



DELBERT HOSEMANN  
*Secretary of State*

**2009 BUSINESS REFORM STUDY GROUPS  
MEETING OF THE TRUST LAWS STUDY GROUP**

**Third Meeting**

Thursday, October 1, 2009  
11:00 A.M.

**Secretary of State's Office  
700 North Street  
Jackson, Mississippi**

**AGENDA**

1. Welcome – Cheryn Baker
2. Approval of minutes
3. Presentation of subcommittee recommendations:
  - a. Dynasty trusts and virtual representation – Barry Jones
  - b. Asset-protection trusts – Len Martin
  - c. Uniform Principal and Income Act – Lynne Green
  - d. Uniform Prudent Management of Institutional Funds Act – Mark McCrary
4. Discussion of proposed revised Miss. Code Ann. § 91-9-1
5. Discussion of next steps
6. Adjourn 1:00 P.M (or earlier)

Handouts

1. Minutes of August 25, 2009, Trust Laws Study Group meeting
2. Subcommittee recommendations and supplemental materials
3. Proposed revised Miss. Code Ann. § 91-9-1.



## DELBERT HOSEMANN *Secretary of State*

### 2009 Business Reform Committees Minutes of the Trust Laws Study Group, Meeting # 2 August 25, 2009

The second meeting of the Trust Laws Study Group was called to order on Tuesday, August 25, 2009, at 11:00 A.M. at the Secretary of State's Office, 700 North Street, Jackson, Mississippi. A list of the persons who were present is attached as Exhibit A.

#### **Introduction**

Cheryn Baker, Assistant Secretary of State, Policy and Research Division ("the Division"), welcomed everyone to the meeting and noted that this was one of the larger groups that the Division was hosting this year.

#### **Approval of minutes**

The members unanimously approved the minutes of the July 22, 2009, meeting.

#### **Sub-Group reports**

Doug Jennings, Senior Attorney, Policy and Research Division, stated that the meeting's purpose was to discuss the progress the sub-groups were making and to identify any issues that the group could foresee arising. Mr. Jennings then asked each sub-group chair to give his or her report.

Asset-Protection Trusts Sub-group: Chairman Len Martin reported that the sub-group had looked closely at the laws of Alaska, Tennessee, Delaware, Utah, Nevada, and Wyoming regarding self-settled asset-protection trusts (hereinafter "APTs"). Martin also reported that the sub-group had not yet come to a firm decision on the initial question of whether Mississippi *should* validate self-settled APTs. Several members expressed the view that adopting laws validating self-settled APTs would be a positive move for Mississippi, if only to keep Mississippi dollars from escaping to other states with more favorable trust laws.

Mr. Martin then went through the specific exceptions that the sub-group agreed would need to be included in legislation should the sub-group decide to recommend validation of self-settled APTs. Martin reported that the sub-group members were most comfortable with following the approach taken by Delaware and Tennessee, both which allow a claimant to invade the assets of a self-settled APT if those assets were placed there fraudulently (i.e., to hinder or

delay a creditor, or placed in trust while the trustor was insolvent). The sub-group also decided to follow Delaware's lead in adopting an exception providing that when an event giving rise to liability occurs before the assets are placed into a self-settled APT, creditors may reach those assets. Lastly, Martin said, the sub-group decided to allow exceptions allowing child support and alimony payments to be taken out of a self-settled APT.

Mr. Martin said that the sub-group also recommended following the Delaware and Tennessee rules regarding creation of a self-settled APT. Under the sub-group's proposal, in order to create a self-settled APT in Mississippi, the trust instrument must state that it is irrevocable, that Mississippi law governs the validity, construction, and administration of the trust, and must contain a spendthrift clause. In addition, Martin said, a settlor would have to sign an affidavit stating that he or she is solvent at the time the trust is created.

Dynasty Trusts and Virtual Representation Sub-group: Chairman Barry Jones was unable to attend the meeting and asked Mr. Jennings to give his sub-group's status report. Jennings said that there was consensus among the sub-group's members that the Rule Against Perpetuities (RAP) need not be repealed, only modified. The sub-group's initial proposal would allow an attorney drafting a trust instrument to opt out of the RAP by inserting a provision allowing the suspension of alienation for a maximum of 150 years, but also stating that the trustee would at all times retain the power to sell the trust assets. This rule would apply to both personal and real property, Jennings said.

Further discussion about the RAP contemplated a further option considered by the sub-group. This approach would allow a trustor to opt out of the RAP and suspend the alienation of the trust property for a period of longer than 150 years. Some members questioned how the generation-skipping tax would affect these dispositions, and what should be the maximum additional period of time. The members also questioned the sub-group's proposal of repealing the fiduciary income tax and what effect its repeal would have on revenue for the state. Other concerns that arose from that topic were how to separate dynasty trusts from all other trusts and how to secure legislative approval in the present economy to eliminate a currently existing tax. Mr. Jennings stated that he would research these issues before the next meeting.

The sub-group also reported its unanimous agreement that a virtual representation statute should be adopted in Mississippi. Mr. Jennings informed the group that the open issues were whether to explicitly require that virtual representation be "adequate" and whether virtual representation by remaindermen should also apply to contingent remaindermen. See Exhibit B for the memorandum to the Trust Laws Study Group from the Dynasty Trust and Virtual Representation sub-group.

