trust by reason of a will, even if there is an intervening period of administration of the estate; or

(3) the individual dies, in the case of an asset that is transferred to a fiduciary by a third party because of the death of the individual.

(C) An asset becomes subject to a successive income interest on the day after the preceding income interest ends, as determined pursuant to subsection (D), even if there is an intervening period of administration to wind up the preceding income interest.

(D) An income interest ends on the day before an income beneficiary dies or another terminating event occurs or on the last day of a period during which there is no beneficiary to whom a trustee may distribute income.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Period during which there is no beneficiary. The purpose of the second part of subsection (D) is to provide that, at the end of a period during which there is no beneficiary to whom a trustee may distribute income, the trustee must apply the same apportionment rules that apply when a mandatory income interest ends. This provision would apply, for example, if a settlor creates a trust for grandchildren before any grandchildren are born. When the first grandchild is born, the period preceding the date of birth is treated as having ended, followed by a successive income interest, and the apportionment rules in Sections 62‑7‑908 and 909 apply accordingly if the terms of the trust do not contain different provisions.

Library References

Trusts 273.

Wills 683 to 686.

Westlaw Topic Nos. 390, 409.

C.J.S. Trusts Sections 542 to 550.

C.J.S. Wills Sections 1425, 1429, 1453, 1462 to 1484, 1486 to 1506.

**SECTION 62‑7‑908.** Allocation of income receipts and disbursements.

(A) A trustee shall allocate an income receipt or disbursement, other than one subject to Section 62‑7‑905(1), to principal if its due date occurs before a decedent dies in the case of an estate or before an income interest begins in the case of a trust or successive income interest.

(B) A trustee shall allocate an income receipt or disbursement to income if its due date occurs on or after the date on which a decedent dies or an income interest begins and it is a periodic due date. An income receipt or disbursement must be treated as accruing from day to day if its due date is not periodic or it has no due date. The portion of the receipt or disbursement accruing before the date on which a decedent dies or an income interest begins must be allocated to principal and the balance must be allocated to income.

(C) An item of income or an obligation is due on the date the payer is required to make a payment. If a payment date is not stated, there is no due date for the purposes of this part. Distributions to shareholders or other owners from an entity subject to Section 62‑7‑910 are considered due on the date fixed by the entity for determining who is entitled to receive the distribution or, if no date is fixed, on the declaration date for the distribution. A due date is periodic for receipts or disbursements that must be paid at regular intervals under a lease or an obligation to pay interest or if an entity customarily makes distributions at regular intervals.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Prior Acts. Professor Bogert stated that “Section 4 of the [1962] Act makes a change with respect to the apportionment of the income of trust property not due until after the trust began but which accrued in part before the commencement of the trust. It treats such income as to be credited entirely to the income account in the case of a living trust, but to be apportioned between capital and income in the case of a testamentary trust. The [1931] Act apportions such income in the case of both types of trusts, except in the case of corporate dividends.” George G. Bogert, The Revised Uniform Principal and Income Act, 38 Notre Dame Law. 50, 52 (1962). The 1962 Act also provided that an asset passing to an inter vivos trust by a bequest in the settlor’s will is governed by the rule that applies to a testamentary trust, so that different rules apply to assets passing to an inter vivos trust depending upon whether they were transferred to the trust during the settlor’s life or by his will.

Having several different rules that apply to similar transactions is confusing. In order to simplify administration, Section 62‑7‑908 of this Act applies the same rule to inter vivos trusts (revocable and irrevocable), testamentary trusts, and assets that become subject to an inter vivos trust by a testamentary bequest.

Periodic payments. Under Section 62‑7‑908 a periodic payment is principal if it is due but unpaid before a decedent dies or before an asset becomes subject to a trust, but the next payment is allocated entirely to income and is not apportioned. Thus, periodic receipts such as rents, dividends, interest, and annuities, and disbursements such as the interest portion of a mortgage payment, are not apportioned. This is the original common law rule. Edwin A. Howes, Jr., The American Law Relating to Income and Principal 70 (1905). In trusts in which a surviving spouse is dependent upon a regular flow of cash from the decedent’s securities portfolio, this rule will help to maintain payments to the spouse at the same level as before the settlor’s death. Under the 1962 Act, the pre‑death portion of the first periodic payment due after death was apportioned to principal in the case of a testamentary trust or securities bequeathed by will to an inter vivos trust.

Nonperiodic payments. Under the second sentence of Section 62‑7‑908(B) interest on an obligation that does not provide a due date for the interest payment, such as interest on an income tax refund, would be apportioned to principal to the extent it accrues before a person dies or an income interest begins unless the obligation is specifically given to a devisee or remainder beneficiary, in which case all of the accrued interest passes under Section 62‑7‑905(1) to the person who receives the obligation. The same rule applies to interest on an obligation that has a due date but does not provide for periodic payments. If there is no stated interest on the obligation, such as a zero coupon bond, and the proceeds from the obligation are received more than one year after it is purchased or acquired by the trustee, the entire amount received is principal under Section 62‑7‑915.

Library References

Trusts 272, 274.

Wills 684.3, 684.5.

Westlaw Topic Nos. 390, 409.

C.J.S. Trusts Sections 391 to 400, 510 to 511, 551 to 554.

C.J.S. Wills Sections 1463, 1465 to 1479.

**SECTION 62‑7‑909.** Undistributed income.

(A) In this section, “undistributed income” means net income received before the date on which an income interest ends. The term does not include an item of income or expense that is due or accrued or net income that has been added or must be added to principal under the terms of the trust.

(B) When a mandatory income interest ends, the trustee shall pay to a mandatory income beneficiary who survives that date, or the estate of a deceased mandatory income beneficiary whose death causes the interest to end, the beneficiary’s share of the undistributed income that is not disposed of under the terms of the trust, unless the beneficiary has an unqualified power to revoke more than five percent of the trust immediately before the income interest ends. In that case, the undistributed income from the portion of the trust that may be revoked must be added to principal.

(C) When the obligation of a trustee to pay a fixed annuity or a fixed fraction of the value of the trust assets ends, the trustee shall prorate the final payment if, and to the extent, required by applicable law to accomplish a purpose of the trust or its settlor relating to income, gift, estate, or other tax requirements.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Prior Acts. Both the 1931 Act (Section 4) and the 1962 Act (Section 4(d)) provided that a deceased income beneficiary’s estate is entitled to the undistributed income. The ULC Drafting Committee for the 1997 Act concluded that this is probably not what most settlors would want, and that, with respect to undistributed income, most settlors would favor the income beneficiary first, the remainder beneficiaries second, and the income beneficiary’s heirs last, if at all. However, it decided not to eliminate this provision to avoid causing disputes about whether the trustee should have distributed collected cash before the income beneficiary died.

Accrued periodic payments. Under the prior Acts, an income beneficiary or his estate is entitled to receive a portion of any payments, other than dividends, that are due or that have accrued when the income interest terminates. The last sentence of subsection (A) changes that rule by providing that such items are not included in undistributed income. The items affected include periodic payments of interest, rent, and dividends, as well as items of income that accrue over a longer period of time; the rule also applies to expenses that are due or accrued.

Example—Accrued periodic payments. The rules in Sections 62‑7‑908 and 909 work in the following manner: Assume that a periodic payment of rent that is due on July 20 has not been paid when an income interest ends on July 30; the successive income interest begins on July 31, and the rent payment that was due on July 20 is paid on August 3. Under Section 62‑7‑908(A), the July 20 payment is added to the principal of the successive income interest when received. Under Section 62‑7‑909(B), the entire periodic payment of rent that is due on August 20 is income when received by the successive income interest. Under Section 62‑7‑909, neither the income beneficiary of the terminated income interest nor the beneficiary’s estate is entitled to any part of either the July 20 or the August 20 payments because neither one was received before the income interest ended on July 30. The same principles apply to expenses of the trust.

Beneficiary with an unqualified power to revoke. The requirement in subsection (B) to pay undistributed income to a mandatory income beneficiary or his estate does not apply to the extent the beneficiary has an unqualified power to revoke more than five percent of the trust immediately before the income interest ends. Without this exception, subsection (B) would apply to a revocable living trust whose settlor is the mandatory income beneficiary during her lifetime, even if her will provides that all of the assets in the probate estate are to be distributed to the trust.

If a trust permits the beneficiary to withdraw all or a part of the trust principal after attaining a specified age and the beneficiary attains that age but fails to withdraw all of the principal that he is permitted to withdraw, a trustee is not required to pay him or his estate the undistributed income attributable to the portion of the principal that he left in the trust. The assumption underlying this rule is that the beneficiary has either provided for the disposition of the trust assets (including the undistributed income) by exercising a power of appointment that he has been given or has not withdrawn the assets because he is willing to have the principal and undistributed income be distributed under the terms of the trust. If the beneficiary has the power to withdraw 25% of the trust principal, the trustee must pay to him or his estate the undistributed income from the 75% that he cannot withdraw.

Library References

Trusts 274, 280, 282.

Wills 684.2, 687.

Westlaw Topic Nos. 390, 409.

C.J.S. Trusts Sections 391 to 400, 510 to 511, 531, 544 to 550.

C.J.S. Wills Sections 1463 to 1464, 1480 to 1482, 1486 to 1487, 1507 to 1512.

**SECTION 62‑7‑910.** Allocation of receipts from an entity to principal or income.

(A) In this section, “entity” means a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or other organization in which a trustee has an interest other than a trust or estate subject to Section 62‑7‑911, a business or activity to which Section 62‑7‑912 applies, or an asset‑backed security to which Section 62‑7‑924 applies.

(B) Except as otherwise provided in this section, a trustee shall allocate to income money received from an entity.

(C) A trustee shall allocate the following receipts from an entity to principal:

(1) property other than money;

(2) money received in one distribution or a series of related distributions in exchange for part or all of a trust’s interest in the entity;

(3) money received in total or partial liquidation of the entity; and

(4) money received from an entity that is a regulated investment company or a real estate investment trust if the money distributed is a capital gain dividend for federal income tax purposes.

(D) Money is received in partial liquidation:

(1) to the extent that the entity, at or near the time of a distribution, indicates that it is a distribution in partial liquidation; or

(2) if the total amount of money and property received in a distribution or series of related distributions is greater than twenty percent of the entity’s gross assets of the entity, as shown by the year‑end financial statements immediately preceding the initial receipt.

(E) Money is not received in partial liquidation, nor may it be taken into account pursuant to subsection (D)(2), to the extent that it does not exceed the amount of income tax that a trustee or beneficiary must pay on taxable income of the entity that distributes the money.

(F) A trustee may rely upon a statement made by an entity about the source or character of a distribution if the statement is made at or near the time of distribution by the board of directors or other person or group of persons authorized to exercise powers to pay money or transfer property comparable to those of a corporation’s board of directors.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Entities to which Section 62‑7‑910 applies. The reference to partnerships in Section 62‑7‑910(A) is intended to include all forms of partnerships, including limited partnerships, limited liability partnerships, and variants that have slightly different names and characteristics from State to State. The section does not apply, however, to receipts from an interest in property that a trust owns as a tenant in common with one or more co‑owners, nor would it apply to an interest in a joint venture if, under applicable law, the trust’s interest is regarded as that of a tenant in common.

Capital gain dividends. If a capital gain dividend does not include any net short‑term capital gain, cash received by a trust because of a net short‑term capital gain is income under this Act.

Reinvested dividends. If a trustee elects (or continues an election made by its predecessor) to reinvest dividends in shares of stock of a distributing corporation or fund, whether evidenced by new certificates or entries on the books of the distributing entity, the new shares would be principal. Making or continuing such an election would be equivalent to deciding under Section 62‑7‑904 to transfer income to principal in order to comply with Section 62‑7‑903(B). However, if the trustee makes or continues the election for a reason other than to comply with Section 62‑7‑903(B), e.g., to make an investment without incurring brokerage commissions, the trustee should transfer cash from principal to income in an amount equal to the reinvested dividends.

Distribution of property. The 1963 SC Act describes a number of types of property that would be principal if distributed by a corporation. This becomes unwieldy in a section that applies to both corporations and all other entities. By stating that principal includes the distribution of any property other than money, Section 62‑7‑910 embraces all of the items enumerated in the 1963 SC Act as well as any other form of nonmonetary distribution not specifically mentioned in that Act.

Partial liquidations. Under subsection (D)(1) any distribution designated by the entity as a partial liquidating distribution is principal regardless of the percentage of total assets that it represents. If a distribution exceeds twenty percent of the entity’s gross assets, the entire distribution is a partial liquidation under subsection (D)(2) whether or not the entity describes it as a partial liquidation. In determining whether a distribution is greater than twenty percent of the gross assets, the portion of the distribution that does not exceed the amount of income tax that the trustee or a beneficiary must pay on the entity’s taxable income is ignored.

Other large distributions. A cash distribution may be quite large (for example, more than ten percent but not more than twenty percent of the entity’s gross assets) and have characteristics that suggest it should be treated as principal rather than income. For example, an entity may have received cash from a source other than the conduct of its normal business operations because it sold an investment asset; or because it sold a business asset other than one held for sale to customers in the normal course of its business and did not replace it; or it borrowed a large sum of money and secured the repayment of the loan with a substantial asset; or a principal source of its cash was from assets such as mineral interests, ninety percent of which would have been allocated to principal if the trust had owned the assets directly. In such a case, the trustee, after considering the total return from the portfolio as a whole and the income component of that return, may decide to exercise the power under Section 62‑7‑904(A) to make an adjustment between income and principal, subject to the limitations in Section 62‑7‑904(C).

Library References

Trusts 272.

Wills 684.

Westlaw Topic Nos. 390, 409.

C.J.S. Trusts Sections 551 to 554.

C.J.S. Wills Sections 1463 to 1484, 1486 to 1496.

**SECTION 62‑7‑911.** Allocations of income and principal received from a trust or an estate.

A trustee shall allocate to income an amount received as a distribution of income from a trust or an estate in which the trust has an interest other than a purchased interest, and shall allocate to principal an amount received as a distribution of principal from such a trust or estate. If a trustee purchases an interest in a trust that is an investment entity, or a decedent or donor transfers an interest in such a trust to a trustee, Section 62‑7‑910 or 62‑7‑924 applies to a receipt from the trust.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Terms of the distributing trust or estate. Under Section 62‑7‑903(A) a trustee is to allocate receipts in accordance with the terms of the recipient trust or, if there is no provision, in accordance with this Act. However, in determining whether a distribution from another trust or an estate is income or principal, the trustee should also determine what the terms of the distributing trust or estate say about the distribution—for example, whether they direct that the distribution, even though made from the income of the distributing trust or estate, is to be added to principal of the recipient trust. Such a provision should override the terms of this Act, but if the terms of the recipient trust contain a provision requiring such a distribution to be allocated to income, the trustee may have to obtain a judicial resolution of the conflict between the terms of the two documents.

Investment trusts. An investment entity to which the second sentence of this Section 62‑7‑911 applies includes a mutual fund, a common trust fund, a business trust or other entity organized as a trust for the purpose of receiving capital contributed by investors, investing that capital, and managing investment assets, including asset‑backed security arrangements to which Section 62‑7‑924 applies. See John H. Langbein, The Secret Life of the Trust: The Trust as an Instrument of Commerce, 107 Yale L.J. 165 (1997).

Library References

Trusts 272.

Wills 684.

Westlaw Topic Nos. 390, 409.

C.J.S. Trusts Sections 551 to 554.

C.J.S. Wills Sections 1463 to 1484, 1486 to 1496.

**SECTION 62‑7‑912.** Separate accounting for a business activity.

(A) If a trustee who conducts a business or other activity determines that it is in the best interest of all the beneficiaries to account separately for the business or activity instead of accounting for it as part of the general accounting records of the trust, the trustee may maintain separate accounting records for its transactions, whether or not its assets are segregated from other trust assets.

(B) A trustee who accounts separately for a business or other activity may determine the extent to which its net cash receipts must be retained for working capital, the acquisition or replacement of fixed assets, and other reasonably foreseeable needs of the business or activity, and the extent to which the remaining net cash receipts are accounted for as principal or income in the trust’s general accounting records. If a trustee sells assets of the business or other activity, other than in the ordinary course of the business or activity, the trustee shall account for the net amount received as principal in the general accounting records of the trust to the extent the trustee determines that the amount received is no longer required in the conduct of the business.

(C) Activities for which a trustee may maintain separate accounting records include:

(1) retail, manufacturing, service, and other traditional business activities;

(2) farming;

(3) raising and selling livestock and other animals;

(4) management of rental properties;

(5) extraction of minerals and other natural resources;

(6) timber operations; and

(7) activities subject to Section 62‑7‑923.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Purpose and scope. The provisions in Section 62‑7‑912 are intended to give greater flexibility to a trustee who operates a business or other activity in proprietorship form rather than in a wholly‑owned corporation (or, where permitted by state law, a single‑member limited liability company), and to facilitate the trustee’s ability to decide the extent to which the net receipts from the activity should be allocated to income, just as the board of directors of a corporation owned entirely by the trust would decide the amount of the annual dividend to be paid to the trust. It permits a trustee to account for farming or livestock operations, rental properties, oil and gas properties, timber operations, and activities in derivatives and options as though they were held by a separate entity. It is not intended, however, to permit a trustee to account separately for a traditional securities portfolio to avoid the provisions of this Act that apply to such securities.

Section 62‑7‑912 permits the trustee to account separately for each business or activity for which the trustee determines separate accounting is appropriate. A trustee with a computerized accounting system may account for these activities in a “subtrust”; an individual trustee may continue to use the business and record‑keeping methods employed by the decedent or transferor who may have conducted the business under an assumed name. The intent of this section is to give the trustee broad authority to select business record‑keeping methods that best suit the activity in which the trustee is engaged.

If a fiduciary liquidates a sole proprietorship or other activity to which Section 62‑7‑912 applies, the proceeds would be added to principal, even though derived from the liquidation of accounts receivable, because the proceeds would no longer be needed in the conduct of the business. If the liquidation occurs during probate or during an income interest’s winding up period, none of the proceeds would be income for purposes of Section 62‑7‑905.

Separate accounts. A trustee may or may not maintain separate bank accounts for business activities that are accounted for under Section 62‑7‑912. A professional trustee may decide not to maintain separate bank accounts, but an individual trustee, especially one who has continued a decedent’s business practices, may continue the same banking arrangements that were used during the decedent’s lifetime. In either case, the trustee is authorized to decide to what extent cash is to be retained as part of the business assets and to what extent it is to be transferred to the trust’s general accounts, either as income or principal.

Library References

Trusts 272.1, 295.

Wills 684.3(1).

Westlaw Topic Nos. 390, 409.

C.J.S. Trusts Sections 551, 554, 600 to 601.

C.J.S. Wills Sections 1463, 1465 to 1479.

**SECTION 62‑7‑913.** Allocations to principal.

A trustee shall allocate to principal:

(1) to the extent not allocated to income pursuant to this part, assets received from a transferor during his lifetime, a decedent’s estate, a trust with a terminating income interest, or a payer under a contract naming the trust or its trustee as beneficiary;

(2) money or other property received from the sale, exchange, liquidation, or change in form of a principal asset, including realized profit;

(3) amounts recovered from third parties to reimburse the trust because of disbursements described in Section 62‑7‑926(A)(7) or for other reasons to the extent not based on the loss of income;

(4) proceeds of property taken by eminent domain, but a separate award made for the loss of income with respect to an accounting period during which a current income beneficiary had a mandatory income interest is income;

(5) net income received in an accounting period during which there is no beneficiary to whom a trustee may or must distribute income; and

(6) other receipts as provided in Sections 62‑7‑917 through 62‑7‑924.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Eminent domain awards. Even though the award in an eminent domain proceeding may include an amount for the loss of future rent on a lease, if that amount is not separately stated, the entire award is principal. The rule is the same in the 1931 and 1962 Acts and in the 1963 SC Act (Section 62‑7‑406(2)).

Library References

Trusts 272.1, 272.2.

Wills 684.3.

Westlaw Topic Nos. 390, 409.

C.J.S. Trusts Sections 551, 553 to 554.

C.J.S. Wills Sections 1463, 1465 to 1479.

**SECTION 62‑7‑914.** Accounting for receipts from rental property.

To the extent that a trustee accounts for receipts from rental property pursuant to this section, the trustee shall allocate to income an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease. An amount received as a refundable deposit, including a security deposit or a deposit applied as rent for future periods, must be added to principal and held subject to the terms of the lease and is not available for distribution to a beneficiary until the trustee’s contractual obligations have been satisfied with respect to that amount.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Application of Section 62‑7‑912. This section applies to the extent that the trustee does not account separately under Section 62‑7‑912 for the management of rental properties owned by the trust.

Receipts that are capital in nature. A portion of the payment under a lease may be a reimbursement of principal expenditures for improvements to the leased property that is characterized as rent for purposes of invoking contractual or statutory remedies for nonpayment. If the trustee is accounting for rental income under Section 62‑7‑914, a transfer from income to reimburse principal may be appropriate under Section 62‑7‑904 to the extent that some of the “rent” is really a reimbursement for improvements. This set of facts could also be a relevant factor for a trustee to consider under Section 62‑7‑904 (B) in deciding whether and to what extent to make an adjustment between principal and income under Section 62‑7‑904(A) after considering the return from the portfolio as a whole.

Library References

Trusts 272.1.

Wills 684.3(2).

Westlaw Topic Nos. 390, 409.

C.J.S. Trusts Sections 551, 554.

C.J.S. Wills Sections 1463, 1465 to 1466.

**SECTION 62‑7‑915.** Allocation of interest as income; allocation of proceeds from disposition of an obligation as principal; exceptions.

(A) An amount received as interest, whether determined at a fixed, variable, or floating rate, on an obligation to pay money to the trustee, including an amount received as consideration for prepaying principal, must be allocated to income without provision for amortization of premium.

(B) A trustee shall allocate to principal an amount received from the sale, redemption, or other disposition of an obligation to pay money to the trustee more than one year after it is purchased or acquired by the trustee, including an obligation whose purchase price or value when it is acquired is less than its value at maturity. If the obligation matures within one year after it is purchased or acquired by the trustee, an amount received in excess of its purchase price or its value when acquired by the trust must be allocated to income.

(C) This section does not apply to an obligation subject to Section 62‑7‑918, 62‑7‑919, 62‑7‑920, 62‑7‑921, or 62‑7‑924.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Variable or floating interest rates. The reference in subsection (A) to variable or floating interest rate obligations is intended to clarify that, even though an obligation’s interest rate may change from time to time based upon changes in an index or other market indicator, an obligation to pay money containing a variable or floating rate provision is subject to this section and is not to be treated as a derivative financial instrument under Section 62‑7‑923.

Discount obligations. Subsection (B) applies to all obligations acquired at a discount, including short‑term obligations such as U.S. Treasury Bills, long‑term obligations such as U.S. Savings Bonds, zero‑coupon bonds, and discount bonds that pay interest during part, but not all, of the period before maturity. Under subsection (B) the entire increase in value of these obligations is principal when the trustee receives the proceeds from the disposition unless the obligation, when acquired, has a maturity of less than one year. In order to have one rule that applies to all discount obligations, this Act eliminates the provision in the 1962 Act for the payment from principal of an amount equal to the increase in the value of U.S. Series E bonds.

Subsection (B) also applies to inflation‑indexed bonds—any increase in principal due to inflation after issuance is principal upon redemption if the bond matures more than one year after the trustee acquires it; if it matures within one year, all of the increase, including any attributable to an inflation adjustment, is income.

Effect of Section 62‑7‑904. In deciding whether and to what extent to exercise the power to adjust between principal and income granted by Section 62‑7‑904(A) a relevant factor for the trustee to consider is the effect on the portfolio as a whole of having a portion of the assets invested in bonds that do not pay interest currently.

Library References

Trusts 272.

Wills 684.3.

Westlaw Topic Nos. 390, 409.

C.J.S. Trusts Sections 551 to 554.

C.J.S. Wills Sections 1463, 1465 to 1479.

**SECTION 62‑7‑916.** Allocation of proceeds of insurance contracts; exception.

(A) Except as otherwise provided in subsection (B), a trustee shall allocate to principal the proceeds of a life insurance policy or other contract in which the trust or its trustee is named as beneficiary, including a contract that insures the trust or its trustee against loss for damage to, destruction of, or loss of title to a trust asset. The trustee shall allocate dividends on an insurance policy to income if the premiums on the policy are paid from income, and to principal if the premiums are paid from principal.

(B) A trustee shall allocate to income proceeds of a contract that insures the trustee against loss of occupancy or other use by an income beneficiary, loss of income, or, subject to Section 62‑7‑912, loss of profits from a business.

(C) This section does not apply to a contract subject to Section 62‑7‑918.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

Library References

Trusts 272.1.

Wills 684.3(2).

Westlaw Topic Nos. 390, 409.

C.J.S. Trusts Sections 551, 554.

C.J.S. Wills Sections 1463, 1465 to 1466.

**SECTION 62‑7‑917.** Insubstantial allocations.

If a trustee determines that an allocation between principal and income required by Section 62‑7‑918, 62‑7‑919, 62‑7‑920, 62‑7‑921, or 62‑7‑924 is insubstantial, the trustee may allocate the entire amount to principal unless one of the circumstances provided in Section 62‑7‑904(C) applies to the allocation. This power may be exercised by a cotrustee in the circumstances provided in Section 62‑7‑904(D) and may be released for the reasons and in the manner provided in Section 62‑7‑904(E). An allocation is presumed to be insubstantial if:

(1) the amount of the allocation increases or decreases net income in an accounting period, as determined before the allocation, by less than ten percent; or

(2) the value of the asset producing the receipt for which the allocation is made is less than ten percent of the total value of the assets of the trust at the beginning of the accounting period.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section is intended to relieve a trustee from making relatively small allocations while preserving the trustee’s right to do so if an allocation is large in terms of absolute dollars.

For example, assume that a trust’s assets, which include a working interest in an oil well, have a value of $1,000,000; the net income from the assets other than the working interest is $40,000; and the net receipts from the working interest are $400. The trustee may allocate all of the net receipts from the working interest to principal instead of allocating ten percent or $40, to income under Section 62‑7‑920. If the net receipts from the working interest are $35,000, so that the amount allocated to income under Section 62‑7‑920 would be $3,500, the trustee may decide that this amount is sufficiently significant to the income beneficiary that the allocation provided for by Section 62‑7‑920 should be made, even though the trustee is still permitted under Section 62‑7‑917 to allocate all of the net receipts to principal because the $3,500 would increase the net income of $40,000, as determined before making an allocation under Section 62‑7‑920 by less than ten percent. Section 62‑7‑917 will also relieve a trustee from having to allocate net receipts from the sale of trees in a small woodlot between principal and income.

While the allocation to principal of small amounts under this section should not be a cause for concern for tax purposes, allocations are not permitted under this section in circumstances described in Section 62‑7‑904 (C) to eliminate claims that the power in this section has adverse tax consequences.

Library References

Trusts 272.

Wills 684.3.

Westlaw Topic Nos. 390, 409.

C.J.S. Trusts Sections 551 to 554.

C.J.S. Wills Sections 1463, 1465 to 1479.

**SECTION 62‑7‑918.** Allocation of payments; interest, dividends, or payments made instead of interest or dividends; allocation of payments made from separate fund; exception.

(A) In this section:

(1) “Payment” means a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments. The term includes a payment made in money or property from the payer’s general assets or from a separate fund created by the payer. For purposes of subsections (D), (E), (F), and (G), the term also includes a payment from a separate fund, regardless of the reason for the payment.

(2) “Separate fund” includes a private or commercial annuity, an individual retirement account, and a pension, profit‑sharing, stock‑bonus, or stock‑ownership plan.

(B) To the extent that a payment is characterized as interest, a dividend, or a payment made instead of interest or a dividend, a trustee shall allocate the payment to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment.

(C) If part of a payment is not characterized as interest, a dividend, or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate to income ten percent of the part that is required to be made during the accounting period and the balance to principal. If a part of a payment is not required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of this subsection, a payment is not “required to be made” to the extent that it is made because the trustee exercises a right of withdrawal.

(D) Except as otherwise provided in subsection (E), subsections (F) and (G) apply, and subsections (B) and (C) do not apply, in determining the allocation of a payment made from a separate fund to:

(1) a trust to which an election to qualify for a marital deduction under Section 2056(b)(7) of the Internal Revenue Code of 1986, as amended, has been made; or

(2) a trust that qualifies for the marital deduction under Section 2056(b)(5) of the Internal Revenue Code of 1986, as amended.

(E) Subsections (D), (F), and (G) do not apply if and to the extent that the series of payments would, without the application of subsection (D), qualify for the marital deduction under Section 2056(b)(7)(C) of the Internal Revenue Code of 1986, as amended.

(F) A trustee shall determine the internal income of each separate fund for the accounting period as if the separate fund were a trust subject to this act. Upon request of the surviving spouse, the trustee shall demand that the person administering the separate fund distribute the internal income to the trust. The trustee shall allocate a payment from the separate fund to income to the extent of the internal income of the separate fund and distribute that amount to the surviving spouse. The trustee shall allocate the balance of the payment to principal. Upon request of the surviving spouse, the trustee shall allocate principal to income to the extent the internal income of the separate fund exceeds payments made from the separate fund to the trust during the accounting period.

(G) If a trustee cannot determine the internal income of a separate fund but can determine the value of the separate fund, the internal income of the separate fund is deemed to equal four percent of the fund’s value, according to the most recent statement of value preceding the beginning of the accounting period. If the trustee can determine neither the internal income of the separate fund nor the fund’s value, the internal income of the fund is deemed to equal the product of the interest rate and the present value of the expected future payments, as determined under Section 7520 of the Internal Revenue Code of 1986, as amended, for the month preceding the accounting period for which the computation is made.

(H) This section does not apply to payments subject to Section 62‑7‑919.

HISTORY: 2005 Act No. 66, Section 1; 2012 Act No. 204, Section 1.A, eff June 7, 2012; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Scope. Section 62‑7‑918 applies to amounts received under contractual arrangements that provide for payments to a third party beneficiary as a result of services rendered or property transferred to the payer. While the right to receive such payments is a liquidating asset of the kind described in Section 62‑7‑919 i.e., “an asset whose value will diminish or terminate because the asset is expected to produce receipts for a period of limited duration,” these payment rights are covered separately in Section 62‑7‑918 because of their special characteristics.

Section 62‑7‑918 applies to receipts from all forms of annuities and deferred compensation arrangements, whether the payment will be received by the trust in a lump sum or in installments over a period of years. It applies to bonuses that may be received over two or three years and payments that may last for much longer periods, including payments from an individual retirement account (IRA), deferred compensation plan (whether qualified or not qualified for special federal income tax treatment), and insurance renewal commissions. It applies to a retirement plan to which the settlor has made contributions, just as it applies to an annuity policy that the settlor may have purchased individually, and it applies to variable annuities, deferred annuities, annuities issued by commercial insurance companies, and “private annuities” arising from the sale of property to another individual or entity in exchange for payments that are to be made for the life of one or more individuals. The section applies whether the payments begin when the payment right becomes subject to the trust or are deferred until a future date, and it applies whether payments are made in cash or in kind, such as employer stock (in‑kind payments usually will be made in a single distribution that will be allocated to principal under the second sentence of subsection (C).

Prior Acts. Under Section 12 of the 1962 Act and Section 62‑7‑414 of the 1963 SC Act, receipts from “rights to receive payments on a contract for deferred compensation” are allocated to income each year in an amount “not in excess of 5% per year” of the property’s inventory value. While “not in excess of 5%” suggests that the annual allocation may range from zero to five percent of the inventory value, in practice the rule is usually treated as prescribing a five percent allocation. The inventory value is usually the present value of all the future payments, and since the inventory value is determined as of the date on which the payment right becomes subject to the trust, the inventory value, and thus the amount of the annual income allocation, depends significantly on the applicable interest rate on the decedent’s date of death. That rate may be much higher or lower than the average long‑term interest rate. The amount determined under the five percent formula tends to become fixed and remain unchanged even though the amount received by the trust increases or decreases.

Allocations Under Section 62‑7‑918(B). Section 62‑7‑918(B) applies to plans whose terms characterize payments made under the plan as dividends, interest, or payments in lieu of dividends or interest. For example, some deferred compensation plans that hold debt obligations or stock of the plan’s sponsor in an account for future delivery to the person rendering the services provide for the annual payment to that person of dividends received on the stock or interest received on the debt obligations. Other plans provide that the account of the person rendering the services shall be credited with “phantom” shares of stock and require an annual payment that is equivalent to the dividends that would be received on that number of shares if they were actually issued; or a plan may entitle the person rendering the services to receive a fixed dollar amount in the future and provide for the annual payment of interest on the deferred amount during the period prior to its payment. Under Section 62‑7‑918(B) payments of dividends, interest or payments in lieu of dividends or interest under plans of this type are allocated to income; all other payments received under these plans are allocated to principal.

Section 62‑7‑918(B) does not apply to an IRA or an arrangement with payment provisions similar to an IRA. IRAs and similar arrangements are subject to the provisions in Section 62‑7‑918(C).

Allocations Under Section 62‑7‑918(C). The focus of Section 62‑7‑918, for purposes of allocating payments received by a trust to or between principal and income, is on the payment right rather than on assets that may be held in a fund from which the payments are made. Thus, if an IRA holds a portfolio of marketable stocks and bonds, the amount received by the IRA as dividends and interest is not taken into account in determining the principal and income allocation except to the extent that the Internal Revenue Service may require them to be taken into account when the payment is received by a trust that qualifies for the estate tax marital deduction (a situation that is provided for in Section 62‑7‑918(D)). An IRA is subject to federal income tax rules that require payments to begin by a particular date and be made over a specific number of years or a period measured by the lives of one or more persons. The payment right of a trust that is named as a beneficiary of an IRA is not a right to receive particular items that are paid to the IRA, but is instead the right to receive an amount determined by dividing the value of the IRA by the remaining number of years in the payment period. This payment right is similar to the right to receive a unitrust amount, which is normally expressed as an amount equal to a percentage of the value of the unitrust assets without regard to dividends or interest that may be received by the unitrust.

An amount received from an IRA or a plan with a payment provision similar to that of an IRA is allocated under Section 62‑7‑918(C) which differentiates between payments that are required to be made and all other payments. To the extent that a payment is required to be made (either under federal income tax rules or, in the case of a plan that is not subject to those rules, under the terms of the plan), ten percent of the amount received is allocated to income and the balance is allocated to principal. All other payments are allocated to principal because they represent a change in the form of a principal asset; Section 62‑7‑918 follows the rule in Section 62‑7‑913(2) which provides that money or property received from a change in the form of a principal asset be allocated to principal.

Section 62‑7‑918(C) produces an allocation to income that is similar to the allocation under the 1962 Act formula and the 1963 SC Act formula if the annual payments are the same throughout the payment period, and it is simpler to administer. The amount allocated to income under Section 62‑7‑918 is not dependent upon the interest rate that is used for valuation purposes when the decedent dies, and if the payments received by the trust increase or decrease from year to year because the fund from which the payment is made increases or decreases in value, the amount allocated to income will also increase or decrease.

Marital Deduction Requirements. When an IRA or other retirement arrangement (a “plan”) is payable to a marital deduction trust, the IRS treats the plan as a separate property interest that itself must qualify for the marital deduction. IRS Revenue Ruling 2006‑26 said that, as written, the prior uniform act version of Section 62‑7‑918 does not cause a trust to qualify for the IRS’ safe harbors. Revenue Ruling 2006‑26 was limited in scope to certain situations involving IRAs and defined contribution retirement plans. Without necessarily agreeing with the IRS’ position in that ruling, the revision to this section is designed to satisfy the IRS’ safe harbor and to address concerns that might be raised for similar assets. No IRS pronouncements have addressed the scope of Code Section 2056(b)(7)(C).

Subsection (F) requires the trustee to demand certain distributions if the surviving spouse so requests. The safe harbor of Revenue Ruling 2006‑26 requires that the surviving spouse be separately entitled to demand the fund’s income (without regard to the income from the trust’s other assets) and the income from the other assets (without regard to the fund’s income). In any event, the surviving spouse is not required to demand that the trustee distribute all of the fund’s income from the fund or from other trust assets. Treas. Reg. Section 20.2056(b)‑5(f)(8).

Subsection (F) also recognizes that the trustee might not control the payments that the trustee receives and provides a remedy to the surviving spouse if the distributions under subsection (d)(1) are insufficient.

Subsection (G) addresses situations where, due to lack of information provided by the fund’s administrator, the trustee is unable to determine the fund’s actual income. The bracketed language is the range approved for unitrust payments by Treas. Reg. Section 1.643(b)‑1. In determining the value for purposes of applying the unitrust percentage, the trustee would seek to obtain the value of the assets as of the most recent statement of value immediately preceding the beginning of the year. For example, suppose a trust’s accounting period is January 1 through December 31. If a retirement plan administrator furnishes information annually each September 30 and declines to provide information as of December 31, then the trustee may rely on the September 30 value to determine the distribution for the following year. For funds whose values are not readily available, subsection (G) relies on Code Section 7520 valuation methods because many funds described in Section 62‑7‑918 are annuities, and one consistent set of valuation principles should apply whether or not the fund is, in fact, an annuity.

Application of Section 62‑7‑904. Section 62‑7‑904(A) of this act gives a trustee who is acting under the prudent investor rule the power to adjust from principal to income if, considering the portfolio as a whole and not just receipts from deferred compensation, the trustee determines that an adjustment is necessary. See Example (5) in the comment following Section 62‑7‑904.

CODE COMMISSIONER’S COMMENT

For the effective dates and applicability of this section, see Act 204 of 2012.

Editor’s Note

2012 Act No. 204, Section 1.B., provides as follows:

“B. Section 62‑7‑918 of the 1976 Code, as amended in subsection (A) of this section, applies to a trust described in Section 62‑7‑918(D) on and after the following dates:

“(1) if the trust is not funded as of the effective date of this act, the date of the decedent’s death;

“(2) if the trust is initially funded in the calendar year beginning January 1, 2011, the date of the decedent’s death;

“(3) if the trust is not described in subsections (1) or (2) of this section, January 1, 2011.”