Uniform Principal and Income Act (UPIA) Sub-group: Chair Lynne Green reported on this sub-group's progress, stating that the group looked favorably on adopting the UPIA. Ms. Green said the sub-group had also considered the viability of "safe harbor" provisions, which would protect a trustee from liability for making an adjustment between principal and income within a certain range. A number of other states have adopted this type of provision, Green said, and the range is typically 4% to 6%. Ms. Green also reported that the sub-group was contemplating whether to adopt the UPIA's provisions regarding receipt of mineral and timber revenues and how this change would affect current beneficiaries of trusts with mineral or timber interests. Ms. Green asked for more information on how states that have adopted the UPIA

define the term “delay” for payment of interest on a delayed pecuniary gift; the types and volume of litigation such states had seen since adopting the act; and whether the act should be revised by replacing the term “trustee” with “fiduciary.”

Uniform Prudent Management of Institutional Funds Act (UPMIFA) Sub-group:

Chairman Mark McCrary stated the group’s unanimous recommendation that the optional Section 4(d), which provides a rebuttable presumption of imprudence for spending over a certain percentage of a fund in a given year, should be omitted from any proposed adoption of UPMIFA in Mississippi. McCrary also reported that the sub-group is considering modifying Section 6(d) of the act (which provides for expedited reformation of smaller, older funds) by changing the qualifications to be eligible for expedited reformation to raise the maximum value of the fund and lessen the required length of time by which the fund had been in existence. The group also recommended changing UPMIFA’s definition of charitable purpose to conform to the current definition in Mississippi’s Charitable Solicitations Act, Miss. Code Ann. § 79-11-501 et seq.

**Reminder of upcoming meetings**

Ms. Baker reminded the members of the next scheduled meeting slated to take place on September 15, 2009.

With no further business to discuss the meeting was adjourned at 12:02 P.M.

Respectfully submitted,

Cheryn Baker  
Assistant Secretary of State  
Policy and Research Division

## **EXHIBIT A**

### **Minutes of the Trust Laws Study Group, Meeting # 2 August 25, 2009**

#### In Attendance:

1. Jamie Houston (Co-Chair)
2. Jimmy Young (Co-Chair)
3. Pete Cajoleas
4. Charles Cleland
5. Rebecca Covington
6. Raleigh Cutrer
7. James Dossett, Jr.
8. Lynne Greene
9. Rusty Hawkins
10. Linda Keng
11. Michelle Mahoney
12. Len Martin
13. Mark McCrary
14. Caryn Quilter
15. Maureen Scott
16. Randy Shell
17. William Staggers
18. William Wilkins
19. Warren Wiltshire

#### Attending by Phone:

1. Charles Caldwell
2. Walton Dallas
3. Jeramie Fortenberry
4. Robert Paine
5. John Temple
6. Eric Wooten

#### Secretary of State's Staff:

1. Cheryn Baker, Assistant Secretary of State, Policy and Research
2. Doug Jennings, Senior Attorney, Policy and Research
3. Leann Hager, Legal Intern, Policy and Research

## Trusts Study Group subcommittee recommendations – October 1, 2009

### **I. Dynasty Trusts / Virtual Representation Subcommittee recommendations:**

#### *Dynasty trusts*

1. Adopt a statute allowing a trustor to opt out of the common-law Rule Against Perpetuities (the RAP has not been codified in Mississippi) and into a modified version of the rule, provided that certain language appears in the trust instrument.
2. Under this approach, the drafter could include a provision in a trust instrument imposing a restriction on alienation of the trust property for a period of up to 150 years. The drafter could also opt to extend the restriction on alienation for an additional period of time beyond the 150-year mark (see “remaining questions” below).
3. In order to take advantage of the modified rule, the trust instrument would also have to provide either:
  - a. A power allowing the trustee to make a sale of personal or real property, in its discretion, despite the specific restraint on alienation; or
  - b. A right granted to one or more beneficiaries or third parties to terminate the trust.
4. For consistency, the modified rule would apply to both personal and real property.

#### *Virtual representation*

1. Adopt Uniform Trust Code § 304, which provides for virtual representation, with only slight changes. Section 304 reads:

#### **Section 304. Representation by person having substantially identical interest.**

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

2. Insert the following provisions:
  - a. Limiting the application of the statute to trust and probate proceedings; and
  - b. Making it explicit that the statute would in no way limit the discretion of the chancery court to appoint a guardian ad litem if the court deems it necessary to protect a particular party’s interest.

#### Remaining questions:

1. What period (if any) beyond the default 150-year term would be appropriate? The subcommittee discussed the possible extensions of time to be 300 years, 500 years or 1,000 years.
2. Whether virtual representation by remaindermen should also apply to contingent remaindermen.
3. Whether the fiduciary income tax should be repealed.

## Summary of State Rule Against Perpetuities Laws

State	Rule Against Perpetuities	Statutory Citation
Alabama	Common-law Rule	Ala. St. §35-4-4
Alaska	<p>Powers of alienation cannot be suspended for more than 30 years after the death of an individual alive at the time when the power was suspended. <b>However, a power of alienation is not considered “suspended” if the trustee has the power to sell the trust property.</b></p>	AK ST §34.27.100
	<p>A general or nongeneral power of appointment not presently exercisable because of a condition precedent is invalid unless, within a period of 1,000 years after its creation, either the power is irrevocably exercised or the power terminates.</p>	AK ST §34.27.051
Arizona	Common-law Rule generally applicable	ARS §33-261
	<p><b>The common-law Rule does not apply to a non-vested interest under a trust whose trustee has the expressed or implied power to sell the trust assets and at one or more times after the creation of the interest one or more persons who are living when the trust is created have an unlimited power to terminate the interest.</b></p>	ARS §14-2901(A)(3)
Arkansas	Uniform Statutory Rule Against Perpetuities	A.C.A. § 18-3-101
California	Uniform Statutory Rule Against Perpetuities	Cal. Prob. Code §21200
Colorado	<p>A nonvested property interest is invalid unless it either vests or terminates within 1,000 years after its creation.</p>	CRS §15-11-1102.5
Connecticut	Uniform Statutory Rule Against Perpetuities	Conn. Gen. Stat. §45a-491

State	Rule Against Perpetuities	Statutory Citation
Delaware	<p><b>Rule Against Perpetuities does not apply to personal property in trust.</b></p> <p>Real property in trust must vest within 110 years; “real property” does not include any intangible personal property, such as an interest in a corporation, limited liability company, partnership, statutory trust, business trust, or other entity, regardless of whether such entity is the owner of real property or any interest in real property.</p>	25 Del. C. §503
District of Columbia	Uniform Statutory Rule Against Perpetuities	DC ST §19-901
Florida	Uniform Statutory Rule Against Perpetuities	FL ST §689.225
Georgia	Uniform Statutory Rule Against Perpetuities	OCGA §44-6-200
Hawaii	Uniform Statutory Rule Against Perpetuities	HRS §525-1
Idaho	<p><b>Rule abolished as to personal property;</b> modified as to real property:</p> <p>The absolute power of alienation of real property cannot be suspended by any limitation or condition whatever, for a longer period than during the continuance of the lives of the persons in being at the creation of the limitation or condition, and 25 years thereafter; there shall be no Rule Against Perpetuities applicable to real or personal property, nor any rule prohibiting the placing of restraints on the alienation of personal property; no trust heretofore or hereafter created, either testamentary or inter vivos, shall be declared void, but shall be so construed as to eliminate parts violating the above provisions, and in such a way that the testators or trustors wishes are carried out to the greatest extent permitted by this act; that there shall be no presumption that a person is capable of having children at any stage of adult life.</p>	ID Code §55-111
Illinois	<p><b>Rule does not apply to “qualified perpetual trusts” (any trust created on or after January 1, 1998, expressly states that the Rule doesn’t apply, and the trustee has the unlimited power to sell assets).</b></p>	IL ST Ch. 765, §305/4



State	Rule Against Perpetuities	Statutory Citation
Indiana	Uniform Statutory Rule Against Perpetuities	Ind. Code §§32-17-8-1
Iowa	Common-law Rule codified	Iowa Code §558.68
Kansas	Uniform Statutory Rule Against Perpetuities	KSA §59-3401
Kentucky	Common-law Rule codified	KRS §381.215
Louisiana	The Rule Against Perpetuities is not known to the laws of Louisiana; laws only provide that a beneficiary must be in being and ascertainable on the date of the creation of the trust.	LA RS §9:1803
Maine	<b>Rule does not apply to trusts created after September 18, 1999 if trust expressly states that the Rule doesn't apply, and the trustee has the power to sell, mortgage, or lease property for any period of time beyond the period that is required for an interest created under the governing instrument to vest in order to be valid under the Rule Against Perpetuities.</b>	33 ME RSA §101-A
Maryland	<b>Rule does not apply if trust expressly states that the Rule doesn't apply, and the trustee has the power to sell, mortgage, or lease property for any period of time beyond the period that is required for an interest created under the instrument to vest in order to be valid under the Rule Against Perpetuities.</b>	MD Est. & Trust §11-102(5)
Massachusetts	Common-law Rule codified	MGLA c. 184A §1
Michigan	Uniform Statutory Rule Against Perpetuities <b>(Legislation has been introduced to abolish the Rule with respect to personal property. 2007 MI H.B. 4602.)</b>	MCLA §554.71
Minnesota	Uniform Statutory Rule Against Perpetuities	Minn. Stat. §501A.01
Mississippi	Mississippi has not codified the Rule Against Perpetuities, but the common-law Rule is mentioned in other statutes and in case law	N/A

State	Rule Against Perpetuities	Statutory Citation
Missouri	<b>The Rule Against Perpetuities will not apply to a trust created after August 28, 2001, if a trustee has the power pursuant to the terms of the trust or applicable law to sell the trust property during the period of time the trust continues beyond the period of the Rule Against Perpetuities that would apply to the trust but for this subsection</b>	V.A.M.S. §456.025(1)
Montana	Uniform Statutory Rule Against Perpetuities	Mont. Code Ann. §72-2-1001
Nebraska	Uniform Statutory Rule Against Perpetuities	Neb. Rev. Stat. §76-2001
Nevada	Uniform Statutory Rule Against Perpetuities	NRS §111.103
New Hampshire	The common law Rule Against Perpetuities shall not apply to any trust created after January 1, 2004 if: (1) the trust instrument contains a provision which expressly exempts the instrument from the application of the Rule Against Perpetuities; and (2) the trustee has the power under the governing instrument, applicable statute, or common law, to sell, mortgage, or lease property for any period of time beyond the period that is required for an interest created under the governing instrument to vest in order to be valid under the Rule Against Perpetuities	N.H. Rev. Stat. §564:24
New Jersey	<b>No interest created in real or personal property shall be void by reason of any Rule Against Perpetuities, whether the common law Rule or otherwise. The common law Rule Against Perpetuities shall not be in force in this State.</b>	NJSA §46:2F-9
New Mexico	Uniform Statutory Rule Against Perpetuities	NMSA §45-2-901
New York	Common-law Rule codified	NY Est. Pow. & Trust §9-1.1
North Carolina	Uniform Statutory Rule Against Perpetuities  <b>(Legislation is currently pending that is similar to Alaska’s statute, which provides that a power of alienation is not considered “suspended” if the trustee has the power to sell the trust property, or if there is an unlimited power to terminate in one or more persons in being. 2007 NC H.B. 1384.)</b>	NC Gen. Stat. §§41-15