Effect of Amendment

The 2012 amendment rewrote the section.

Library References

Trusts 272.

Wills 684.3.

Westlaw Topic Nos. 390, 409.

C.J.S. Trusts Sections 551 to 554.

C.J.S. Wills Sections 1463, 1465 to 1479.

**SECTION 62‑7‑919.** Liquidating assets.

(A) In this section, “liquidating asset” means an asset whose value diminishes or terminates because the asset is expected to produce receipts for a period of limited duration. The term includes a leasehold, patent, copyright, royalty right, and right to receive payments during a period of more than one year under an arrangement that does not provide for the payment of interest on the unpaid balance. The term does not include a payment subject to Section 62‑7‑918, resources subject to Section 62‑7‑920, timber subject to Section 62‑7‑921, an activity subject to Section 62‑7‑923, an asset subject to Section 62‑7‑924, or any asset for which the trustee establishes a reserve for depreciation pursuant to Section 62‑7‑927.

(B) A trustee shall allocate to income ten percent of the receipts from a liquidating asset and the balance to principal.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Prior Acts. Section 11 of the 1962 Act (Section 62‑7‑414 of the 1963 SC Act) allocates receipts from “property subject to depletion” to income in an amount “not in excess of 5%” of the asset’s inventory value. The 1931 Act has a similar five percent rule that applies when the trustee is under a duty to change the form of the investment. The five percent rule imposes on a trust the obligation to pay a fixed annuity to the income beneficiary until the asset is exhausted. Under these prior Acts the balance of each year’s receipts is added to principal. A fixed payment can produce unfair results. The remainder beneficiary receives all of the receipts from unexpected growth in the asset, e.g., if royalties on a patent or copyright increase significantly. Conversely, if the receipts diminish more rapidly than expected, most of the amount received by the trust will be allocated to income and little to principal. Moreover, if the annual payments remain the same for the life of the asset, the amount allocated to principal will usually be less than the original inventory value. For these reasons, Section 62‑7‑919 abandons the annuity approach under the five percent rule.

Lottery payments. The reference in subsection (A) to rights to receive payments under an arrangement that does not provide for the payment of interest includes state lottery prizes and similar fixed amounts payable over time that are not deferred compensation arrangements covered by Section 62‑7‑918.

Library References

Trusts 272.1.

Wills 684.3(2).

Westlaw Topic Nos. 390, 409.

C.J.S. Trusts Sections 551, 554.

C.J.S. Wills Sections 1463, 1465 to 1466.

**SECTION 62‑7‑920.** Allocation of receipts from interests in minerals or other natural resources.

(A) To the extent that a trustee accounts for receipts from an interest in minerals or other natural resources pursuant to this section, the trustee shall allocate them if:

(1) received as nominal delay rental or nominal annual rent on a lease, a receipt must be allocated to income;

(2) received from a production payment, a receipt must be allocated to income if and to the extent that the agreement creating the production payment provides a factor for interest or its equivalent. The balance must be allocated to principal;

(3) an amount received as a royalty, shut‑in‑well payment, take‑or‑pay payment, bonus, or delay rental is more than nominal, ninety percent must be allocated to principal and the balance to income;

(4) an amount is received from a working interest or any other interest not otherwise provided for in this subsection, ninety percent of the net amount received must be allocated to principal and the balance to income.

(B) An amount received on account of an interest in water that is renewable must be allocated to income. If the water is not renewable, ninety percent of the amount must be allocated to principal and the balance to income.

(C) This part applies whether or not a decedent or donor was extracting minerals, water, or other natural resources before the interest became subject to the trust.

(D) If a trust owns an interest in minerals, water, or other natural resources on the effective date of this part, the trustee may allocate receipts from the interest as provided in this part or in the manner used by the trustee before the effective date of this part. If the trust acquires an interest in minerals, water, or other natural resources after the effective date of this part, the trustee shall allocate receipts from the interest as provided in this part.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Prior Acts. The 1962 Act and the 1963 SC Act allocate to principal as a depletion allowance, twenty seven and one‑half percent of the gross receipts, but not more than fifty percent of the net receipts after paying expenses. Section 9 of the 1931 Act allocates all of the net proceeds received as consideration for the “permanent severance of natural resources from the lands” to principal.

Section 62‑7‑920 allocates ninety percent of the net receipts to principal and ten percent to income. A depletion provision that is tied to past or present Code provisions is undesirable because it causes a large portion of the oil and gas receipts to be paid out as income. As wells are depleted, the amount received by the income beneficiary falls drastically. Allocating a larger portion of the receipts to principal enables the trustee to acquire other income producing assets that will continue to produce income when the mineral reserves are exhausted.

Application of Sections 62‑7‑912 and 917. This Section 62‑7‑920 applies to the extent that the trustee does not account separately for receipts from minerals and other natural resources under Section 62‑7‑912 or allocate all of the receipts to principal under Section 62‑7‑917.

Open mine doctrine. The purpose of Section 62‑7‑920(C) is to abolish the “open mine doctrine” as it may apply to the rights of an income beneficiary and a remainder beneficiary in receipts from the production of minerals from land owned or leased by a trust. Instead, such receipts are to be allocated to or between principal and income in accordance with the provisions of this Act. For a discussion of the open mine doctrine, see generally 3A Austin W. Scott & William F. Fratcher, The Law of Trusts Section 239.3 (4th ed. 1988), and Nutter v. Stockton, 626 P.2d 861 (Okla. 1981).

Effective date provision. Section 9(b) of the 1962 Act and Section 4122(b) of the SC Act provide that the natural resources provision does not apply to property interests held by the trust on the effective date of the Act, which reflects concerns about the constitutionality of applying a retroactive administrative provision to interests in real estate, based on the opinion in the Oklahoma case of Franklin v. Margay Oil Corporation, 153 P.2d 486, 501 (Okla. 1944). Section 62‑7‑920(D) permits a trustee to use either the method provided for in this Act or the method used before the Act takes effect. Lawyers in jurisdictions other than Oklahoma may conclude that retroactivity is not a problem as to property situated in their States, and this provision permits trustees to decide, based on advice from counsel in States whose law may be different from that of Oklahoma, whether they may apply this provision retroactively if they conclude that to do so is in the best interests of the beneficiaries.

If the property is in a State other than the State where the trust is administered, the trustee must be aware that the law of the property’s situs may control this question. The outcome turns on a variety of questions: whether the terms of the trust specify that the law of a State other than the situs of the property shall govern the administration of the trust, and whether the courts will follow the terms of the trust; whether the trust’s asset is the land itself or a leasehold interest in the land (as it frequently is with oil and gas property); whether a leasehold interest or its proceeds should be classified as real property or personal property, and if as personal property, whether applicable state law treats it as a movable or an immovable for conflict of laws purposes. See 5A Austin W. Scott & William F. Fratcher, The Law of Trusts Sections 648, at 531, 533‑534; Sec 657, at 600 (4th ed. 1989).

Library References

Trusts 272.1.

Wills 684.3(2).

Westlaw Topic Nos. 390, 409.

C.J.S. Trusts Sections 551, 554.

C.J.S. Wills Sections 1463, 1465 to 1466.

**SECTION 62‑7‑921.** Allocation of receipts from sale of timber and related products.

(A) To the extent that a trustee accounts for receipts from the sale of timber and related products pursuant to this section, the trustee shall allocate the net receipts to:

(1) income, to the extent that the amount of timber removed from the land does not exceed the rate of growth of the timber during the accounting periods in which a beneficiary has a mandatory income interest;

(2) principal, to the extent that the amount of timber removed from the land exceeds the rate of growth of the timber or the net receipts are from the sale of standing timber;

(3) or between income and principal, if the net receipts are from the lease of timberland or from a contract to cut timber from land owned by a trust, by determining the amount of timber removed from the land under the lease or contract and applying items (1) and (2); or

(4) principal, to the extent that advance payments, bonuses, and other payments are not otherwise allocated pursuant to this subsection.

(B) In determining net receipts to be allocated pursuant to subsection (A), a trustee shall deduct and transfer to principal a reasonable amount for depletion.

(C) This part applies whether or not a decedent or transferor was harvesting timber from the property before it became subject to the trust.

(D) If a trust owns an interest in timberland on the effective date of this part, the trustee may allocate net receipts from the sale of timber and related products as provided in this part or in the manner used by the trustee before the effective date of this part. If the trust acquires an interest in timberland after the effective date of this part, the trustee shall allocate net receipts from the sale of timber and related products as provided in this part.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Scope of section. The rules in Section 62‑7‑921 are intended to apply to net receipts from the sale of trees and by‑products from harvesting and processing trees without regard to the kind of trees that are cut or whether the trees are cut before or after a particular number of years of growth. The rules apply to the sale of trees that are expected to produce lumber for building purposes, trees sold as pulpwood, and Christmas and other ornamental trees. Subsection (A) applies to net receipts from property owned by the trustee and property leased by the trustee. The Act is not intended to prevent a tenant in possession of the property from using wood that he cuts on the property for personal, noncommercial purposes, such as a Christmas tree, firewood, mending old fences or building new fences, or making repairs to structures on the property.

Under subsection (A) the amount of net receipts allocated to income depends upon whether the amount of timber removed is more or less than the rate of growth. The method of determining the amount of timber removed and the rate of growth is up to the trustee, based on methods customarily used for the kind of timber involved.

Application of Sections 62‑7‑912 and 917. This Section 62‑7‑921 applies to the extent that the trustee does not account separately for net receipts from the sale of timber and related products under Section 62‑7‑912 or allocate all of the receipts to principal under Section 62‑7‑917. The option to account for net receipts separately under Section 62‑7‑912 takes into consideration the possibility that timber harvesting operations may have been conducted before the timber property became subject to the trust, and that it may make sense to continue using accounting methods previously established for the property. It also permits a trustee to use customary accounting practices for timber operations even if no harvesting occurred on the property before it became subject to the trust.

Library References

Trusts 272.1.

Wills 684.3(2).

Westlaw Topic Nos. 390, 409.

C.J.S. Trusts Sections 551, 554.

C.J.S. Wills Sections 1463, 1465 to 1466.

**SECTION 62‑7‑922.** Marital deduction adjustments.

(A) If a marital deduction is allowed for all or part of a trust whose assets consist substantially of property that does not provide the surviving spouse with sufficient income from or use of the trust assets, and if the amounts that the trustee transfers from principal to income pursuant to Section 62‑7‑904 and distributes to the spouse from principal pursuant to the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction, the spouse may require the trustee to make property productive of income, convert property within a reasonable time, or exercise the power in Section 62‑7‑904(A). The trustee may decide which action or combination of actions to take.

(B) If subsection (A) is inapplicable, proceeds from the sale or other disposition of an asset are principal without regard to the amount of income the asset produces during any accounting period.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Prior Acts’ Conflict with the South Carolina Uniform Prudent Investor Act. Section 62‑7‑933(C)(2) of SCUPIA provides that “[a] trustee’s investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole ... .” The underproductive property provisions in Section 12 of the 1962 Act, Section 62‑7‑415 of the 1963 SC Act, and Section 11 of the 1931 Act give the income beneficiary a right to receive a portion of the proceeds from the sale of underproductive property as “delayed income.” In each Act the provision applies on an asset by asset basis and not by taking into consideration the trust portfolio as a whole, which conflicts with the basic precept in Section 62‑7‑933(C)(2) of SCUPIA. Moreover, in determining the amount of delayed income, the prior Acts do not permit a trustee to take into account the extent to which the trustee may have distributed principal to the income beneficiary, under principal invasion provisions in the terms of the trust, to compensate for insufficient income from the unproductive asset. Under Section 62‑7‑904(B)(7) of this Act, a trustee must consider prior distributions of principal to the income beneficiary in deciding whether and to what extent to exercise the power to adjust conferred by Section 62‑7‑904(A).

Duty to make property productive of income. In order to implement SCUPIA, this Act abolishes the right to receive delayed income from the sale proceeds of an asset that produces little or no income, but it does not alter existing state law regarding the income beneficiary’s right to compel the trustee to make property productive of income. As the law continues to develop in this area, the duty to make property productive of current income in a particular situation should be determined by taking into consideration the performance of the portfolio as a whole and the extent to which a trustee makes principal distributions to the income beneficiary under the terms of the trust and adjustments between principal and income under Section 62‑7‑904 of this Act.

Trusts for which the value of the right to receive income is important for tax reasons may be affected by Reg. Sec 1.7520‑3(b)(2)(v) Example (1), Sec 20.7520‑3(b)(2)(v) Examples (1) and (2), and Sec 25.7520‑3(b)(2)(v) Examples (1) and (2), which provide that if the income beneficiary does not have the right to compel the trustee to make the property productive, the income interest is considered unproductive and may not be valued actuarially under those sections.

Marital deduction trusts. Subsection (A) draws on language in Reg. Sec 20.2056(b)‑5(f)(4) and (5) to enable a trust for a spouse to qualify for a marital deduction if applicable state law is unclear about the spouse’s right to compel the trustee to make property productive of income. The trustee should also consider the application of Section 62‑7‑904 of this Act and the provisions of Restatement of Trusts 3d: Prudent Investor Rule Sec 240, at 186, app. Sec 240, at 252 (1992). Example (6) in the Comment to Section 62‑7‑904 describes a situation involving the payment from income of carrying charges on unproductive real estate in which Section 62‑7‑904 may apply.

Once the two conditions have occurred—insufficient beneficial enjoyment from the property and the spouse’s demand that the trustee take action under this section—the trustee must act; but instead of the formulaic approach of both the 1962 and the 1963 SC Acts which is triggered only if the trustee sells the property, this Act permits the trustee to decide whether to make the property productive of income, convert it, transfer funds from principal to income, or to take some combination of those actions. The trustee may rely on the power conferred by Section 62‑7‑904(A) to adjust from principal to income if the trustee decides that it is not feasible or appropriate to make the property productive of income or to convert the property. Given the purpose of Section 62‑7‑922 the power under Section 62‑7‑904(A) would be exercised to transfer principal to income and not to transfer income to principal.

Section 62‑7‑922 does not apply to a so‑called “estate” trust, which will qualify for the marital deduction, even though the income may be accumulated for a term of years or for the life of the surviving spouse, if the terms of the trust require the principal and undistributed income to be paid to the surviving spouse’s estate when the spouse dies. Reg. Sec 20.2056(c)‑2(b)(1)(iii).

Library References

Trusts 270, 272.2.

Wills 684.3(3).

Westlaw Topic Nos. 390, 409.

C.J.S. Trusts Sections 321 to 324, 330 to 331, 551, 553.

C.J.S. Wills Sections 1463, 1465 to 1470.

**SECTION 62‑7‑923.** Allocation of derivatives; options.

(A) In this section, “derivative” means a contract or financial instrument or a combination of contracts and financial instruments which gives a trust the right or obligation to participate in some or all changes in the price of a tangible or intangible asset or group of assets, or changes in a rate, an index of prices or rates, or other market indicator for an asset or a group of assets.

(B) To the extent that a trustee does not account pursuant to Section 62‑7‑912 for transactions in derivatives, the trustee shall allocate to principal receipts from and disbursements made in connection with those transactions.

(C) If a trustee grants an option to buy property from the trust, whether or not the trust owns the property when the option is granted, grants an option that permits another person to sell property to the trust, or acquires an option to buy property for the trust or an option to sell an asset owned by the trust, and the trustee or other owner of the asset is required to deliver the asset if the option is exercised, an amount received for granting the option must be allocated to principal. An amount paid to acquire the option must be paid from principal. A gain or loss realized upon the exercise of an option, including an option granted to a settlor of the trust for services rendered, must be allocated to principal.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Scope and application. It is difficult to predict how frequently and to what extent trustees will invest directly in derivative financial instruments rather than participating indirectly through investment entities that may utilize these instruments in varying degrees. If the trust participates in derivatives indirectly through an entity, an amount received from the entity will be allocated under Section 62‑7‑910 and not Section 62‑7‑923. If a trustee invests directly in derivatives to a significant extent, the expectation is that receipts and disbursements related to derivatives will be accounted for under Section 62‑7‑912; if a trustee chooses not to account under Section 62‑7‑912. Section 62‑7‑923(B) provides the default rule. Certain types of option transactions in which trustees may engage are dealt with in subsection (C) to distinguish those transactions from ones involving options that are embedded in derivative financial instruments.

Definition of “derivative.” “Derivative” is a difficult term to define because new derivatives are invented daily as dealers tailor their terms to achieve specific financial objectives for particular clients. Since derivatives are typically contract‑based, a derivative can probably be devised for almost any set of objectives if another party can be found who is willing to assume the obligations required to meet those objectives.

The most comprehensive definition of derivative is in the Exposure Draft of a Proposed Statement of Financial Accounting Standards titled “Accounting for Derivative and Similar Financial Instruments and for Hedging Activities,” which was released by the Financial Accounting Standards Board (FASB) on June 20, 1996 (No. 162‑B). The definition in Section 62‑7‑923(A) is derived in part from the FASB definition. The purpose of the definition in subsection (A) is to implement the substantive rule in subsection (B) that provides for all receipts and disbursements to be allocated to principal to the extent the trustee elects not to account for transactions in derivatives under Section 62‑7‑912. As a result, it is much shorter than the FASB definition, which serves much more ambitious objectives.

A derivative is frequently described as including futures, forwards, swaps and options, terms that also require definition, and the definition in this Act avoids these terms. FASB used the same approach, explaining in paragraph 65 of the Exposure Draft:

The definition of derivative financial instrument in this Statement includes those financial instruments generally considered to be derivatives, such as forwards, futures, swaps, options, and similar instruments. The Board considered defining a derivative financial instrument by merely referencing those commonly understood instruments, similar to paragraph 5 of Statement 119, which says that “... a derivative financial instrument is a futures, forward, swap, or option contract, or other financial instrument with similar characteristics.” However, the continued development of financial markets and innovative financial instruments could ultimately render a definition based on examples inadequate and obsolete. The ULC, therefore, decided to base the definition of a derivative financial instrument on a description of the common characteristics of those instruments in order to accommodate the accounting for newly developed derivatives. (Footnote omitted.)

Marking to market. A gain or loss that occurs because the trustee marks securities to market or to another value during an accounting period is not a transaction in a derivative financial instrument that is income or principal under the Act only cash receipts and disbursements, and the receipt of property in exchange for a principal asset, affect a trust’s principal and income accounts.

Receipt of property other than cash. If a trustee receives property other than cash upon the settlement of a derivatives transaction, that property would be principal under Section 62‑7‑913(2).

Options. Options to which subsection (C) applies include an option to purchase real estate owned by the trustee and a put option purchased by a trustee to guard against a drop in value of a large block of marketable stock that must be liquidated to pay estate taxes. Subsection (C) would also apply to a continuing and regular practice of selling call options on securities owned by the trust if the terms of the option require delivery of the securities. It does not apply if the consideration received or given for the option is something other than cash or property, such as cross‑options granted in a buy‑sell agreement between owners of an entity.