State	Rule Against Perpetuities	Statutory Citation
North Dakota	Uniform Statutory Rule Against Perpetuities	NDCC §47-02-27.1
Ohio	Common-law Rule codified	OH ST §2131.08
Oklahoma	Common-law Rule codified	OK Const. Art. 2, Sec. 32; 60 OS Sec. 175.47
Oregon	Uniform Statutory Rule Against Perpetuities	ORS §105.950
Pennsylvania	Common-law Rule codified	20 Pa.C.S. §6104
Rhode Island	<b>The common law rule against perpetuities shall no longer be deemed to be in force and/or of any effect in this state, provided, the provisions of this section shall not be construed to invalidate or modify the terms of any interest which would have been valid prior to the effective date of this act, and, provided further, that the provisions of this section shall apply to both legal and equitable interests.</b>	RI GL §34-11-38
South Carolina	Uniform Statutory Rule Against Perpetuities	SC ST §27-6-10
South Dakota	<b>The common-law Rule Against Perpetuities is not in force in this state</b>	SDCL §43-5-8
Tennessee	Common-law Rule generally applicable, but as to any trust created after June 30, 2007, or that becomes irrevocable after June 30, 2007, the terms of the trust may require that all beneficial interests in the trust vest or terminate or the power of appointment is exercised within three hundred sixty (360) years. Provided, however, this section (f) shall only apply to trusts that grant a power of appointment at death to at least one member of each generation of beneficiaries who are beneficiaries of the trust more than ninety (90) years after the creation of the interest. The permissible appointees of each such power of appointment must at least include all descendants of the beneficiary, yet may include other persons	TCA §66-1-202(f)
Texas	Common-law Rule codified	TX Prop. Code §112.036
Utah	A nonvested property interest is invalid unless within 1,000 years after the interest's creation the interest vests or terminates	UT ST §75-2-1203(1)

State	Rule Against Perpetuities	Statutory Citation
Vermont	Vermont has not codified the Rule Against Perpetuities, but the common-law Rule is mentioned in other statutes and in case law	N/A
Virginia	Uniform Statutory Rule Against Perpetuities	Va Code §55-12.1
Washington	No provision of an instrument creating a trust, including the provisions of any further trust created, and no other disposition of property made pursuant to exercise of a power of appointment granted in or created through authority under such instrument is invalid under the Rule Against Perpetuities, or any similar statute or common law, during the 150 years following the effective date of the instrument. Thereafter, unless the trust assets have previously become distributable or vested, the provision or other disposition of property is deemed to have been rendered invalid under the Rule Against Perpetuities.	RCW §11.98.130
West Virginia	Uniform Statutory Rule Against Perpetuities	W.Va. ST §36-1A-1
Wisconsin	A future interest or trust is void if it suspends the power of alienation for longer than lives in being plus 30 years. <b>However, an interest is not considered “suspended” if the trustee has power to sell the trust property, or if there is an unlimited power to terminate in one or more persons in being.</b>	Wis. Stat. §700.16(5) *No RAP problem as long as the trustee has the power to sell trust assets.
Wyoming	The Rule will not apply to a trust created after July 1, 2003 if: (1) the trust instrument states that the Rule Against Perpetuities shall not apply to the trust; (2) the trust instrument states that the trust shall terminate no later than 1,000 years after the trust's creation; and (3) the trust is governed by the laws of this state and the trustee maintains a place of business, administers the trust in this state, or is a resident of this state.	WY ST §34-1-139(b)

Note: This chart does not specify whether a state that has a Rule Against Perpetuities has adopted a “wait and see” approach.

## Trusts Study Group subcommittee recommendations – October 1, 2009

### **IV. Asset-protection Trusts subcommittee**

The subcommittee recommends adoption of a statute allowing the creation of self-settled spendthrift trusts in Mississippi, and that the statute contain the following provisions:

1. Requirements to come within protection of the statute:
  - a. The trust instrument must: (1) be irrevocable; (2) expressly state that Mississippi law governs the validity, construction, and administration of the trust; and (3) contain a spendthrift clause;
  - b. Before transferring assets to the trust, the settlor must sign a solvency affidavit;
  - c. Some or all of the trust assets must be deposited in Mississippi; and
  - d. A Mississippi trustee must be appointed or must otherwise participate materially in the administration of the trust.
2. Qualifications of trustee
  - a. The trustee must be a resident individual (other than the settlor) or corporation whose activities are subject to supervision by the state bank regulator, FDIC, Comptroller of Currency, or Office of Thrift Supervision.
  - b. Under the proposed statute, a Mississippi trustee would automatically cease to serve if it failed to meet the above requirements.
3. Limitation of claims
  - a. Under the proposed statute and subject to the exceptions set forth below, the only allowable claim against the assets of a Mississippi self-settled spendthrift trust would be under the Uniform Fraudulent Transfer Act (UFTA).
  - b. For creditors whose claims arose before creation of the trust:
    - i. The act would set aside transfers made with actual intent to hinder, delay, or defraud, and transfers made with constructive fraudulent intent.
    - ii. Statute of limitations: Four years after the transfer, or one year after the transfer was or reasonably could have been discovered if claim is based upon intent to hinder, delay, or defraud. Four years after the transfer for claims based upon constructive fraud.
  - c. For creditors whose claims arise after creation of the trust:
    - i. The act would set aside only those transfers made with actual intent to defraud.
    - ii. Statute of limitations: four years after the transfer.
4. Exceptions allowing invasion of trust assets
  - a. The statute would allow the following non-UFTA claims:
    - i. Claims resulting from the settlor's breach of an agreement or court order as to child support, alimony, or equitable distribution, but, in the case of alimony or equitable distribution, only if the ex-spouse was married to the settlor before or on the date of transfer.
    - ii. Claims arising as a result of death, personal injury, or property damage occurring before or on the date of transfer, for which the settlor was liable either directly or through vicarious liability.
5. Transfer of trusts into Mississippi:
  - a. A trust may become subject to the statute if moved to Mississippi provided that the trust meets the statutory requirements listed in (1) above, except the trust instrument would not have to state that Mississippi law applies.

## **Trusts Study Group subcommittee recommendations – October 1, 2009**

- b. For purposes of the statute of limitations, if a trust is moved from another jurisdiction, the transfer would be deemed made on the date the property was originally transferred in trust, whether before or after the effective date of the Mississippi statute.
6. Protection of trustees:
  - a. The proposed statute would bar all claims by creditors against the trustee of a self-settled spendthrift trust, advisor of such a trust, or any person involved in the counseling, drafting, preparation, execution or funding of such a trust, unless brought under the UFTA.
7. The settlor would retain the following powers:
  - a. The power to veto distributions;
  - b. A non-general testamentary power of appointment;
  - c. The power to replace a trustee advisor with an unrelated non-subordinate party;  
and
  - d. The power to serve as an investment advisor.
8. Trust advisors / protectors
  - a. Under the proposed statute, a trust could have one or more advisors (including the settlor) who may remove and appoint qualified trustees or trust advisors or who have authority to direct, consent to, or disapprove distributions from the trust.
9. Miscellaneous
  - a. The statute would provide that a spendthrift clause constitutes a transfer restriction described in § 541(c)(2) of the Bankruptcy Code.
  - b. The statute would provide that express or implied understandings regarding distributions to the settlor are invalid.

Appendix B – Comparison of asset-protection trust (APT) statutes from selected states<sup>1</sup>

Prepared by the Mississippi Secretary of State, Division of Policy and Research  
July 2009

I. What requirements must a trust meet to come within protection of the statute?

Alaska	Delaware	Nevada
<p>The trust instrument must: (1) be irrevocable; (2) expressly state that Alaska law governs the validity, construction, and administration of the trust; and (3) contain a spendthrift clause.</p> <p>In addition, before transferring assets to the trust, the settlor must sign a solvency affidavit.</p>	<p>The trust instrument must: (1) be irrevocable; (2) expressly state that Delaware law governs the validity, construction, and administration of the trust (unless trust is being transferred to a Delaware trustee from a non-Delaware trustee); and (3) contain a spendthrift clause.</p>	<p>The trust instrument must: (1) be irrevocable; (2) provide that if the settlor is not a Nevada resident, at least some of the trust assets must be located in Nevada and a Nevada trustee be appointed; and (3) state that distributions to the settlor must be approved by someone other than the settlor.</p>
Tennessee	Utah	Wyoming
<p>The trust instrument must: (1) be irrevocable; (2) expressly state that Tennessee law governs the validity, construction, and administration of the trust (unless the trust is being transferred to Tennessee from a non-Tennessee trustee); and (3) contain a spendthrift clause.</p>	<p>The trust instrument must be irrevocable and contain a spendthrift clause.</p>	<p>The trust instrument must: (1) state that the trust is a qualified spendthrift trust; (2) be irrevocable; (3) expressly state that Wyoming law governs the validity, construction, and administration of the trust; and (4) contain a spendthrift clause.</p> <p>In addition, before transferring assets to the trust, the settlor must sign a solvency affidavit that includes a recitation that the settlor has and will maintain personal liability coverage equal to the lesser of \$1 million or the value of the trust assets.</p>

<sup>1</sup> Information taken from Richard W. Nenno and John E. Sullivan III, *Planning and Defending Asset-Protection Trusts*, American Law Institute - American Bar Association Continuing Legal Education Course of Study, April 20 - 24, 2009, and David G. Shaftel, *Comparison of the Twelve Domestic Asset Protection Statutes*, 34 ACTEC J. 293 (2009).

II. What contacts with the state are suggested or required by law?

Alaska	Delaware	Nevada
<p><u>Suggested</u> (but not required) that: (1) some or all of the trust assets be deposited in Alaska; (2) an Alaska trustee be appointed; and (3) part or all of the administration of the trust must take place in Alaska.</p>	<p>Delaware <u>requires</u> that (1) some or all of the trust assets be deposited in Delaware, and (2) that a Delaware trustee be appointed or participate materially in the administration of the trust.</p>	<p>Nevada law <u>requires</u> that: (1) some or all of the trust assets be deposited in Nevada, and (2) that a Nevada trustee be appointed and all or part of the trust’s administration takes place in the state.</p>
Tennessee	Utah	Wyoming
<p>Tennessee law <u>requires</u> that: (1) some or all of the trust assets be deposited in the state, and (2) a Tennessee trustee be appointed or participate materially in the administration of the trust.</p>	<p>Utah law <u>requires</u> that: (1) a Utah trust company be appointed as trustee, and (2) some or all of the trust assets be held in certain types of accounts in the state.</p>	<p>Wyoming law <u>requires</u> that a Wyoming trustee be appointed who either maintains custody of some or all of the trust assets within the state or who otherwise materially participates in the administration of the trust.</p>