Library References

Trusts 272.2, 272.3(1).

Wills 684.3(3), 684.3(4.1).

Westlaw Topic Nos. 390, 409.

C.J.S. Trusts Sections 551 to 553.

C.J.S. Wills Sections 1463, 1465 to 1470.

**SECTION 62‑7‑924.** Allocation of payments related to asset‑backed securities.

(A) In this section, “asset‑backed security” means an asset whose value is based upon the right it gives the owner to receive distributions from the proceeds of financial assets that provide collateral for the security. The term includes an asset that gives the owner the right to receive from the collateral financial assets only the interest or other current return or only the proceeds other than interest or current return. The term does not include an asset subject to Section 62‑7‑909 or 62‑7‑918.

(B) If a trust receives a payment from interest or other current return and from other proceeds of the collateral financial assets, the trustee shall allocate to income the portion of the payment which the payer identifies as being from interest or other current return and shall allocate the balance of the payment to principal.

(C) If a trust receives one or more payments in exchange for the entire interest in an asset‑backed security in one accounting period, the trustee shall allocate the payments to principal. If a payment is one of a series of payments that results in the liquidation of the interest of the trust in the security over more than one accounting period, the trustee shall allocate ten percent of the payment to income and the balance to principal.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Scope of section. Typical asset‑backed securities include arrangements in which debt obligations such as real estate mortgages, credit card receivables and auto loans are acquired by an investment trust and interests in the trust are sold to investors. The source for payments to an investor is the money received from principal and interest payments on the underlying debt. An asset‑backed security includes an “interest only” or a “principal only” security that permits the investor to receive only the interest payments received from the bonds, mortgages or other assets that are the collateral for the asset‑backed security, or only the principal payments made on those collateral assets. An asset‑backed security also includes a security that permits the investor to participate in either the capital appreciation of an underlying security or in the interest or dividend return from such a security, such as the “Primes” and “Scores” issued by Americus Trust. An asset‑backed security does not include an interest in a corporation, partnership, or an investment trust described in the Comment to Section 62‑7‑911 whose assets consist significantly or entirely of investment assets. Receipts from an instrument that do not come within the scope of this section or any other section of this Act would be allocated entirely to principal under the rule in Section 62‑7‑903(A)(4) and the trustee may then consider whether and to what extent to exercise the power to adjust in Section 62‑7‑904 taking into account the return from the portfolio as whole and other relevant factors.

Library References

Trusts 272.3(1).

Wills 684.3(4.1).

Westlaw Topic Nos. 390, 409.

C.J.S. Trusts Sections 551 to 552.

C.J.S. Wills Section 1463.

**SECTION 62‑7‑925.** Disbursements from income.

A trustee shall make the following disbursements from income to the extent that they are not disbursements subject to Section 62‑7‑905(2)(b) or (c):

(1) one‑half of the regular compensation of the trustee and of any person providing investment advisory or custodial services to the trustee;

(2) one‑half of all expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests;

(3) all of the other ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal, and expenses of a proceeding or other matter that concerns primarily the income interest; and

(4) recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Trustee fees. The regular compensation of a trustee or the trustee’s agent includes compensation based on a percentage of either principal or income or both.

Insurance premiums. The reference in paragraph (4) to “recurring” premiums is intended to distinguish premiums paid annually for fire insurance from premiums on title insurance, each of which covers the loss of a principal asset. Title insurance premiums would be a principal disbursement under Section 62‑7‑926(A)(5).

Regularly recurring taxes. The reference to “regularly recurring taxes assessed against principal” includes all taxes regularly imposed on real property and tangible and intangible personal property.

Library References

Trusts 274.

Wills 684.5.

Westlaw Topic Nos. 390, 409.

C.J.S. Trusts Sections 391 to 400, 510 to 511.

C.J.S. Wills Sections 1463, 1471 to 1477, 1479.

**SECTION 62‑7‑926.** Disbursements from principal.

(A) A trustee shall make the following disbursements from principal:

(1) the remaining one‑half of the disbursements provided in Section 62‑7‑925(1) and (2);

(2) all of the trustee’s compensation calculated on principal as a fee for acceptance, distribution, or termination, and disbursements made to prepare property for sale;

(3) payments on the principal of a trust debt;

(4) expenses of a proceeding that concerns primarily principal, including a proceeding to construe the trust or to protect the trust or its property;

(5) premiums paid on a policy of insurance not provided in Section 62‑7‑925(4) of which the trust is the owner and beneficiary;

(6) estate, inheritance, and other transfer taxes, including penalties, apportioned to the trust; and

(7) disbursements related to environmental matters, including reclamation, assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, collecting amounts from persons liable or potentially liable for the costs of those activities, penalties imposed under environmental laws or regulations and other payments made to comply with those laws or regulations, statutory or common law claims by third parties, and defending claims based on environmental matters.

(B) If a principal asset is encumbered with an obligation that requires income from that asset to be paid directly to the creditor, the trustee shall transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of the obligation.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Environmental expenses. All environmental expenses are payable from principal, subject to the power of the trustee to transfer funds to principal from income under Section 62‑7‑928. However, the ULC Drafting Committee decided that it was not necessary to broaden this provision to cover other expenditures made under compulsion of governmental authority. See generally the annotation at 43 A.L.R.4th 1012 (Duty as Between Life Tenant and Remainderman with Respect to Cost of Improvements or Repairs Made Under Compulsion of Governmental Authority).

Environmental expenses paid by a trust are to be paid from principal under Section 62‑7‑926(A)(7) on the assumption that they will usually be extraordinary in nature. Environmental expenses might be paid from income if the trustee is carrying on a business that uses or sells toxic substances, in which case environmental cleanup costs would be a normal cost of doing business and would be accounted for under Section 62‑7‑912. In accounting under that Section, environmental costs will be a factor in determining how much of the net receipts from the business is trust income. Paying all other environmental expenses from principal is consistent with this Act’s approach regarding receipts—when a receipt is not clearly a current return on a principal asset, it should be added to principal because over time both the income and remainder beneficiaries benefit from this treatment. Here, allocating payments required by environmental laws to principal imposes the detriment of those payments over time on both the income and remainder beneficiaries.

Under Sections 62‑7‑928(A) and (B)(5) a trustee who makes or expects to make a principal disbursement for an environmental expense described in Section 62‑7‑926(A)(7) is authorized to transfer an appropriate amount from income to principal to reimburse principal for disbursements made or to provide a reserve for future principal disbursements.

The first part of Section 62‑7‑926(A)(7) is based upon the definition of an “environmental remediation trust” in Treas. Reg. Sec 301.7701‑4(e)(as amended in 1996). This is not because the Act applies to an environmental remediation trust, but because the definition is a useful and thoroughly vetted description of the kinds of expenses that a trustee owning contaminated property might incur. Expenses incurred to comply with environmental laws include the cost of environmental consultants, administrative proceedings and burdens of every kind imposed as the result of an administrative or judicial proceeding, even though the burden is not formally characterized as a penalty.

Title proceedings. Disbursements that are made to protect a trust’s property, referred to in Section 62‑7‑926(A)(4) include an “action to assure title” that is mentioned in Section 13(c)(2) of the 1962 Act and Section 62‑7‑418(2) of the 1963 SC Act.

Insurance premiums. Insurance premiums referred to in Section 62‑7‑926(A)(5) include title insurance premiums. They also include premiums on life insurance policies owned by the trust, which represent the trust’s periodic investment in the insurance policy. There is no provision in the 1962 or 1963 SC Act for life insurance premiums.

Taxes. Generation‑skipping transfer taxes are payable from principal under Section 62‑7‑926(A)(6).

Library References

Trusts 274.

Wills 684.5.

Westlaw Topic Nos. 390, 409.

C.J.S. Trusts Sections 391 to 400, 510 to 511.

C.J.S. Wills Sections 1463, 1471 to 1477, 1479.

**SECTION 62‑7‑927.** Transfer to principal of cash receipts from asset subject to depreciation.

(A) In this section, “depreciation” means a reduction in value due to wear, tear, decay, corrosion, or gradual obsolescence of a fixed asset having a useful life of more than one year.

(B) A trustee may transfer to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation, but may not transfer any amount for depreciation:

(1) of that portion of real property used or available for use by a beneficiary as a residence or of tangible personal property held or made available for the personal use or enjoyment of a beneficiary;

(2) during the administration of a decedent’s estate; or

(3) under this section if the trustee is accounting pursuant to Section 62‑7‑912 for the business or activity in which the asset is used.

(C) An amount transferred to principal need not be held as a separate fund.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Prior Acts. The 1931 Act has no provision for depreciation. Sections 13(a)(2) of the 1962 Act and 62‑7‑417(2) of the 1963 SC Act provide that a charge shall be made against income for “... a reasonable allowance for depreciation on property subject to depreciation under generally accepted accounting principles ...” That provision has been resisted by many trustees, who do not provide for any depreciation for a variety of reasons. One reason relied upon is that a charge for depreciation is not needed to protect the remainder beneficiaries if the value of the land is increasing; another is that generally accepted accounting principles may not require depreciation to be taken if the property is not part of a business. The Drafting Committee for the 1997 NCCUSL Act concluded that the decision to provide for depreciation should be discretionary with the trustee. The power to transfer funds from income to principal that is granted by this section is a “discretionary power of administration” referred to in Section 62‑7‑903(B) and in exercising the power a trustee must comply with Section 62‑7‑903(B).

One purpose served by transferring cash from income to principal for depreciation is to provide funds to pay the principal of an indebtedness secured by the depreciable property. Section 62‑7‑928(B)(4) permits the trustee to transfer additional cash from income to principal for this purpose to the extent that the amount transferred from income to principal for depreciation is less than the amount of the principal payments.

Library References

Trusts 272.1.

Wills 684.3(1).

Westlaw Topic Nos. 390, 409.

C.J.S. Trusts Sections 551, 554.

C.J.S. Wills Sections 1463, 1465 to 1479.

**SECTION 62‑7‑928.** Future principal disbursements reserves.

(A) If a trustee makes or expects to make a principal disbursement described in this section, the trustee may transfer an appropriate amount from income to principal in one or more accounting periods to reimburse principal or to provide a reserve for future principal disbursements.

(B) A principal disbursement for purposes of this section includes the following, but only to the extent that the trustee has not been, and does not expect to be, reimbursed by a third party:

(1) an amount chargeable to income but paid from principal because it is unusually large, including extraordinary repairs;

(2) a capital improvement to a principal asset, whether in the form of changes to an existing asset or the construction of a new asset, including special assessments;

(3) a disbursement made to prepare property for rental, including tenant allowances, leasehold improvements, and broker’s commissions;

(4) a periodic payment on an obligation secured by a principal asset to the extent that the amount transferred from income to principal for depreciation is less than the periodic payments; and

(5) a disbursement described in Section 62‑7‑926(A)(7).

(C) If the asset whose ownership gives rise to the disbursements becomes subject to a successive income interest after an income interest ends, a trustee may continue to transfer amounts from income to principal as provided in subsection (A).

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Prior Acts. The South Carolina sources of Section 62‑7‑928 are: Section 62‑7‑417(b) of the 1963 SC Act, which permits a trustee to “regularize distributions,” if charges against income are unusually large, by using “reserves or other reasonable means” to withhold sums from income distributions; and Section 62‑7‑417(a)(2) of the 1963 SC Act, which authorizes a trustee to establish an allowance for depreciation out of income if principal is used for extraordinary repairs and capital improvements. [Note, however, that “special assessments” are not specifically mentioned in Section 62‑7‑417(a)(2) of the 1963 SC Act.] Section 12(3) of the 1931 Act permits the trustee to spread income expenses of unusual amount “throughout a series of years.” 62‑7‑928 of this Act contains a more detailed enumeration of the circumstances in which this authority may be used, and includes in subsection (B)(4) the express authority to use income to make principal payments on a mortgage if the depreciation charge against income is less than the principal payments on the mortgage.

Library References

Trusts 274.

Wills 684.5.

Westlaw Topic Nos. 390, 409.

C.J.S. Trusts Sections 391 to 400, 510 to 511.

C.J.S. Wills Sections 1463, 1471 to 1477, 1479.

**SECTION 62‑7‑929.** Payment of taxes from income and principal.

(A) A tax required to be paid by a trustee based on receipts allocated to income must be paid from income.

(B) A tax required to be paid by a trustee based on receipts allocated to principal must be paid from principal, even if the tax is called an income tax by the taxing authority.

(C) A tax required to be paid by a trustee on the trust’s share of the taxable income of the entity must be paid:

(1) from income, to the extent that receipts from the entity are allocated to income;

(2) from principal, to the extent that receipts from the entity are allocated only to principal;

(3) proportionately from principal and income to the extent that receipts from the entity are allocated to both income and principal; and

(4) from principal to the extent that the tax exceeds the total receipts from the entity.

(D) After applying subsections (A) through (C), the trustee shall adjust income or principal receipts to the extent that the trust’s taxes are reduced because the trust receives a deduction for payments made to a beneficiary.

HISTORY: 2005 Act No. 66, Section 1; 2012 Act No. 204, Section 2, eff June 7, 2012; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Taxes on Undistributed Entity Taxable Income. When a trust owns an interest in a pass‑through entity, such as a partnership or “S” corporation, it must report its share of the entity’s taxable income regardless of how much the entity distributes to the trust. Whether the entity distributes more or less than the trust’s tax on its share of the entity’s taxable income, the trust must pay the taxes and allocate them between income and principal.

Subsection (C) requires the trust to pay the taxes on its share of an entity’s taxable income from income or principal receipts to the extent that receipts from the entity are allocable to each. This assures the trust a source of cash to pay some or all of the taxes on its share of the entity’s taxable income. Subsection (D) recognizes that, except in the case of an Electing Small Business Trust (ESBT), a trust normally receives a deduction for amounts distributed to a beneficiary. Accordingly, subsection (D) requires the trust to increase receipts payable to a beneficiary as determined under subsection (C) to the extent the trust’s taxes are reduced by distributing those receipts to the beneficiary.

Because the trust’s taxes and amounts distributed to a beneficiary are interrelated, the trust may be required to apply a formula to determine the correct amount payable to a beneficiary. This formula should take into account that each time a distribution is made to a beneficiary, the trust taxes are reduced and amounts distributable to a beneficiary are increased. The formula assures that after deducting distributions to a beneficiary, the trust has enough to satisfy its taxes on its share of the entity’s taxable income as reduced by distributions to beneficiaries.

Example (1)—Trust T receives a Schedule K‑1 from Partnership P reflecting taxable income of $1 million. Partnership P distributes $100,000 to T, which allocates the receipts to income. Both Trust T and income Beneficiary B are in the 35 percent tax bracket.

Trust T’s tax on $1 million of taxable income is $350,000. Under subsection (C) T’s tax must be paid from income receipts because receipts from the entity are allocated only to income. Therefore, T must apply the entire $100,000 of income receipts to pay its tax. In this case, Beneficiary B receives nothing.

Example (2)—Trust T receives a Schedule K‑1 from Partnership P reflecting taxable income of $1 million. Partnership P distributes $500,000 to T, which allocates the receipts to income. Both Trust T and income Beneficiary B are in the 35 percent tax bracket.

Trust T’s tax on $1 million of taxable income is $350,000. Under subsection (C), T’s tax must be paid from income receipts because receipts from P are allocated only to income. Therefore, T uses $350,000 of the $500,000 to pay its taxes and distributes the remaining $150,000 to B. The $150,000 payment to B reduces T’s taxes by $52,500, which it must pay to B. But the $52,500 further reduces T’s taxes by $18,375, which it also must pay to B. In fact, each time T makes a distribution to B, its taxes are further reduced, causing another payment to be due B.

Alternatively, T can apply the following algebraic formula to determine the amount payable to B:

D = (C‑R\*K)/(1‑R)

D = Distribution to income beneficiary

C = Cash paid by the entity to the trust

R = tax rate on income

K = entity’s K‑1 taxable income

Applying the formula to Example (2) above, Trust T must pay $230,769 to B so that after deducting the payment, T has exactly enough to pay its tax on the remaining taxable income from P.

|  |  |  |
| --- | --- | --- |
|  |  |  |
|  | Taxable Income per K‑1 | $1,000,000 |
|  | Payment to beneficiary | $230,769 [1] |
|  | Trust Taxable Income | $769,231 |
|  | 35 percent tax | $269,231 |
|  | Partnership Distribution | $500,000 |
|  | Fiduciary’s Tax Liability | ($269,231) |
|  | Payable to the Beneficiary | $230,769 |

In addition, B will report $230,769 on his or her own personal income tax return, paying taxes of $80,769. Because Trust T withheld $269,231 to pay its taxes and B paid $80,769 taxes of its own, B bore the entire $350,000 tax burden on the $1 million of entity taxable income, including the $500,000 that the entity retained that presumably increased the value of the trust’s investment entity.

If a trustee determines that it is appropriate to do so, it should consider exercising the discretion granted in Section 62‑7‑930 to adjust between income and principal. Alternatively, the trustee may exercise the power to adjust under Section 62‑7‑904 to the extent it is available and appropriate under the circumstances, including whether a future distribution from the entity that would be allocated to principal should be reallocated to income because the income beneficiary already bore the burden of taxes on the reinvested income. In exercising the power, the trust should consider the impact that future distributions will have on any current adjustments.

[1] D = (C‑R\*K)/(1‑R) = (500,000—350,000)/(1—.35) = $230,769. (D is the amount payable to the income beneficiary, K is the entity’s K‑1 taxable income, R is the trust ordinary tax rate, and C is the cash distributed by the entity)

Effect of Amendment

The 2012 amendment rewrote subsections (C) and (D).

Library References

Trusts 274(2).

Wills 684.5.

Westlaw Topic Nos. 390, 409.

C.J.S. Trusts Sections 391 to 394, 510.

C.J.S. Wills Sections 1463, 1471 to 1477, 1479.

**SECTION 62‑7‑930.** Certain adjustments between principal and income; reduction of marital deduction or charitable contribution deduction.

(A) A fiduciary may make adjustments between principal and income to offset the shifting of economic interests or tax benefits between income beneficiaries and remainder beneficiaries which arise from:

(1) elections and decisions, other than those provided in subsection (B), that the fiduciary makes from time to time regarding tax matters;

(2) an income tax or any other tax that is imposed upon the fiduciary or a beneficiary as a result of a transaction involving or a distribution from the estate or trust; or

(3) the ownership by an estate or trust of an interest in an entity whose taxable income, whether or not distributed, is includable in the taxable income of the estate, trust, or a beneficiary.