III. Who must serve as trustee to come within protection of statute?

Alaska	Delaware	Nevada
<p>An Alaska trustee is not required, but it is suggested that the trustee be a resident individual, or a trust company or bank that possesses trust powers and has its principal place of business in Alaska.</p>	<p>The trustee must be a resident individual (other than the settlor) or corporation whose activities are subject to supervision by the Delaware Bank Commissioner, FDIC, Comptroller of Currency, or Office of Thrift Supervision. A Delaware trustee automatically ceases to serve if it fails to meet these requirements.</p>	<p>The trustee must be a resident individual or trust company or bank that maintains an office in Nevada.</p>
Tennessee	Utah	Wyoming
<p>The trustee must be a resident individual (other than the settlor) or corporation whose activities are subject to supervision by the Tennessee Department of Financial Institutions, FDIC, Comptroller of Currency, or Office of Thrift Supervision. A Tennessee trustee automatically ceases to serve if it fails to meet these requirements.</p>	<p>The trustee must be an institution authorized to engage in trust business in Utah, including Utah depository institutions, non-Utah depository institutions authorized to do business in Utah, and certain other institutions.</p>	<p>The trustee must be a resident individual, person authorized to conduct trust business in Wyoming, or a regulated financial institution. A Wyoming trustee automatically ceases to serve if it fails to meet these requirements.</p>



IV. Does the statute provide exceptions for spouses or children of the settlor?

Alaska	Delaware	Nevada
<p>Yes. A creditor due child support may proceed against the trust if, at the time of transfer, the settlor was 30 days or more in default of making a payment under a child support judgment or order. In addition, federal law might enable minor children to access the trust assets for support.</p> <p>An Alaska APT created before marriage is not subject to division in an Alaska divorce proceeding.</p>	<p>Yes. Creditors whose claims result from the settlor’s breach of an agreement or court order as to child support, alimony, or equitable distribution may proceed against the trust, but, in the case of alimony or equitable distribution, only if the ex-spouse was married to the settlor before or on the date of transfer.</p>	<p>No. However, federal law might enable minor children to access the trust assets for support.</p>
Tennessee	Utah	Wyoming
<p>Yes. Creditors whose claims result from the settlor’s breach of an agreement or court order as to child support, alimony, or equitable distribution may proceed against the trust, but, in the case of alimony or equitable distribution, only if the ex-spouse was married to the settlor before or on the date of transfer.</p>	<p>Yes. Creditors whose claims result from the settlor’s breach of an agreement or court order as to child support, alimony, or equitable distribution may proceed against the trust. The creditor must prove by clear and convincing evidence that the exception applies.</p>	<p>Yes. Creditors whose claims result from the settlor’s breach of an agreement or court order as to child support may proceed against the trust. They may not proceed if the claim involves alimony.</p>

V. May tort creditors proceed against the trust?

Alaska	Delaware	Nevada
<p>No. Presumably, however, a tort creditor as of the date of transfer would be able to proceed against the trust, subject to the statute of limitations set forth below.</p>	<p>Yes. Creditors whose claims arise as result of death, personal injury, or property damage occurring before or on the date of transfer, for which the settlor was liable either directly or through vicarious liability, may proceed against the trust.</p>	<p>No. Presumably, however, a tort creditor as of the date of transfer would be able to proceed against the trust, subject to the statute of limitations set forth below.</p>
Tennessee	Utah	Wyoming
<p>No. Presumably, however, a tort creditor as of the date of transfer would be able to proceed against the trust, subject to the statute of limitations set forth below.</p>	<p>Utah law contains no specific exception for tort creditors. But see the discussion of other exceptions below at VIII.</p>	<p>No. Presumably, however, a tort creditor as of the date of transfer would be able to proceed against the trust, subject to the statute of limitations set forth below.</p>

VI. Are fraudulent transfers excepted from coverage?

<b>Alaska</b>	<b>Delaware</b>	<b>Nevada</b>
Yes. Alaska has not adopted the Uniform Fraudulent Transfer Act (UFTA). The Alaska statute sets aside transfers made with intent to defraud.	Yes. UFTA applies and sets aside transfers with actual intent to hinder, delay, or defraud, and transfers made with constructive fraudulent intent. However, future creditors may set aside a transfer only if it was made with actual intent to defraud.	Yes. UFTA applies and sets aside transfers with actual intent to hinder, delay, or defraud, and transfers made with constructive fraudulent intent.
<b>Tennessee</b>	<b>Utah</b>	<b>Wyoming</b>
Yes. UFTA applies and sets aside transfers with actual intent to hinder, delay, or defraud, and transfers made with constructive fraudulent intent.	Yes. UFTA applies and sets aside transfers with actual intent to hinder, delay, or defraud, and transfers made with constructive fraudulent intent.	Yes. UFTA applies and sets aside transfers with actual intent to hinder, delay, or defraud, and transfers made with constructive fraudulent intent.

VII. For a fraudulent transfer action, what is the statute of limitations?

<b>Alaska</b>	<b>Delaware</b>	<b>Nevada</b>
Existing creditors: Four years after the transfer, or one year after the transfer was or reasonably could have been discovered.  Future creditors: Four years after the transfer.	Existing creditors: Four years after the transfer, or one year after the transfer was or reasonably could have been discovered if claim is based upon intent to hinder, delay, or defraud. Four years after the transfer for claims based upon constructive fraud.  Future creditors: Four years after the transfer.	Existing creditors: Two years after the transfer, or, if longer, six months after the transfer was or could reasonably have been discovered if the claim is based upon actual intent to defraud. A transfer is deemed discovered when reflected in a public record.  Future creditors: Two years after the transfer.
<b>Tennessee</b>	<b>Utah</b>	<b>Wyoming</b>
Existing creditors: Four years after the transfer, or one year after the transfer was or reasonably could have been discovered if claim is based upon intent to hinder, delay, or defraud. Four years after the transfer for claims based upon constructive fraud.  Future creditors: Four years after the transfer.	Existing and future creditors: Four years after the transfer, or one year after the transfer was or reasonably could have been discovered if claim is based upon intent to hinder, delay, or defraud. Four years after the transfer for claims based upon constructive fraud.	Existing and future creditors: Four years after the transfer, or one year after the transfer was or reasonably could have been discovered if claim is based upon intent to hinder, delay, or defraud. Four years after the transfer for claims based upon constructive fraud.

VIII. Are there any other circumstances under which creditor may proceed against the trust?

<b>Alaska</b>	<b>Delaware</b>	<b>Nevada</b>
No.	No.	No.
<b>Tennessee</b>	<b>Utah</b>	<b>Wyoming</b>
No.	<p>Yes. A creditor may proceed against the trust if: (1) the claim is based on a decision or ruling resulting from judicial, arbitration, mediation, or administrative proceeding commenced prior to or within three years after the trust was created; (2) if the settlor’s transfer into the trust was made with actual intent to hinder, delay, or defraud that creditor; (3) a transfer was made when the settlor was insolvent or rendered the settlor insolvent; (4) the claim is for recovery of public assistance received by the settlor under Utah law; (5) the claim is for taxes owed by the settlor to a governmental entity; (6) the settlor transferred assets into the trust in violation of certain written representations or agreements; or (7) the claim is a judgment, award, order, sentence, fine, penalty, or other determination of liability of settlor constituting fraud, intentional infliction of harm, or a crime.</p> <p>The creditor must prove by clear and convincing evidence that the exception applies.</p>	<p>Yes – if trust property is listed on an application or financial statement used to obtain credit or if the property was transferred to the trust from the settlor and the settlor received it fraudulently.</p>

## IX. Are there provisions for moving the trust to the state and making it subject to the statute?

<b>Alaska</b>	<b>Delaware</b>	<b>Nevada</b>
<p>Yes. The trust must meet all statutory requirements (listed above), and an Alaska trustee must serve.</p>	<p>Yes. A trust may become subject to the statute if moved to Delaware, provided that trust meets the statutory requirements listed above, except the trust instrument does not have to state that Delaware law applies.</p> <p>For purposes of the statute of limitations, if a trust is moved from another jurisdiction, the transfer is deemed made on the date the property was originally transferred in trust, whether before or after the effective date of the Delaware statute.</p>	<p>No.</p>
<b>Tennessee</b>	<b>Utah</b>	<b>Wyoming</b>
<p>Yes. A trust may become subject to the statute if moved to Tennessee, provided that trust meets the statutory requirements listed above, except the trust instrument does not have to state that Tennessee law applies.</p> <p>For purposes of the statute of limitations, if a trust is moved from another jurisdiction, the transfer is deemed made on the date the property was originally transferred in trust, whether before or after the effective date of the Tennessee statute.</p>	<p>Yes. The trust must have a Utah trust company as the trustee and must be administered in Utah.</p>	<p>Yes. A trust may become subject to the statute if moved to Wyoming, provided that trust meets the statutory requirements listed above, except the trust instrument does not have to state that Wyoming law applies.</p> <p>For purposes of the statute of limitations, if a trust is moved from another jurisdiction, the transfer is deemed made on the date the property was originally transferred in trust, whether before or after the effective date of the Wyoming statute.</p>

X. What powers may the settlor retain?

<b>Alaska</b>	<b>Delaware</b>	<b>Nevada</b>
The settlor may retain: (1) the power to veto distributions; (2) a non-general testamentary power of appointment; and (3) the right to appoint a trust protector or trustee advisor.	The settlor may retain: (1) the power to veto distributions; (2) a non-general testamentary power of appointment; and (3) the power to replace a trustee adviser.	The settlor may retain: (1) the power to veto distributions; and (2) a testamentary special power of appointment.
<b>Tennessee</b>	<b>Utah</b>	<b>Wyoming</b>
The settlor may retain: (1) the power to veto distributions; (2) a non-general testamentary power of appointment; (3) the power to replace a trustee advisor with an unrelated non-subordinate party; and (4) the power to serve as an investment advisor.	The settlor may retain: (1) the power to veto distributions; (2) a testamentary special power of appointment; and (3) the power to appoint non-subordinate advisors or protectors.	The settlor may retain: (1) the power to veto distributions; (2) an inter vivos or testamentary general or limited power of appointment; (3) the power to add, remove, or replace a trustee, trust protector, or trust advisor; and (4) the power to serve as an investment advisor.

XI. May the trust utilize a distribution advisor, investment advisor, or trust protector?

<b>Alaska</b>	<b>Delaware</b>	<b>Nevada</b>
Yes. A trust may have a trust protector (who must be a disinterested third party) and a trustee advisor. The settlor may be an advisor if he/she does not have trustee power over discretionary distributions.	Yes. A trust may have one or more advisors (other than the settlor) who may remove and appoint qualified trustees or trust advisors or who have authority to direct, consent to, or disapprove distributions from the trust. The trust may also have an investment advisor, which may be the settlor.	N/A
<b>Tennessee</b>	<b>Utah</b>	<b>Wyoming</b>
Yes. A trust may have one or more advisors (other than the settlor) who may remove and appoint qualified trustees or trust advisors or who have authority to direct, consent to, or disapprove distributions from the trust. The trust may also have an investment advisor, which may be the settlor.	Yes. A trust may utilize non-subordinate advisors or protectors who may remove or appoint trustees, who may direct, consent to, or disapprove distributions, and who may serve as investment directors. The settlor may also serve as an investment director.	Yes. A trust may have one or more advisors (other than the settlor) who may remove and appoint qualified trustees or trust advisors or who have authority to direct, consent to, or disapprove distributions from the trust. The trust may also have an investment advisor, which may be the settlor.