(B) If the amount of an estate tax marital deduction or charitable contribution deduction is reduced because a fiduciary deducts an amount paid from principal for income tax purposes instead of deducting it for estate tax purposes, and as a result estate taxes paid from principal are increased and income taxes paid by an estate, trust, or beneficiary are decreased, each estate, trust, or beneficiary that benefits from the decrease in income tax shall reimburse the principal from which the increase in estate tax is paid. The total reimbursement must equal the increase in the estate tax to the extent that the principal used to pay the increase would have qualified for a marital deduction or charitable contribution deduction but for the payment. The proportionate share of the reimbursement for each estate, trust, or beneficiary whose income taxes are reduced must be the same as its proportionate share of the total decrease in income tax. An estate or trust shall reimburse principal from income.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Discretionary adjustments. Section 62‑7‑930(A) permits the fiduciary to make adjustments between income and principal because of tax law provisions. It would permit discretionary adjustments in situations like these: (1) A fiduciary elects to deduct administration expenses that are paid from principal on an income tax return instead of on the estate tax return; (2) a distribution of a principal asset to a trust or other beneficiary causes the taxable income of an estate or trust to be carried out to the distributee and relieves the persons who receive the income of any obligation to pay income tax on the income; or (3) a trustee realizes a capital gain on the sale of a principal asset and pays a large state income tax on the gain, but under applicable federal income tax rules the trustee may not deduct the state income tax payment from the capital gain in calculating the trust’s federal capital gain tax, and the income beneficiary receives the benefit of the deduction for state income tax paid on the capital gain. See generally Joel C. Dobris, Limits on the Doctrine of Equitable Adjustment in Sophisticated Postmortem Tax Planning, 66 Iowa L. Rev. 273 (1981).

Section 62‑7‑930(A)(3) applies to a qualified Subchapter S trust (QSST) whose income beneficiary is required to include a pro rata share of the S corporation’s taxable income in his return. If the QSST does not receive a cash distribution from the corporation that is large enough to cover the income beneficiary’s tax liability, the trustee may distribute additional cash from principal to the income beneficiary. In this case the retention of cash by the corporation benefits the trust principal. This situation could occur if the corporation’s taxable income includes capital gain from the sale of a business asset and the sale proceeds are reinvested in the business instead of being distributed to shareholders.

Mandatory adjustment. Section 62‑7‑930(B) provides for a mandatory adjustment from income to principal to the extent needed to preserve an estate tax marital deduction or charitable contributions deduction. It is derived from New York’s EPTL Sec 11‑1.2(A), which requires principal to be reimbursed by those who benefit when a fiduciary elects to deduct administration expenses on an income tax return instead of the estate tax return. Unlike the New York provision, Section 62‑7‑930(B) limits a mandatory reimbursement to cases in which a marital deduction or a charitable contributions deduction is reduced by the payment of additional estate taxes because of the fiduciary’s income tax election. It is intended to preserve the result reached in Estate of Britenstool v. Commissioner, 46 T.C. 711 (1966), in which the Tax Court held that a reimbursement required by the predecessor of EPTL Sec 11‑1.2(A) resulted in the estate receiving the same charitable contributions deduction it would have received if the administration expenses had been deducted for estate tax purposes instead of for income tax purposes. Because a fiduciary will elect to deduct administration expenses for income tax purposes only when the income tax reduction exceeds the estate tax reduction, the effect of this adjustment is that the principal is placed in the same position it would have occupied if the fiduciary had deducted the expenses for estate tax purposes, but the income beneficiaries receive an additional benefit. For example, if the income tax benefit from the deduction is $30,000 and the estate tax benefit would have been $20,000, principal will be reimbursed $20,000 and the net benefit to the income beneficiaries will be $10,000.

Irrevocable grantor trusts. Under Sections 671‑679 of the Internal Revenue Code (the “grantor trust” provisions), a person who creates an irrevocable trust for the benefit of another person may be subject to tax on the trust’s income or capital gains, or both, even though the settlor is not entitled to receive any income or principal from the trust. Because this is now a well‑known tax result, many trusts have been created to produce this result, but there also may be trusts that are unintentionally subject to this rule. The Act does not require or authorize a trustee to distribute funds from the trust to the settlor in these cases because it is difficult to establish a rule that applies only to trusts where this tax result is unintended and does not apply to trusts where the tax result is intended. Settlors who intend this tax result rarely state it as an objective in the terms of the trust, but instead rely on the operation of the tax law to produce the desired result. As a result it may not be possible to determine from the terms of the trust if the result was intentional or unintentional. Where the drafter of such a trust wants the trustee to have the authority to distribute principal or income to the settlor to reimburse the settlor for taxes paid on the trust’s income or capital gains, such a provision should be placed in the terms of the trust. In some situations the Internal Revenue Service may require that such a provision be placed in the terms of the trust as a condition to issuing a private letter ruling.

Library References

Trusts 274(2).

Wills 684.5.

Westlaw Topic Nos. 390, 409.

C.J.S. Trusts Sections 391 to 394, 510.

C.J.S. Wills Sections 1463, 1471 to 1477, 1479.

**SECTION 62‑7‑931.** Application and construction of Uniform Principal and Income Act.

In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

Library References

Statutes 226.

Westlaw Topic No. 361.

C.J.S. Statutes Sections 306, 358 to 361.

**SECTION 62‑7‑932.** RESERVED.

Effect of Amendment

The 2013 amendment deleted the prior section and reserved the section number. Prior Section 62‑7‑932 was titled Discretionary power of a fiduciary and had the following history: 2005 Act No. 66, Section 1.

Part 9A

South Carolina Uniform Prudent Investor Act

GENERAL COMMENT

Effective July 18, 2001, South Carolina enacted as part of its Uniform Probate Code (SCPC) the South Carolina Uniform Prudent Investor Act (SCUPIA), Section 62‑7‑302. This is South Carolina’s version of the Uniform Prudent Investor Act (UPIA) which was enacted and recommended in 1994 by the Uniform Law Commission (ULC) for enactment in all the states. UPIA consists of 16 separate sections, the first ten of which are each followed by a separate ULC Comment; whereas, SCUPIA is a single section (multi‑subsection) consolidation of (1) UPIA’s first ten sections but without any of the ULC Comments, (2) two other UPIA sections which have never had any comments (Sections 12, “Uniformity of Application and Construction” and 13, “Short Title”) and (3) two new subsections which are not in UPIA and have never had any comments (SCUPIA subsections (J) and (K)). The remaining four sections of UPIA are not in SCUPIA and have never had any comments. Thus, prior to 2005 SCUPIA had no ULC Comments. When in 2005 South Carolina enacted its version of ULC’s recommended 2000 Uniform Trust Code as the South Carolina Trust Code (SCTC), SC Code Title 62, Article 7, SCUPIA was retained, re‑numbered and incorporated at SCTC Section 62‑7‑933, but still without any ULC Comments. Now, with this 2013 (or “current”) amendment, the ULC Comments are consolidated into a single Comment drafted specifically for South Carolina purposes and inserted immediately following SCUPIA. Again, any reference elsewhere in the South Carolina Code to former SCPC Section 62‑7‑302 should now refer to SCTC Section 62‑7‑933.

When in 2005 SCUPIA was retained, re‑numbered and incorporated at SCTC Section 62‑7‑933, certain subsections of SCUPIA as it had been originally enacted in 2001 (SCPC Section 62‑7‑302) were deleted as recommended by ULC because they were duplicative of provisions in the newly enacted SCTC: former SCPC Section 62‑7‑302(C)(6), (F), and (H). The correlative provisions of SCTC, which govern investment, management, and distribution of trust assets (i.e., trust administration), are broader in perspective than the deleted SCPC subsections, which governed only investment and management of trust assets. SCTC Section 62‑7‑933(C)(5)(c) retains and incorporates former SCPC Section 62‑7‑602.

Over the quarter century from the late 1960’s to the early 1990s the investment practices of fiduciaries experienced significant change. ULC’s Uniform Prudent Investor Act (UPIA) undertakes to update trust investment law in recognition of the alterations that have occurred in investment practice. These changes have occurred under the influence of a large and broadly accepted body of empirical and theoretical knowledge about the behavior of capital markets, often described as “modern portfolio theory.”

UPIA, now enacted in South Carolina as SCUPIA at Section 62‑7‑933, draws upon the revised standards for prudent trust investment promulgated by the American Law Institute in its Restatement (Third) of Trusts: Prudent Investor Rule (1992) [hereinafter Restatement of Trusts 3d: Prudent Investor Rule; also referred to as 1992 Restatement]. [Since the early 1990’s when the uniform version of this Prefatory Note and the following Comments were prepared by ULC, Restatement of Trusts 3d has progressed significantly as reported in the Forenote to Chapter 17 of what is now cited as “Restatement Third, Trusts”:

The contents of this Chapter (Introduction and Sections 90‑92) were approved at the American Law Institute’s 1990 Annual Meeting and were originally published as Sections 227‑229 of Restatement Third, Trusts (Prudent Investor Rule) in 1992 [referred to throughout this SCUPIA Prefatory Note and the following Comments as either “Restatement of Trusts 3d: Prudent Investor Rule” or simply “1992 Restatement”]. The “prudent investor rule” is incorporated here without substantive change, with some updating of the Reporter’s Notes, adaptation of cross‑references to reflect the new numbering and content of other Trust Third Sections, and adaptation of some wording to reflect the passage of time and interim developments, particularly the widespread substitution of prudent‑investor principles for prior law. Therefore, appropriate reference to Chapter 17 (Introduction and Sections 90‑92) of Restatement Third, Trusts is suggested.]

Objectives of the Act. SCUPIA makes five fundamental alterations in the former criteria for prudent investing. All are to be found in the Restatement of Trusts 3d: Prudent Investor Rule.

(1) The standard of prudence is applied to any investment as part of the total portfolio, rather than to individual investments. In the trust setting the term “portfolio” embraces all the trust’s assets. SCUPIA Subsection (C)(2).

(2) The tradeoff in all investing between risk and return is identified as the fiduciary’s central consideration. SCUPIA Subsection (C)(2).

(3) All categoric restrictions on types of investments have been abrogated; the trustee can invest in anything that plays an appropriate role in achieving the risk/return objectives of the trust and that meets the other requirements of prudent investing. SCUPIA Subsection (C)(5)(a).

(4) The long familiar requirement that fiduciaries diversify their investments has been integrated into the definition of prudent investing. SCUPIA Subsection (D).

(5) The much criticized former rule of trust law forbidding the trustee to delegate investment and management functions has been reversed. Delegation is now permitted, subject to safeguards. SCUPIA Subsection (J).

Literature. These changes in trust investment law have been presaged in an extensive body of practical and scholarly writing. See especially the discussion and reporter’s notes by Edward C. Halbach, Jr., in Restatement of Trusts 3d: Prudent Investor Rule (1992); see also Edward C. Halbach, Jr., Trust Investment Law in the Third Restatement, 27 Real Property, Probate & Trust J. 407 (1992); Bevis Longstreth, Modern Investment Management and the Prudent Man Rule (1986); Jeffrey N. Gordon, The Puzzling Persistence of the Constrained Prudent Man Rule, 62 N.Y.U.L. Rev. 52 (1987); John H. Langbein & Richard A. Posner, The Revolution in Trust Investment Law, 62 A.B.A.J. 887 (1976); Note, The Regulation of Risky Investments, 83 Harvard L. Rev. 603 (1970). A succinct account of the main findings of modern portfolio theory, written for lawyers, is Jonathan R. Macey, An Introduction to Modern Financial Theory (1991) (American College of Trust & Estate Counsel Foundation). A leading introductory text on modern portfolio theory is R.A. Brealey, An Introduction to Risk and Return from Common Stocks (2d ed. 1983).

Legislation. Most states have had legislation governing trust‑investment law for many years. This Act promotes uniformity of state law on the basis of the new consensus reflected in the Restatement of Trusts 3d: Prudent Investor Rule. Some states had already acted. California, Delaware, Georgia, Minnesota, South Carolina, Tennessee, and Washington revised their prudent investor legislation to emphasize the total‑portfolio standard of care in advance of the 1992 Restatement. These statutes are extracted and discussed in Restatement of Trusts 3d: Prudent Investor Rule Section 227, reporter’s note, at 60‑66 (1992). Although South Carolina took such action in 1990 by amending SC Code Section 62‑7‑302, the South Carolina revision was not extracted and discussed in the 1992 Restatement.

Remedies. This Act does not undertake to address issues of remedy law or the computation of damages in trust matters. Remedies are the subject of a reasonably distinct body of doctrine. See generally Restatement (Second) of Trusts Sections 197‑226A (1959) [hereinafter cited as Restatement of Trusts 2d; also referred to as 1959 Restatement]. [With the enactment of the South Carolina Trust Code in 2005, however, remedies and damages for breach of trust are addressed. SCTC Part 10.]

Implications for charitable and pension trusts. This Act is centrally concerned with the investment responsibilities arising under the private gratuitous trust, which is the common vehicle for conditioned wealth transfer within the family. Nevertheless, the prudent investor rule also bears on charitable and pension trusts, among others. “In making investments of trust funds the trustee of a charitable trust is under a duty similar to that of the trustee of a private trust.” Restatement of Trusts 2d Section 389 (1959). The Employee Retirement Income Security Act (ERISA), the federal regulatory scheme for pension trusts enacted in 1974, absorbs trust‑investment law through the prudence standard of ERISA Section 404(a)(1)(B), 29 U.S.C. Section 1104(a). The Supreme Court has said: “ERISA’s legislative history confirms that the Act’s fiduciary responsibility provisions ‘codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.”‘ Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110‑11 (1989) (footnote omitted).

Other fiduciary relationships. The South Carolina Uniform Prudent Investor Act (SCUPIA) regulates the investment responsibilities of trustees. Other fiduciaries—such as executors, conservators, and guardians of the property—sometimes have responsibilities over assets that are governed by the standards of prudent investment. It will often be appropriate for states to adapt the law governing investment by trustees under this Act to these other fiduciary regimes, taking account of such changed circumstances as the relatively short duration of most executorships and the intensity of court supervision of conservators and guardians in some jurisdictions. The present Act does not undertake to adjust trust‑investment law to the special circumstances of the state schemes for administering decedents’ estates or conducting the affairs of protected persons. In South Carolina two other SC Code sections have been enacted for this purpose:

(1) Section 62‑5‑414.

In the exercise of his powers, a conservator is to act as a fiduciary and shall observe the standards of care applicable to trustees as described by Section 62‑7‑933 (SCUPIA).

(2) Section 62‑3‑703

(a) A personal representative is a fiduciary who ... shall observe the standards of care as described by Section 62‑7‑804.

(3) Both of these sections referred to Section 62‑7‑933 (SCUPIA) until 2010 when Section 62‑3‑703 was amended by replacing Section 62‑7‑933 with Section 62‑7‑804. Prudent administration—

A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

(4) The Comments to the SCTC point out that Section 62‑7‑804 is “similar to” SCUPIA and recognizes that trust “administration” includes a trustee’s “distribution to beneficiaries” in addition to a trustee’s investment and management of trust assets.

Although SCUPIA by its terms applies to trusts and not to charitable corporations, the standards of the Act can be expected to inform the investment responsibilities of directors and officers of charitable corporations. As the 1992 Restatement observes, “the duties of the members of the governing board of a charitable corporation are generally similar to the duties of the trustee of a charitable trust.” Restatement of Trusts 3d: Prudent Investor Rule Section 379, Comment b, at 190 (1992). See also id. Section 389, Comment b, at 190‑91 (absent contrary statute or other provision, prudent investor rule applies to investment of funds held for charitable corporations).

It is interesting to note that the ULC did not mention, on this investment point, in the 1994 UPIA Prefatory Note its earlier 1972 Uniform Management of Institutional Funds Act (UMIFA). This is probably explained by the following contrary view expressed in the 1972 Comment following UMIFA Section 6:

The section establishes a standard of care and prudence for a member of a governing board. The standard is generally comparable to that of a director of a business corporation rather than that of a private trustee, but it is cast in terms of the duties and responsibilities of a manager of a nonprofit institution.

Officers of a corporation owe a duty of care and loyalty to the corporation, and the more intimate the knowledge of the affairs of the corporation the higher the standard of care. Directors are obligated to act in the utmost good faith and to exercise ordinary business care and prudence in all matters affecting the management of the corporation. This is a proper standard for the managers of a nonprofit institution, whether or not it is incorporated.

Not until 2000 did South Carolina enact the South Carolina Uniform Management of Institutional Funds Act (SCUMIFA). Then in 2006 the ULC approved and recommended the Uniform Prudent Management of Institutional Funds Act (UPMIFA) which South Carolina enacted in 2008 as the South Carolina Uniform Prudent Management of Institutional Funds Act (SCUPMIFA), Sections 34‑6‑10 through 100. Many of SCUPIA’s provisions are in SCUPMIFA which is described by ULC as “bringing the law governing charitable institutions in line with modern investment and expenditure practice”.

**SECTION 62‑7‑933.** Uniform Prudent Investor Act.

(A) This section may be cited as the South Carolina Uniform Prudent Investor Act, or this act.

(B)(1) Except as otherwise provided in item (2) of this subsection, a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule in this act.

(2) The prudent investor rule is a default rule that may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

(C)(1) A trustee shall invest and manage trust assets as a prudent investor would by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

(2) A trustee’s investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(3) Among other circumstances provided in item (1) of this subsection which a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:

(a) general economic conditions;

(b) the possible effect of inflation or deflation;

(c) the expected tax consequences of investment decisions or strategies;

(d) the role that each investment or course of action plays within the overall trust portfolio, including financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;

(e) the expected total return from income and the appreciation of capital;

(f) other resources of the beneficiaries;

(g) needs for liquidity, regularity of income, and preservation or appreciation of capital; and

(h) an asset’s special relationship or special value to the purposes of the trust or to one or more of the beneficiaries.

(4) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

(5)(a) A trustee may invest in any kind of property or type of investment consistent with the standards of this act.

(b) Nothing in this act prohibits affiliate investments if they otherwise comply with the standards of this act. For these purposes, ‘affiliate’ means an entity that owns or is owned by the trustee, in whole or in part, or is owned by the same entity that owns the trustee. Affiliate investments include:

(i) investment and reinvestment in the securities of an open‑end or closed‑end management investment company or of an investment trust registered under the Investment Company Act of 1940, as amended. A bank or trustee, or both of them, may invest in these securities even if the bank or trustee, or an affiliate of the bank or trustee, provides services to the investment company or investment trust such as that of an investment advisor, custodian, transfer agent, registrar, sponsor, distributor, manager, or otherwise, and receives reasonable remuneration for those services;

(ii) retention of the securities into which corporate securities owned by the trustee may be converted or which may be derived as a result of merger, consolidation, stock dividends, splits, liquidations, and similar procedures, and the exercise by purchase or otherwise any rights, warrants, or conversion features attaching to the securities;

(iii) purchase or other acquisition and retention of a security underwritten by a syndicate, even if the trustee or its affiliate participates or has participated as a member of the syndicate, provided the trustee does not purchase the security from itself, its affiliate, or from another member of the underwriting syndicate, or its affiliate, pursuant to an implied or express reciprocal agreement between the trustee, or its affiliate, and the other member, or its affiliate, to purchase all or part of each other’s underwriting participation commitment within the syndicate.

(c) Notwithstanding any other provision of law, any fiduciary holding securities in its fiduciary capacity, any bank, trust company, or private banker holding securities as a custodian or managing agent, and any bank, trust company, or private banker holding securities as custodian for a fiduciary, is authorized to deposit or arrange for the deposit of such securities in a clearing corporation, as defined in Article 8 of the Uniform Commercial Code. When such securities are so deposited, certificates representing securities of the same class of the same issuer may be merged and held in bulk in the name of the nominee of such clearing corporation with any other such securities deposited in such clearing corporation by any person regardless of the ownership of such securities, and certificates of small denomination may be merged into one or more certificates of larger denomination. The records of such fiduciary and the records of such bank, trust company, or private banker acting as custodian, as managing agent or as custodian for a fiduciary shall at all times show the name of the party for whose account the securities are so deposited. Ownership of, and other interests in, such securities may be transferred by bookkeeping entry on the books of such clearing corporation without physical delivery of certificates representing such securities. A bank, trust company, or private banker so depositing securities pursuant to this section shall be subject to such regulations as in the case of state‑chartered institutions, the Board of Financial Institutions, and, in the case of national banking associations, The Comptroller of the Currency may from time to time issue. A bank, trust company, or private banker acting as custodian for a fiduciary shall, on demand by the fiduciary, certify in writing to the fiduciary the securities so deposited by such bank, trust company, or private banker in such clearing corporation for the account of such fiduciary. A fiduciary shall, on demand by any party to a judicial proceeding for the settlement of such fiduciary’s account or on demand by the attorney for such party, certify in writing to such party the securities deposited by such fiduciary in such clearing corporation for its account as such fiduciary. This subsection shall apply to any fiduciary holding securities in its fiduciary capacity, and to any bank, trust company, or private banker holding securities as a custodian, managing agent, or custodian for a fiduciary, acting on April 17, 1973, or who thereafter may act regardless of the date of the agreement, instrument, or court order by which it is appointed and regardless of whether or not such fiduciary, custodian, managing agent, or custodian for a fiduciary owns capital stock of such clearing corporation.

(6) RESERVED

(D) A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

(E) Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust and with the requirements of this act.

(F) RESERVED

(G) Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee’s decision or action and not by hindsight.

(H) RESERVED

(I) The following terms or comparable language in the provisions of a trust, unless otherwise limited or modified, authorize any investment or strategy permitted pursuant to this act: “investments permissible by law for investment of trust funds”, “legal investments”, “authorized investments”, “using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital”, “prudent man rule”, “prudent trustee rule”, “prudent person rule”, and “prudent investor rule”.

(J)(1) Notwithstanding provisions of this act to the contrary, the duties of a trustee with respect to acquiring a contract of insurance upon the life of the trustor or upon the lives of the trustor and the trustor’s spouse, children, or parents do not include a duty to:

(a) determine whether the contract is or remains a proper investment;

(b) exercise policy options available under the contract; or

(c) diversify the contract.

(2) The trustee is not liable to the beneficiaries of the contract of insurance or to another party for loss arising from this subsection.

(3) Except as specifically provided in the trust instrument, the provisions of this subsection apply to a trust established before or after the effective date of this subsection and to a life insurance policy acquired by the trustee before or after the effective date of this act.

(K) This act applies to “charitable remainder trusts”. “Charitable remainder trust” means a trust that provides for a specified distribution at least annually for either life or a term of years to one or more beneficiaries, at least one of which is not a charity with an irrevocable remainder interest to be held for the benefit of, or paid over to, charity.

(L) This act must be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this act among the States enacting it.

HISTORY: 2005 Act No. 66, Section 1; 2010 Act No. 244, Section 57, eff June 7, 2010; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Subsection 62‑7‑933(B):

Subsection 62‑7‑933(B)(1) of the South Carolina Uniform Prudent Investor Act (SCUPIA) imposes on trustees the obligation of prudence in the conduct of investment functions and identifies further subsections of SCUPIA that specify the attributes of prudent conduct.

Origins. The prudence standard for trust investing traces back to Harvard College v. Amory, 26 Mass. (9 Pick.) 446 (1830). Trustees should “observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested.” Id. at 461.

Prior legislation. The Model Prudent Man Rule Statute (1942), sponsored by the American Bankers Association, undertook to codify the language of the Amory case. See Mayo A. Shattuck, The Development of the Prudent Man Rule for Fiduciary Investment in the United States in the Twentieth Century, 12 Ohio State L.J. 491, at 501 (1951); for the text of the model act, which inspired many state statutes, see id. at 508‑09. Another prominent codification of the Amory standard is Uniform Probate Code Section 7‑302 (1969), which provides that “the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another...” [Italics added.]

Congress has imposed a comparable prudence standard for the administration of pension and employee benefit trusts in the Employee Retirement Income Security Act (ERISA), enacted in 1974. ERISA Section 404(a)(1)(B), 29 U.S.C. Section 1104(a), provides that “a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and ... with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims...” [Italics added.]

Prior Restatement. The Restatement of Trusts 2d (1959) also tracked the language of the Amory case: “In making investments of trust funds the trustee is under a duty to the beneficiary ... to make such investments and only such investments as a prudent man would make of his own property having in view the preservation of the estate and the amount and regularity of the income to be derived ...” Restatement of Trusts 2d Section 227 (1959).

Objective standard. The concept of prudence in the judicial opinions and legislation is essentially relational or comparative. It resembles in this respect the “reasonable person” rule of tort law. A prudent trustee behaves as other trustees similarly situated would behave. The standard is, therefore, objective rather than subjective. SCUPIA subsections 62‑7‑933(C) through (G) identify the main factors that bear on prudent investment behavior.

Variation. Almost all of the rules of trust law are default rules, that is, rules that the settlor may alter or abrogate. SCUPIA subsection 62‑7‑933(B)(2) carries forward this traditional attribute of trust law. Traditional trust law also allows the beneficiaries of the trust to excuse its performance, when they are all capable and not misinformed. Restatement of Trusts 2d Section 216 (1959).

Subsection 62‑7‑933(C)

SCUPIA subsection (C) is the heart of the Act. Subsections (C)(1), (2) and (3) are patterned loosely on the language of the Restatement of Trusts 3d: Prudent Investor Rule Section 227 (1992), and on the 1991 Illinois statute, 760 Section ILCS 5⁄5 a (1992). Subsection (C)(6) is derived from Uniform Probate Code Section 7‑302 (1969).

Objective Standard. SCUPIA subsection (C)(1) carries forward the relational and objective standard made familiar in the Amory case, in earlier prudent investor legislation, and in the Restatements. Early formulations of the prudent person rule were sometimes troubled by the effort to distinguish between the standard of a prudent person investing for another and investing on his or her own account. The language of SCUPIA subsection (C)(1), by relating the trustee’s duty to “the purposes, terms, distribution requirements, and other circumstances of the trust,” should put such questions to rest. The standard is the standard of the prudent investor similarly situated.

Portfolio Standard. SCUPIA subsection (C)(2) emphasizes the consolidated portfolio standard for evaluating investment decisions. An investment that might be imprudent standing alone can become prudent if undertaken in sensible relation to other trust assets, or to other nontrust assets. In the trust setting the term “portfolio” embraces the entire trust estate.

Risk and Return. SCUPIA subsection (C)(2) also sounds the main theme of modern investment practice, sensitivity to the risk/return curve. See generally the works cited in the Prefatory Note to this Act, under “Literature.” Returns correlate strongly with risk, but tolerance for risk varies greatly with the financial and other circumstances of the investor, or in the case of a trust, with the purposes of the trust and the relevant circumstances of the beneficiaries. A trust whose main purpose is to support an elderly widow of modest means will have a lower risk tolerance than a trust to accumulate for a young scion of great wealth.

SCUPIA subsection (C)(2) of this Act follows Restatement of Trusts 3d: Prudent Investor Rule Section 227(a), which provides that the standard of prudent investing “requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust.”

Factors Affecting Investment. SCUPIA subsection (C)(3) points to certain of the factors that commonly bear on risk/return preferences in fiduciary investing. This listing is non‑exclusive. Tax considerations, such as preserving the stepped up basis on death under Internal Revenue Code Section 1014 for low‑basis assets, have traditionally been exceptionally important in estate planning for affluent persons. Under the present recognition rules of the federal income tax, taxable investors, including trust beneficiaries, are in general best served by an investment strategy that minimizes the taxation incident to portfolio turnover. See generally Robert H. Jeffrey & Robert D. Arnott, Is Your Alpha Big Enough to Cover Its Taxes?, Journal of Portfolio Management 15 (Spring 1993).

Another familiar example of how tax considerations bear upon trust investing: In a regime of pass‑through taxation, it may be prudent for the trust to buy lower yielding tax‑exempt securities for high‑bracket taxpayers, whereas it would ordinarily be imprudent for the trustees of a charitable trust, whose income is tax exempt, to accept the lowered yields associated with tax‑exempt securities.

When tax considerations affect beneficiaries differently, the trustee’s duty of impartiality requires attention to the competing interests of each of them.

Duty to Monitor. SCUPIA subsection (C)(1) through (4) apply both to investing and managing trust assets. “Managing” embraces monitoring, that is, the trustee’s continuing responsibility for oversight of the suitability of investments already made as well as the trustee’s decisions respecting new investments.

Duty to Investigate. SCUPIA subsection (C)(4) carries forward the traditional responsibility of the fiduciary investor to examine information likely to bear importantly on the value or the security of an investment—for example, audit reports or records of title. E.g., Estate of Collins, 72 Cal. App. 3d 663, 139 Cal. Rptr. 644 (1977) (trustees lent on a junior mortgage on unimproved real estate, failed to have land appraised, and accepted an unaudited financial statement; held liable for losses).

Abrogating Categoric Restrictions. SCUPIA subsection (C)(5)(a) clarifies that no particular kind of property or type of investment is inherently imprudent. Traditional trust law was encumbered with a variety of categoric exclusions, such as prohibitions on junior mortgages or new ventures. In some states legislation created so‑called “legal lists” of approved trust investments. The universe of investment products changes incessantly. Investments that were at one time thought too risky, such as equities, or more recently, futures, are now used in fiduciary portfolios. By contrast, the investment that was at one time thought ideal for trusts, the long‑term bond, has been discovered to import a level of risk and volatility—in this case, inflation risk—that had not been anticipated. Accordingly, SCUPIA subsection (C)(5)(a) follows Restatement of Trusts 3d: Prudent Investor Rule in abrogating categoric restrictions. The Restatement says: “Specific investments or techniques are not per se prudent or imprudent. The riskiness of a specific property, and thus the propriety of its inclusion in the trust estate, is not judged in the abstract but in terms of its anticipated effect on the particular trust’s portfolio.” Restatement of Trusts 3d: Prudent Investor Rule Section 227, Comment f, at 24 (1992). The premise of SCUPIA subsection (C)(5)(a) is that trust beneficiaries are better protected by the Act’s emphasis on close attention to risk/return objectives as prescribed in SCUPIA subsection (C)(2) than in attempts to identify categories of investment that are per se prudent or imprudent.

The Act impliedly disavows the emphasis in older law on avoiding “speculative” or “risky” investments. Low levels of risk may be appropriate in some trust settings but inappropriate in others. It is the trustee’s task to invest at a risk level that is suitable to the purposes of the trust.

Professional Fiduciaries. The ULC Drafting Committee declined the suggestion that the Uniform Prudent Investor Act (UPIA) should create an exception to the prudent investor rule (or to the diversification requirement of UPIA Section 3) in the case of smaller trusts. The Committee believes that UPIA subsections 2(b) and (c) (SCUPIA subsections (C)(2) and (3) emphasize factors that are sensitive to the traits of small trusts. Furthermore, it is always open to the settlor of a trust under UPIA subsection 1 (b) (SCUPIA subsection (B)(2)) to reduce the trustee’s standard of care if the settlor deems such a step appropriate. The official comments to the 1992 Restatement observe that pooled investments, such as mutual funds and bank common trust funds, are especially suitable for small trusts. Restatement of Trusts 3d: Prudent Investor Rule Section 227, Comments h, m, at 28, 51; reporter’s note to Comment g, id. at 83.

Matters of Proof. Although virtually all express trusts are created by written instrument, oral trusts are known, and accordingly, this Act presupposes no formal requirement that trust terms be in writing. When there is a written trust instrument, modern authority strongly favors allowing evidence extrinsic to the instrument to be consulted for the purpose of ascertaining the settlor’s intent. See Uniform Probate Code Sec. 2‑601 (1990), Comment; Restatement (Third) of Property: Donative Transfers (Preliminary Draft No. 2, ch. 11, Sept. 11, 1992).

Subsection 62‑7‑933(D)

The language of this SCUPIA subsection derives from Restatement of Trusts 2d Section 228 (1959). ERISA insists upon a comparable rule for pension trusts. ERISA Section 404(a)(1)(C), 29 U.S.C. Section 1104(a)(1)(C). Case law overwhelmingly supports the duty to diversify. See Annot., Duty of Trustee to Diversify Investments, and Liability for Failure to Do So, 24 A.L.R. 3d 730 (1969) & 1992 Supp. at 78‑79.

The 1992 Restatement of Trusts takes the significant step of integrating the diversification requirement into the concept of prudent investing. Section 227(b) of the 1992 Restatement treats diversification as one of the fundamental elements of prudent investing, replacing the separate section 228 of the Restatement of Trusts 2d. The message of the 1992 Restatement, carried forward in SCUPIA subsection (D) is that prudent investing ordinarily requires diversification.

Circumstances can, however, overcome the duty to diversify. For example, if a tax‑sensitive trust owns an under‑diversified block of low‑basis securities, the tax costs of recognizing the gain may outweigh the advantages of diversifying the holding. The wish to retain a family business is another situation in which the purposes of the trust sometimes override the conventional duty to diversify.

Rationale for Diversification. “Diversification reduces risk ... [because] stock price movements are not uniform. They are imperfectly correlated. This means that if one holds a well diversified portfolio, the gains in one investment will cancel out the losses in another.” Jonathan R. Macey, An Introduction to Modern Financial Theory 20 (American College of Trust and Estate Counsel Foundation, 1991). For example, during the Arab oil embargo of 1973, international oil stocks suffered declines, but the shares of domestic oil producers and coal companies benefitted. Holding a broad enough portfolio allowed the investor to set off, to some extent, the losses associated with the embargo.

Modern portfolio theory divides risk into the categories of “compensated” and “uncompensated” risk. The risk of owning shares in a mature and well‑managed company in a settled industry is less than the risk of owning shares in a start‑up high‑technology venture. The investor requires a higher expected return to induce the investor to bear the greater risk of disappointment associated with the start‑up firm. This is compensated risk—the firm pays the investor for bearing the risk. By contrast, nobody pays the investor for owning too few stocks. The investor who owned only international oils in 1973 was running a risk that could have been reduced by having configured the portfolio differently—to include investments in different industries. This is uncompensated risk—nobody pays the investor for owning shares in too few industries and too few companies. Risk that can be eliminated by adding different stocks (or bonds) is uncompensated risk. The object of diversification is to minimize this uncompensated risk of having too few investments. “As long as stock prices do not move exactly together, the risk of a diversified portfolio will be less than the average risk of the separate holdings.” R.A. Brealey, An Introduction to Risk and Return from Common Stocks 103 (2d ed. 1983).

There is no automatic rule for identifying how much diversification is enough. The 1992 Restatement says: “Significant diversification advantages can be achieved with a small number of well‑selected securities representing different industries ... Broader diversification is usually to be preferred in trust investing,” and pooled investment vehicles “make thorough diversification practical for most trustees.” Restatement of Trusts 3d: Prudent Investor Rule Section 227, General Note on Comments e‑h, at 77 (1992). See also Macey, supra, at 23‑24; Brealey, supra, at 111‑13.

Diversifying by Pooling. It is difficult for a small trust fund to diversify thoroughly by constructing its own portfolio of individually selected investments. Transaction costs such as the round‑lot (100 shares) trading economies make it relatively expensive for a small investor to assemble a broad enough portfolio to minimize uncompensated risk. For this reason, pooled investment vehicles have become the main mechanism for facilitating diversification for the investment needs of smaller trusts.

Most states have legislation authorizing common trust funds; see 3 Austin W. Scott & William F. Fratcher, The Law of Trusts Section 227.9, at 463‑65 n.26 (4th ed. 1988) (collecting citations to state statutes). As of 1992, 35 states and the District of Columbia had enacted the Uniform Common Trust Fund Act (UCTFA) (1938), overcoming the rule against commingling trust assets and expressly enabling banks and trust companies to establish common trust funds. 7 Uniform Laws Ann. 1992 Supp. at 130 (schedule of adopting states). The Prefatory Note to the UCTFA explains: “The purposes of such a common or joint investment fund are to diversify the investment of the several trusts and thus spread the risk of loss, and to make it easy to invest any amount of trust funds quickly and with a small amount of trouble.” 7 Uniform Laws Ann. 402 (1985).

Fiduciary Investing in Mutual Funds. Trusts can also achieve diversification by investing in mutual funds. See Restatement of Trusts 3d: Prudent Investor Rule, Section 227, Comment m, at 99‑100 (1992) (endorsing trust investment in mutual funds). ERISA Section 401(b)(1), 29 U.S.C. Section 1101(b)(1), expressly authorizes pension trusts to invest in mutual funds, identified as securities “issued by an investment company registered under the Investment Company Act of 1940 ...”

Subsection 62‑7‑933(E)

SCUPIA subsection (E), requiring the trustee to dispose of unsuitable assets within a reasonable time, is old law, codified in Restatement of Trusts 3d: Prudent Investor Rule Section 229 (1992), lightly revising Restatement of Trusts 2d Section 230 (1959). The duty extends as well to investments that were proper when purchased but subsequently become improper. Restatement of Trusts 2d Section 231 (1959). The same standards apply to successor trustees, see Restatement of Trusts 2d Section 196 (1959).

The question of what period of time is reasonable turns on the totality of factors affecting the asset and the trust. The 1959 Restatement took the view that “ordinarily any time within a year is reasonable, but under some circumstances a year may be too long a time and under other circumstances a trustee is not liable although he fails to effect the conversion for more than a year.” Restatement of Trusts 2d Section 230, comment b (1959). The 1992 Restatement retreated from this rule of thumb, saying, “No positive rule can be stated with respect to what constitutes a reasonable time for the sale or exchange of securities.” Restatement of Trusts 3d: Prudent Investor Rule Section 229, comment b (1992).

The criteria and circumstances identified in SCUPIA subsection (C)(3) as bearing upon the prudence of decisions to invest and manage trust assets also pertain to the prudence of decisions to retain or dispose of inception assets under this section.

Subsection 62‑7‑933(G)

This subsection derives from the 1991 Illinois act, 760 ILCS 5⁄5 (a)(2) (1992), which draws upon Restatement of Trusts 3d: Prudent Investor Rule Section 227, comment b, at 11 (1992). Trustees are not insurers. Not every investment or management decision will turn out in the light of hindsight to have been successful. Hindsight is not the relevant standard. In the language of law and economics, the standard is ex ante, not ex post.

Subsection 62‑7‑933(I):

This provision meant to facilitate incorporation of the Act by means of the formulaic language commonly used in trust instruments.

Effect of Amendment

The 2010 amendment in subsection (C)(3) substituted “Among other circumstances provided in item (1) of this subsection which a” for “A”, and substituted “are such” for “those circumstances” following “investing and managing trust assets”.

The 2013 amendment made nonsubstantive changes.

Library References

Trusts 179, 217.3(5).

Westlaw Topic No. 390.

C.J.S. Trusts Sections 321 to 324, 326, 482, 491, 496.

Part 10

Liability of Trustees and Rights of Persons Dealing With Trustee

General Comment

Sections 62‑7‑1001 through 62‑7‑1009 identify the remedies for breach of trust, describe how money damages are to be determined, and specify potential defenses. Section 62‑7‑1001 lists the remedies for breach of trust and specifies when a breach of trust occurs. A breach of trust occurs when the trustee breaches one of the duties contained in Article 8 or elsewhere in the Code. The remedies for breach of trust in Section 62‑7‑1001 are broad and flexible. Section 62‑7‑1002 provides how money damages for breach of trust are to be determined. The standard for determining money damages rests on two principles: (1) the trust should be restored to the position it would have been in had the harm not occurred; and (2) the trustee should not be permitted to profit from the trustee’s own wrong. Section 62‑7‑1003 holds a trustee accountable for profits made from the trust even in the absence of a breach of trust. Section 62‑7‑1004 reaffirms the court’s power in equity to award costs and attorney’s fees as justice requires.

Sections 62‑7‑1005 through 62‑7‑1009 deal with potential defenses. Section 62‑7‑1005 provides a statute of limitations on actions against a trustee. Section 62‑7‑1006 protects a trustee who acts in reasonable reliance on the terms of a written trust instrument. Section 62‑7‑1007 protects a trustee who has exercised reasonable care to ascertain the happening of events that might affect distribution, such as a beneficiary’s marriage or death. Section 62‑7‑1008 describes the effect and limits on the use of an exculpatory clause. Section 62‑7‑1009 deals with the standards for recognizing beneficiary approval of acts of the trustee that might otherwise constitute a breach of trust.

Sections 62‑7‑1010 through 62‑7‑1013 address trustee relations with persons other than beneficiaries. The emphasis is on encouraging third parties to engage in commercial transactions to the same extent as if the property were not held in trust. Section 62‑7‑1010 negates personal liability on contracts entered into by the trustee if the fiduciary capacity was properly disclosed. The trustee is also relieved from liability for torts committed in the course of administration unless the trustee was personally at fault. Section 62‑7‑1011 negates personal liability for contracts entered into by partnerships in which the trustee is a general partner as long as the fiduciary capacity was disclosed in the contract or partnership certificate. Section 62‑7‑1012 protects persons other than beneficiaries who deal with a trustee in good faith and without knowledge that the trustee is exceeding or improperly exercising a power. Section 62‑7‑1013 permits a third party to rely on a certification of trust, thereby reducing the need for a third party to request a copy of the complete trust instrument.

Much of this Part is not subject to override in the terms of the trust. The settlor may not limit the rights of persons other than beneficiaries as provided in Sections 62‑7‑1010 through 62‑7‑1013, nor interfere with the court’s ability to take such action to remedy a breach of trust as may be necessary in the interests of justice. See Section 62‑7‑105.

**SECTION 62‑7‑1001.** 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 62‑7‑706;

(8) reduce or deny compensation to the trustee;

(9) subject to Section 62‑7‑1012, 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.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section codifies the remedies available to rectify or to prevent a breach of trust for violation of a duty owed to a beneficiary. The duties that a trust might breach include those contained in Part 8 in addition to those specified elsewhere in the Code.

Although subsections (b)(2) through (b)(9) list specific remedies, subsection (b)(10) provides a general statement of available remedies, which essentially confirms broad authority in the court to fashion an appropriate remedy for breach of trust.

This section identifies the available remedies but does not attempt to cover the refinements and exceptions developed in case law. The availability of a remedy in a particular circumstance will be determined not only by this Code but also by the common law of trusts and principles of equity. See Section 62‑7‑106.

Beneficiaries and cotrustees have standing to bring a petition to remedy a breach of trust. Following a successor trustee’s acceptance of office, a successor trustee has standing to sue a predecessor for breach of trust. See Restatement (Second) of Trusts Section 200 (1959). A person who may represent a beneficiary’s interest under Part 3 would have standing to bring a petition on behalf of the person represented. In the case of a charitable trust, those with standing include the state attorney general, a charitable organization expressly designated to receive distributions under the terms of the trust, and other persons with a special interest. See Section 62‑7‑110 & Restatement (Second) of Trusts Section 391 (1959). A person appointed to enforce a trust for an animal or a trust for a noncharitable purpose would have standing to sue for a breach of trust. See Sections 62‑7‑110(c), 62‑7‑408, 62‑7‑409.

Traditionally, remedies for breach of trust at law were limited to suits to enforce unconditional obligations to pay money or deliver chattels. See Restatement (Second) of Trusts Section 198 (1959). Otherwise, remedies for breach of trust were exclusively equitable, and as such, punitive damages were not available and findings of fact were made by the judge and not a jury. See Restatement (Second) of Trusts Section 197 (1959).

The remedies identified in this section are derived from Restatement (Second) of Trusts Section 199 (1959). The reference to payment of money in subsection (b)(3) includes liability that might be characterized as damages, restitution, or surcharge. For the measure of liability, see Section 62‑7‑1002. Subsection (b)(5) makes explicit the court’s authority to appoint a special fiduciary, also sometimes referred to as a receiver. See Restatement (Second) of Trusts Section 199(d) (1959). The authority of the court to appoint a special fiduciary is not limited to actions alleging breach of trust but is available whenever the court, exercising its equitable jurisdiction, concludes that an appointment would promote administration of the trust. See Section 62‑7‑704(e) (special fiduciary may be appointed whenever court considers such appointment necessary for administration).

Subsection (b)(8), which allows the court to reduce or deny compensation, is in accord with Restatement (Second) of Trusts Section 243 (1959). For the factors to consider in setting a trustee’s compensation absent breach of trust, see Section 62‑7‑708 and Comment. In deciding whether to reduce or deny a trustee compensation, the court may wish to consider (1) whether the trustee acted in good faith; (2) whether the breach of trust was intentional; (3) the nature of the breach and the extent of the loss; (4) whether the trustee has restored the loss; and (5) the value of the trustee’s services to the trust. See Restatement (Second) of Trusts Section 243 cmt. c (1959).

The authority under subsection (b)(9) to set aside wrongful acts of the trustee is a corollary of the power to enjoin a threatened breach as provided in subsection (b)(2). However, in setting aside the wrongful acts of the trustee the court may not impair the rights of bona fide purchasers protected under Section 62‑7‑1012. See Restatement (Second) of Trusts Section 284 (1959).

CROSS REFERENCES

Banks and trust companies acting as fiduciaries, see Sections 34‑15‑10 et seq.

Costs against certain fiduciaries, see Section 15‑37‑180.

Library References

Trusts 166, 250, 321, 368.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 307 to 308, 555, 557 to 561, 606 to 607, 630 to 632, 691, 693.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Action Section 10, Particular Actions at Law or in Equity.

LAW REVIEW AND JOURNAL COMMENTARIES

The Impact of Significant Substantive Provisions of the South Carolina Trust Code, 57 S.C. L. Rev. 137 (Autumn 2005).

NOTES OF DECISIONS

Construction and application 1

1. Construction and application

Main purpose of grantor’s action against former trustee for breach of fiduciary duty and an accounting was equitable rather than legal, and thus former trustee did not have a right to a jury trial, where remedy sought for breach of the duty of loyalty, which was to restore income and value to trust, was more akin to restitution than legal damages, remedy sought for breach of duty of loyalty was equitable remedy of disgorgement of commissions and profits, and accounting was an action sounding in equity. S.C. Const. art. Verenes v. Alvanos (S.C. 2010) 387 S.C. 11, 690 S.E.2d 771, rehearing denied. Jury 14(5)

**SECTION 62‑7‑1002.** Damages for breach of trust.

(a) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of:

(1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or

(2) the profit the trustee made by reason of the breach.

(b) Except as otherwise provided in this subsection, if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Subsection (a) is based on Restatement (Third) of Trusts: Prudent Investor Rule Section 205 (1992). If a trustee commits a breach of trust, the beneficiaries may either affirm the transaction or, if a loss has occurred, hold the trustee liable for the amount necessary to compensate fully for the consequences of the breach. This may include recovery of lost income, capital gain, or appreciation that would have resulted from proper administration. Even if a loss has not occurred, the trustee may not benefit from the improper action and is accountable for any profit the trustee made by reason of the breach.

For extensive commentary on the determination of damages, traditionally known as trustee surcharge, with numerous specific applications, see Restatement (Third) of Trusts: Prudent Investor Rule Sections 205‑213 (1992). For the use of benchmark portfolios to determine damages, see Restatement (Third) of Trusts: Prudent Investor Rule Reporter’s Notes to Sections 205 and 208‑211 (1992). On the authority of a court of equity to reduce or excuse damages for breach of trust, see Restatement (Second) of Trusts Section 205 cmt. g (1959). For purposes of this section and Section 62‑7‑1003, “profit” does not include the trustee’s compensation. A trustee who has committed a breach of trust is entitled to reasonable compensation for administering the trust unless the court reduces or denies the trustee compensation pursuant to Section 62‑7‑1001(b)(8).

Subsection (b) is based on Restatement (Second) of Trusts Section 258 (1959). Cotrustees are jointly and severally liable for a breach of trust if there was joint participation in the breach. Joint and several liability also is imposed on a nonparticipating cotrustee who, as provided in Section 62‑7‑703(g), failed to exercise reasonable care (1) to prevent a cotrustee from committing a serious breach of trust, or (2) to compel a cotrustee to redress a serious breach of trust. Joint and several liability normally carries with it a right in any trustee to seek contribution from a cotrustee to the extent the trustee has paid more than the trustee’s proportionate share of the liability. Subsection (b), consistent with Restatement (Second) of Trusts Section 258 (1959), creates an exception. A trustee who was substantially more at fault or committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries is not entitled to contribution from the other trustees.

Determining degrees of comparative fault is a question of fact. The fact that one trustee was more culpable or more active than another does not necessarily establish that this trustee was substantially more at fault. Nor is a trustee substantially less at fault because the trustee did not actively participate in the breach. See Restatement (Second) of Trusts Section 258 cmt. e (1959). Among the factors to consider: (1) Did the trustee fraudulently induce the other trustee to join in the breach? (2) Did the trustee commit the breach intentionally while the other trustee was at most negligent? (3) Did the trustee, because of greater experience or expertise, control the actions of the other trustee? (4) Did the trustee alone commit the breach with liability imposed on the other trustee only because of an improper delegation or failure to properly monitor the actions of the cotrustee? See Restatement (Second) of Trusts Section 258 cmt. d (1959).

Library References

Trusts 265, 339.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 555 to 556, 583.

**SECTION 62‑7‑1003.** Damages in absence of breach.

(a) A trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust.

(b) Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

The principle on which a trustee’s duty of loyalty is premised is that a trustee should not be allowed to use the trust as a means for personal profit other than for routine compensation earned. While most instances of personal profit involve situations where the trustee has breached the duty of loyalty, not all cases of personal profit involve a breach of trust. Subsection (a), which holds a trustee accountable for any profit made, even absent a breach of trust, is based on Restatement (Second) of Trusts Section 203 (1959). A typical example of a profit is receipt by the trustee of a commission or bonus from a third party for actions relating to the trust’s administration. See Restatement (Second) of Trusts Section 203 cmt. a (1959).

A trustee is not an insurer. Similar to Restatement (Second) of Trusts Section 204 (1959), subsection (b) provides that absent a breach of trust a trustee is not liable for a loss or depreciation in the value of the trust property or for failure to make a profit.

For purposes of this section and Section 62‑7‑1002, “profit” does not include the trustee’s compensation. A trustee who has committed a breach of trust is entitled to reasonable compensation for administering the trust unless the court reduces or denies the trustee compensation pursuant to Section 62‑7‑1001(b)(8).

Library References

Trusts 265.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 555 to 556, 583.

**SECTION 62‑7‑1004.** Attorney’s fees and costs.

In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney’s fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section is similar to former South Carolina Probate Code Section 62‑7‑204 Paragraph (B) which granted to the probate court concurrent jurisdiction with the circuit courts of South Carolina over attorney’s fees. As that section states, “Attorney’s fees may be set at a fixed or hourly rate or by contingency fee.” SCTC Section 62‑7‑1004 goes further by codifying the power of the courts to award costs and expenses. This section codifies the court’s historic authority to award costs and fees, including reasonable attorney’s fees, in judicial proceedings grounded in equity. The court may award a party its own fees and costs from the trust. The court may also charge a party’s costs and fees against another party to the litigation. Generally, litigation expenses were at common law chargeable against another party only in the case of egregious conduct such as bad faith or fraud. With respect to a party’s own fees, Section 62‑7‑709 authorizes a trustee to recover expenditures properly incurred in the administration of the trust. The court may award a beneficiary litigation costs if the litigation is deemed beneficial to the trust. Sometimes, litigation brought by a beneficiary involves an allegation that the trustee has committed a breach of trust. On other occasions, the suit by the beneficiary is brought because of the trustee’s failure to take action against a third party, such as to recover property properly belonging to the trust. For the authority of a beneficiary to bring an action when the trustee fails to take action against a third party, see Restatement (Second) of Trusts Sections 281‑282 (1959). For the case law on the award of attorney’s fees and other litigation costs, see 3 Austin W. Scott & William F. Fratcher, The Law of Trusts Sections 188.4 (4th ed. 1988).

Library References

Trusts 268, 330, 377.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 555 to 556, 586, 648 to 653, 756 to 757.

**SECTION 62‑7‑1005.** Limitation of action against trustee.

(a) Unless previously barred by adjudication, consent, or limitation, a beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust.

(b) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.

(c) If subsection (a) does not apply, a judicial proceeding by a beneficiary or on behalf of a beneficiary against a trustee for breach of trust must be commenced within three 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.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section is similar in content to former South Carolina Probate Code Section 62‑7‑307. Both sections establish a statute of limitations especially applicable to trustees’ liabilities to trust beneficiaries for breach of trust. SCTC Section 62‑7‑1005 sets the limit for commencing a proceeding against a trustee for breach of trust at one year after receiving a report from the trustee or its representative that provides sufficient information so that the beneficiary or representative should know of or be on inquiry notice about the claim. In other cases, the three‑year limitation period applies.

SCTC Section 62‑7‑1005(a) does not adopt the Uniform Trust Code requirement that, for the one‑year statute to commence, the report inform the beneficiary of the limitations period. SCTC Section 62‑7‑1005(c) reduces the UTC limitations period from five to three years.

The one‑year and three‑year limitations periods under this section are not the only means for barring an action by a beneficiary. A beneficiary may be foreclosed by consent, release, or ratification as provided in Section 62‑7‑1009. Claims may also be barred by principles such as estoppel and laches arising in equity under the common law of trusts. See Section 62‑7‑106.

The representative referred to in subsection (a) is the person who may represent and bind a beneficiary as provided in Part 3. During the time that a trust is revocable and the settlor has capacity, the person holding the power to revoke is the one who must receive the report. See Section 62‑7‑603(a) (rights of settlor of revocable trust).

This section addresses only the issue of when the clock will start to run for purposes of the statute of limitations. If the trustee wishes to foreclose possible claims immediately, a consent to the report or other information may be obtained pursuant to Section 62‑7‑1009. For the provisions relating to the duty to report to beneficiaries, see Section 62‑7‑813.

Subsection (a) applies only if the trustee has furnished a report. The one‑year statute of limitations does not begin to run against a beneficiary who has waived the furnishing of a report as provided in Section 62‑7‑813(e).

Subsection (c) is intended to provide some ultimate repose for actions against a trustee. It applies to cases in which the trustee has failed to report to the beneficiaries or the report did not meet the disclosure requirements of subsection (b). It also applies to beneficiaries who did not receive notice of the report, whether personally or through representation. While the three‑year limitations period will normally begin to run on termination of the trust, it can also begin earlier. If a trustee leaves office prior to the termination of the trust, the limitations period for actions against that particular trustee begins to run on the date the trustee leaves office. If a beneficiary receives a final distribution prior to the date the trust terminates, the limitations period for actions by that particular beneficiary begins to run on the date of final distribution.

If a trusteeship terminates by reason of death, a claim against the trustee’s estate for breach of fiduciary duty would, like other claims against the trustee’s estate, be barred by a probate creditor’s claim statute even though the statutory period prescribed by this section has not yet expired.

This section does not specifically provide that the statutes of limitations under this section are tolled for fraud or other misdeeds, leaving the resolution of this question to other law of the State.

Library References

Trusts 256.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 555, 566 to 567.

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 965, Settlor’s Control Over Trustee’s Duties to Furnish Information and to Account.

Bogert ‑ the Law of Trusts and Trustees Section 969, Defenses to Action for Accounting.

**SECTION 62‑7‑1005A.** Trust protector.

(A) If a trust instrument provides that a trustee is to follow the direction of a trust protector and the trustee acts in accordance with such direction, then except in cases of wilful misconduct on the part of the trustee so directed, the trustee is not liable directly or indirectly from any such act.

(B) If a trust instrument provides that a trustee is to make decisions with the consent of a trust protector, then except in cases of wilful misconduct or gross negligence on the part of the trustee, the trustee is not liable for any loss resulting directly or indirectly from any act taken or omitted as a result of such trust protector’s failure to provide such consent after having been requested to do so by the trustee.

(C) If the trust document provides for a trust protector and the serving trust protector is unwilling or unable to serve or continue to serve and there is no provision for a successor trust protector, the then serving trustee may petition the court having jurisdiction over the trust estate to appoint an individual or a bank or trust company qualified to do business in the state of the settlor’s domicile at the time of the settlor’s death as successor trust protector.

(D) A trust protector, other than a beneficiary, is a fiduciary with respect to each power granted to such trust protector. In exercising a power or refraining from exercising any power, a trust protector shall act in good faith and in accordance with the terms and purposes of the trust.

(E) A trust protector is an excluded fiduciary with respect to each power granted or reserved exclusively to any one or more other trustees, trust advisors, or trust protectors.

HISTORY: 2013 Act No. 100, Section 2, eff January 1, 2014.

**SECTION 62‑7‑1005B.** Trust investment advisor.

(A) If a trust instrument provides that a trustee is to follow the direction of a trust investment advisor, and the trustee acts in accordance with such a direction, then except in cases of wilful misconduct on the part of the trustee so directed, the trustee is not liable directly or indirectly from any such act.

(B) If a trust instrument provides that a trustee is to make decisions with the consent of a trust investment advisor, then except in cases of wilful misconduct or gross negligence on the part of the trustee, the trustee shall not be liable directly or indirectly from any act taken or omitted as a result of such trust investment advisor’s failure to provide such consent after having been requested to do so by the trustee.

(C) If a trust instrument provides for a trust investment advisor and the serving trust investment advisor is unwilling or unable to serve or continue to serve and there is no provision for a successor trust investment advisor, the then serving trustee may petition the court having jurisdiction over the trust estate to appoint an individual or a bank or trust company qualified to do business in the state of the settlor’s domicile at the time of the settlor’s death as successor trust investment advisor.

(D) A trust investment advisor, other than a beneficiary, is a fiduciary with respect to each power granted to such trust investment advisor. In exercising any power or refraining from exercising any power, a trust investment advisor shall act in good faith and in accordance with the terms and purposes of the trust.

(E) A trust investment advisor is an excluded fiduciary with respect to each power granted or reserved exclusively to any one or more other trustees, trust advisors, or trust protectors.

HISTORY: 2013 Act No. 100, Section 2, eff January 1, 2014.

**SECTION 62‑7‑1006.** 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.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Former South Carolina statutes and case law resembled SCTC Section 62‑7‑1006. Former South Carolina Probate Code Section 62‑7‑302(B)(2), retained and incorporated in Part 9, stated “[a] trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust.” That section is part of the South Carolina Uniform Prudent Investor Act, retained and incorporated in Section 62‑7‑933, which provides trustee guidelines for the administration of trusts, and specifically relates to the investment and management of trust assets. As a result, that section arguably applies to only the investment and management of the trust corpus. SCTC Section 62‑7‑1006, however, covers a broader scope because it does not contain language limiting its application to investment and management of trust assets.

Prior South Carolina case law could be interpreted to allow trustees to rely not only on terms pertaining to investment and management of the trust, but also to other terms contained in the trust document. South Carolina courts have held “[i]n ascertaining the Settlor’s intent, [a] court must resort first to the language of the trust instrument . . .” Sarlin v. Sarlin, 312 S.C. 27, 29, 430 S.E. 2d 530, 532 (S.C. Ct. App. 1993). One could infer that a trustee should follow the same canons of interpretation as applied by the courts. Additionally, former SCPC Section 62‑7‑704 encouraged trustees to perform without the assistance of the courts in providing that “a trustee has the power to perform, without court authorization, every act which a prudent man would perform for the purpose of the trust . . .” This combination of case law and statutory law seems to hold (or at the very least imply) that a trustee could reasonably rely on the terms contained in the trust instrument for all types of provisions, not only those pertaining to the investment and management of trust assets. SCTC Section 62‑7‑1006 provides more certainty with respect to this issue.

It sometimes happens that the intended terms of the trust differ from the apparent meaning of the trust instrument. This can occur because the court, in determining the terms of the trust, is allowed to consider evidence extrinsic to the trust instrument. See Section 62‑7‑103(17) (definition of “terms of a trust”). Furthermore, if a trust is reformed on account of mistake of fact or law, as authorized by Section 62‑7‑415, provisions of a trust instrument can be deleted or contradicted and provisions not in the trust instrument may be added. The concept of the “terms of a trust,” both as defined in this Code and as used in the doctrine of reformation, is intended to effectuate the principle that a trust should be administered and distributed in accordance with the settlor’s intent. However, a trustee should also be able to administer a trust with some dispatch and without concern that a reasonable reliance on the terms of the trust instrument is misplaced. This section protects a trustee who so relies on a trust instrument but only to the extent the breach of trust resulted from such reliance. This section is similar to Section 62‑7‑933(B)(2), which protects a trustee from liability to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

This section protects a trustee only if the trustee’s reliance is reasonable. For example, a trustee’s reliance on the trust instrument would not be justified if the trustee is aware of a prior court decree or binding nonjudicial settlement agreement clarifying or changing the terms of the trust.

Library References

Trusts 252.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 555, 563.

**SECTION 62‑7‑1007.** Event affecting administration or distribution.

If the happening of an event, including marriage, divorce, performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee’s lack of knowledge.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

There was no prior South Carolina statute specifically addressing the issue of a trustee’s duty to ascertain the happening of events affecting the administration or distribution of a trust.

Prior South Carolina case law essentially stated that a trustee could be held liable for negligently failing to investigate events affecting the status of a beneficiary’s rights to distributions. See Rogers v. Herron, 226 S.C. 317, 85 S.E.2d 104 (S.C. 1954); see also First Union Nat. Bank of South Carolina v. Soden, 511 S.E.2d 372 (Ct. App.1998) (essentially applying the same standards to a remainder beneficiary for failing to disclose her father’s remarriage). SCTC Section 62‑7‑1007 expressly provides protection from liability for trustees who do exercise reasonable care.

Library References

Trusts 252.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 555, 563.

**SECTION 62‑7‑1008.** Exculpation of trustee.

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

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

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

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Even if the terms of the trust attempt to completely exculpate a trustee for the trustee’s acts, the trustee must always comply with a certain minimum standard. As provided in subsection (a), a trustee must always act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. Subsection (a) is consistent with the standards expressed in Sections 62‑7‑105 and 62‑7‑814(a), which, similar to this section, place limits on the power of a settlor to negate trustee duties. This section is also similar to Section 222 of the Restatement (Second) of Trusts (1959), except that this Code, unlike the Restatement, allows a settlor to exculpate a trustee for a profit that the trustee made from the trust.

South Carolina Trust Code Section 62‑7‑1008 does not include Uniform Trust Code Section 1008(b) concerning exculpatory terms drafted or caused to be drafted by the trustee.

Library References

Trusts 172.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 318 to 320.

**SECTION 62‑7‑1009.** Beneficiary’s consent, release, or ratification.

(a) A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:

(1) 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 have knowledge of the beneficiary’s rights or of the material facts relating to the breach.

(b) No consideration is required for the consent, release or ratification to be valid.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section is based on Sections 216 through 218 of the Restatement (Second) of Trusts (1959). A consent, release, or affirmance under this section may occur either before or after the approved conduct. This section requires an affirmative act by the beneficiary. A failure to object is not sufficient. See Restatement (Second) of Trusts Section 216 cmt. a (1959). A consent is binding on a consenting beneficiary although other beneficiaries have not consented. See Restatement (Second) of Trusts Section 216 cmt. g (1959). To constitute a valid consent, the beneficiary must know of the beneficiary’s rights and of the material facts relating to the breach. See Restatement (Second) of Trusts Section 216 cmt. k (1959). If the beneficiary’s approval involves a self‑dealing transaction, the approval is binding only if the transaction was fair and reasonable. See Restatement (Second) of Trusts Sections 170(2), 216(3) & cmt. n (1959).

An approval by the settlor of a revocable trust or by the holder of a presently exercisable power of withdrawal binds all the beneficiaries. See Section 62‑7‑603. A beneficiary is also bound to the extent an approval is given by a person authorized to represent the beneficiary as provided in Part 3.

The South Carolina Trust Code adds Section 62‑7‑1009(b) not found in the Uniform Trust Code version.

Library References

Trusts 237, 252.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 329, 555, 563.

**SECTION 62‑7‑1010.** 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.

(d) The question of liability as between the trust estate and the trustee individually may be determined in a proceeding for accounting, surcharge, or indemnification or other appropriate proceeding.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑7‑1010(b) is substantially similar to former South Carolina Probate Code Section 62‑7‑306(b). Section 62‑7‑1010(b) could be viewed as expanding on a trustee’s exemption from tort liability by its specific reference to excluding trustees from liabilities arising from violation of environmental laws. This specific exemption is not contained in former SCPC Section 62‑7‑306(b). It could be assumed, however, that the general exemption for liability from torts provided by former SCPC Section 62‑7‑306(b) would cover tort liabilities associated with environmental laws by virtue of the all encompassing general reference to the term “torts.” This assumption, however, is less than certain in light of the Uniform Trust Code Comment to Section 1010, which indicates that UTC subsection 62‑7‑1010(b) was enacted in response to particular concerns from trustees over this type of liability. UTC Section 1010(c) essentially mirrors Section 62‑7‑306(c) of the South Carolina Probate Code.

SCTC Section 62‑7‑1010(d) retains and incorporates the provisions of former SCPC Section 62‑7‑306(d), not found in the UTC version of Section 62‑7‑1010.

Library References

Trusts 171, 173, 339.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 318 to 324, 330 to 331, 338 to 339.

RESEARCH REFERENCES

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 712, Contracts Within the Powers of the Trustee‑Personal Liability: the Common Law Rule.

Restatement (3d) of Trusts Section 105, Claim Against Trust.

Restatement (3d) of Trusts Section 105 TD 6, Claim Against Trust.

**SECTION 62‑7‑1011.** Interest as general partner.

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

(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.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

Section 62‑7‑1011 protects a trustee from personal liability on contracts that the trustee enters into on behalf of the trust. Section 62‑7‑1011 also absolves a trustee from liability for torts committed in administering the trust unless the trustee was personally at fault. It does not protect a trustee from personal liability for contracts entered into or torts committed by a general or limited partnership of which the trustee was a general partner. That is the purpose of this section. Subsection (a) protects the trustee from personal liability for such partnership obligations whether the trustee signed the contract or it was signed by another general partner. Subsection (b) protects a trustee from personal liability for torts committed by the partnership unless the trustee was personally at fault. Protection from the partnership’s contractual obligations is available under subsection (a) only if the other party is on notice of the fiduciary relationship, either in the contract itself or in the partnership certificate on file.

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

Certain exceptions apply. The section is not intended to be used as a device for individuals or their families to shield assets from creditor claims. Consequently, subsection (c) excludes from the protections provided by this section trustees who own an interest in the partnership in another capacity or if an interest is owned by the trustee’s spouse or the trustee’s descendants, siblings, parents, or the spouse of any of them.

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

There was no prior South Carolina statutory or case law counterpart.

Library References

Trusts 171, 173, 215.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 318 to 324, 327, 330 to 331, 338 to 339.

**SECTION 62‑7‑1012.** 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.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

SCTC Section 62‑7‑1012 is similar to former South Carolina Probate Code Section 62‑7‑708. SCTC Section 62‑7‑1012 protects third parties who act in good faith in dealings with trustees. While good faith is not defined in the South Carolina Trust Code, definitions of good faith in the commercial context should be consistent with the purpose of this section, which is to treat commercial transactions with trustees similar to other commercial transactions. In addition, SCTC section 62‑7‑1012 protects a third party who in good faith deals with a former trustee without knowledge that the trusteeship has terminated.

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

Subsection (a) protects two different classes; persons other than beneficiaries who assist a trustee with a transaction, and persons other than beneficiaries who deal with the trustee for value. As long as the assistance was provided or the transaction was entered into in good faith and without knowledge, third persons in either category are protected in the transaction even if the trustee was exceeding or improperly exercising the power. For the definition of “know,” see Section 62‑7‑104.

Subsection (b) confirms that a third party who is acting in good faith is not charged with a duty to inquire into the extent of a trustee’s powers or the propriety of their exercise. The third party may assume that the trustee has the necessary power. Consequently, there is no need to request or examine a copy of the trust instrument. A third party who wishes assurance that the trustee has the necessary authority instead should request a certification of trust as provided in Section 62‑7‑1013. Subsection (b)is intended to negate the rule, followed by some courts, that a third party is charged with constructive notice of the trust instrument and its contents. The cases are collected in George G. Bogert & George T. Bogert, The Law of Trusts and Trustees Section 897 (Rev. 2d ed. 1995); and 4 Austin W. Scott & William F. Fratcher, The Law of Trusts Section 297 (4th ed. 1989).

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

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

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

Library References

Trusts 171, 203.

Westlaw Topic No. 390.

C.J.S. Trusts Sections 318 to 320, 404, 454 to 457.

**SECTION 62‑7‑1013.** 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 which may make a reference to the powers set forth in the South Carolina Trust Code;

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

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

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

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

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

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

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

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

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

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

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

(j) In a transaction involving title to real property, the certificate of trust must be executed and acknowledged in a manner that permits its recordation in the Office of the Register of Deeds or Clerk of Court in the county in which the real property is located.

(k) The Certificate of Trust may be either in the form set forth below or in any other form that satisfies the above requirements.

Settlor: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Name of Trust: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Date of Trust: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Current Trustee(s): \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Address of Trust: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

The undersigned trustee(s) does hereby confirm the existence of the within described Trust and certify the following:

1. The undersigned is/are all of the currently serving trustee(s).

2. The Trust is in full force and effect and has not been revoked, terminated or otherwise amended in any manner which would cause the representations in this Certification of Trust to be incorrect.

3. The Trust is revocable/irrevocable. (If revocable, define who can revoke the document).

4. The above designated trustee(s) is/are fully empowered to act for said Trust and is/are properly exercising the trustee’s authority under this Trust. No other trustee or other individual or entity is required to execute any document for the Trust.

5. The signature(s) of \_\_\_\_\_\_\_ of the trustees is/are required for any action taken on behalf of the Trust. (Define signature requirements)

6. The proper manner for taking title to Trust property is:

[Name(s) of all current trustees], Trustee

[Name of trust], dated [Date of trust]

7. To the undersigned’s knowledge, there are no claims, challenges of any kind, or cause of action alleged, which contest or question the validity of the Trust or the trustee’s authority to act for the Trust.

8. The trustee is authorized by the Trust Agreement to \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. (State, synopsize, or describe relevant powers.)

IN WITNESS THEREOF: the undersigned, being all of the trustees, do hereby execute this Certificate of Trust this \_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_.

Witnesses: Trustee(s):

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

|  |  |  |
| --- | --- | --- |
|  |  |  |
| STATE OF SOUTH CAROLINA | ) |  |
|  | ) | ACKNOWLEDGMENT |
| COUNTY OF \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | ) |  |

I,\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, do hereby certify that trustee(s) personally appeared before me this day and acknowledged the due execution of the foregoing instrument. Witness my hand and official seal this the day of \_\_\_\_\_\_, 20\_\_

(SEAL)

Notary Public for South Carolina

My Commission Expires:

HISTORY: 2005 Act No. 66, Section 1; 2010 Act No. 244, Section 58, eff June 7, 2010; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

South Carolina Trust Code Section 62‑7‑1013, which has no prior South Carolina statutory counterpart, permits a third party to request a certification of trust from the trustee. The elements of a certification are set forth in this section, and a third party may assume, without inquiry, the existence of facts contained in the certification. A third party who in good faith enters into a transaction in reliance upon the certification may enforce the transaction as if the representations contained in the certification were correct. This section is also designed to protect the privacy of the trust agreement and its beneficiaries, and under certain circumstances, a third party may be liable for damages if he demands a copy of the trust agreement in addition to the certification. The SCTC adds subsection (k) to the UTC version, providing a sample form certificate for use in South Carolina.

Effect of Amendment

The 2010 amendment in subsection (a) deleted the language of subdivision (7) and redesignated former subdivision (8) as subdivision (7); added a new subsection (j); redesignated former subsection (j) as subsection (k) and deleted the last line thereof; and made other nonsubstantive changes.

CROSS REFERENCES

Disclosure of contents of electronic communications held in trust when trustee not original user, see Section 62‑2‑1060.

Disclosure of other digital assets held in trust when trustee not original user, see Section 62‑2‑1065.

Library References

Trusts 40.1.

Westlaw Topic No. 390.

C.J.S. Trusts Section 71.

Part 11

Miscellaneous Provisions

**SECTION 62‑7‑1101.** Uniformity of application and construction.

In applying and construing this article, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact its provisions.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This is consistent with SCPC Section 62‑1‑102, which provides that one of the underlying purposes and policies of the South Carolina Probate Code “is to make uniform the law among the various jurisdictions.” See SCPC Section 62‑1‑102(b)(5).

Library References

Statutes 226.

Westlaw Topic No. 361.

C.J.S. Statutes Sections 306, 358 to 361.

LAW REVIEW AND JOURNAL COMMENTARIES

The Impact of Significant Substantive Provisions of the South Carolina Trust Code. 57 S.C. L. Rev. 137 (Autumn 2005).

**SECTION 62‑7‑1102.** Electronic records and signatures.

The provisions of this article governing the legal effect, validity, or enforceability of electronic records or electronic signatures, and of contracts formed or performed with the use of such records or signatures, conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7002) and supersede, modify, and limit the requirements of the Electronic Signatures in Global and National Commerce Act.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

This section, which is being inserted in all Uniform Acts approved in 2000 or later, preempts the federal Electronic Signatures in Global and National Commerce Act. Section 102(a)(2)(B) of that Act provides that the federal law can be preempted by a later statute of the State that specifically refers to the federal law. The effect of this section, when enacted as part of this Code, is to leave to state law the procedures for obtaining and validating an electronic signature. The SCTC does not require that any document be in paper form, allowing all documents under this Code to be transmitted in electronic form. A properly directed electronic message is a valid method of notice under the Code as long as it is reasonably suitable under the circumstances and likely to result in receipt of the notice or document. See Section 62‑7‑109(a).

**SECTION 62‑7‑1103.** Severability Clause.

If any provision of this article or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

The South Carolina Probate Code has a substantially identical provision in SCPC Section 62‑1‑104.

Library References

Statutes 64.

Westlaw Topic No. 361.

C.J.S. Statutes Sections 83 to 107.

**SECTION 62‑7‑1106.** Application to existing relationships.

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

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

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

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

(4) subject to subsections (a)(5) and (b), any rule of construction or presumption provided in this article applies to trust instruments executed before the effective date of the article unless there is a clear indication of a contrary intent in the terms of the trust; and

(5) an act done and any right acquired or accrued before the effective date of the article is not affected by this article. Unless otherwise provided in this article, any right in a trust accrues in accordance with the law in effect on the date of the creation of a trust.

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

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

REPORTER’S COMMENT

The SCTC is intended to have the widest possible effect within constitutional limitations. Specifically, the Code applies to all trusts whenever created, to judicial proceedings concerning trusts commenced on or after its effective date, and unless the court otherwise orders, to judicial proceedings in progress on the effective date. In addition, any rules of construction or presumption provided in the Code apply to preexisting trusts unless there is a clear indication of a contrary intent in the trust’s terms. By applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen.

This Code cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this Code. Nor is an act done before the effective date of the Code affected by the Code’s enactment.

The SCTC contains an additional effective date provision. Pursuant to Section 62‑7‑602(a), prior law will determine whether a trust executed prior to the effective date of the Code is presumed to be revocable or irrevocable.

The South Carolina Probate Code counterpart is SCPC Section 62‑1‑100, which has been subject to considerable litigation in the years after the probate code’s enactment effective July 1, 1987. Importantly, the intent to safeguard preexisting rights is contained in SCTC Section 62‑7‑1106 as it is in SCPC Section 62‑1‑100. SCPC Section 62‑1‑100 draws a dichotomy between procedural provisions of the SCPC (as in SCPC Section 62‑1‑100(b)(2)) and substantive rights in the decedent’s estate, which are to be unimpaired. SCPC Section 62‑1‑100(b)(4).

Rules of construction or presumption apply to trusts executed before the effective date unless there is a clear indication of a contrary intent in the terms of the trust. This appears similar to SCPC Section 62‑1‑100(b)(5). SCTC Section 62‑7‑1106(b), providing that any period of limitation which had commenced to run before the effective date would continue to apply, is a counterpart to SCPC Section 62‑1‑100(b)(4), last sentence. SCTC subsection 62‑7‑1106(a)(4) makes clear that the application of a presumption or rule of construction shall not disrupt accrued or acquired rights in the trust, which are determined according to the law in effect at the trust’s creation.

Library References

Trusts 7.

Westlaw Topic No. 390.

C.J.S. Trusts Section 143.