XII. Does the state assert an income tax against APTs formed by non-resident settlors?

<b>Alaska</b>	<b>Delaware</b>	<b>Nevada</b>
No.	No. However, it does impose its income tax upon trusts that accumulate revenue for Delaware residents.	No. Nevada has no state income tax.
<b>Tennessee</b>	<b>Utah</b>	<b>Wyoming</b>
No, if the beneficiaries are nonresidents. If the beneficiaries are residents, a tax is levied on dividends and interest.	No, except for Utah source income such as rental income from Utah real property.	No.

XIII. Does the statute provide that a spendthrift clause constitutes a transfer restriction described in § 541(c)(2) of the Bankruptcy Code?

<b>Alaska</b>	<b>Delaware</b>	<b>Nevada</b>
Yes.	Yes.	No.
<b>Tennessee</b>	<b>Utah</b>	<b>Wyoming</b>
Yes.	Yes.	Yes.

XIV. Does the statute provide that express or implied understandings regarding distributions to the settlor are invalid?

<b>Alaska</b>	<b>Delaware</b>	<b>Nevada</b>
Yes.	Yes.	No.
<b>Tennessee</b>	<b>Utah</b>	<b>Wyoming</b>
Yes.	No.	No.

XV. Does the statute provide protection for attorneys, trustees, and others involved in the creation and administration of the trust?

<b>Alaska</b>	<b>Delaware</b>	<b>Nevada</b>
Yes.	Yes.	No.
<b>Tennessee</b>	<b>Utah</b>	<b>Wyoming</b>
Yes.	Yes.	Yes.

XVI. Has the state legislature consistently supported APTs and related estate planning by continued amendments?

<b>Alaska</b>	<b>Delaware</b>	<b>Nevada</b>
Yes; amendments enacted in 1998, 2000, 2001, 2003, 2004, and 2006.	Yes; amendments enacted in 1998, 2000, 2001, 2002, 2003, 2005, 2006, 2007, and 2008.	Yes. The 2007 legislature approved minor amendments.
<b>Tennessee</b>	<b>Utah</b>	<b>Wyoming</b>
Yes; amended in 2008.	No amendments.	No amendments since enacted in 2007.

XVII. What is the allowable duration of trusts?

<b>Alaska</b>	<b>Delaware</b>	<b>Nevada</b>
Up to 1,000 years.	Indefinitely for personal property (Delaware has abolished the rule against perpetuities for personal property); up to 110 years for real property.	Up to 365 years.
<b>Tennessee</b>	<b>Utah</b>	<b>Wyoming</b>
Up to 360 years.	Up to 1,000 years.	Up to 1,000 years, except for real property.

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Title 35. Fiduciaries and Trust Estates

▢ [Chapter 16. Tennessee Investment Services Act of 2007 \(Refs & Annos\)](#)

→ [§ 35-16-101. Short title](#)

This chapter shall be known and may be cited as the “Tennessee Investment Services Act of 2007.”

CREDIT(S)

[2007 Pub.Acts, c. 144, § 1, eff. July 1, 2007.](#)

LAW REVIEW AND JOURNAL COMMENTARIES

Where There's A Will: [The TIST Test: Tennessee Competes for Trust Dollars. Dan Holbrook, 43 Tenn. B.J. 21 \(August 2007\).](#)

RESEARCH REFERENCES

Treatises and Practice Aids

[Asset Protection: Domestic & Int'l Law & Tactics § 1:5, Domestic Strategies.](#)

[Asset Protection: Domestic & Int'l Law & Tactics § 20:2, Introduction to Conceptual Issues.](#)

[Bogert - the Law of Trusts and Trustees § 223, Settlor Creates Spendthrift Trust for Self.](#)

[Tenn. Prac., Tennessee Probate Law App HH, Author's Summary of 2007-2008 Supplement.](#)

T. C. A. § 35-16-101, TN ST § 35-16-101

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▢ [Chapter 16. Tennessee Investment Services Act of 2007 \(Refs & Annos\)](#)

→ **§ 35-16-102. Definitions**

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

- (1) “Claim” means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured;
- (2) “Creditor” means, with respect to a transferor, a person who has a claim;
- (3) “Debt” means liability on a claim;
- (4) “Disposition” means a transfer, conveyance or assignment of property, including a change in the legal ownership of property occurring upon the substitution of one (1) trustee for another or the addition of one (1) or more new trustees. “Disposition” also includes the exercise of a power so as to cause a transfer of property to a trustee or trustees, but shall not include the release or relinquishment of an interest in property that, until the release or relinquishment, was the subject of a qualified disposition;
- (5) “Investment advisor” means a person given authority by the terms of an investment services trust to direct, consent to or disapprove a transferor's actual or proposed investment decisions, distribution decisions or other decisions of the transferor;
- (6) “Investment decision” means the retention, purchase, sale, exchange, tender or other transaction affecting the ownership of or rights in investments;
- (7) “Investment services trust” means an instrument appointing a qualified trustee or qualified trustees for the property that is the subject of a disposition, which instrument:
  - (A) Expressly incorporates the law of this state to govern the validity, construction and administration of the trust;
  - (B) Is irrevocable; and

(C) Provides that the interest of the transferor or other beneficiary in the trust property or the income from the trust property may not be transferred, assigned, pledged or mortgaged, whether voluntarily or involuntarily, before the qualified trustee or qualified trustees actually distribute the property or income from the property to the beneficiary;

(8) “Person” has the meaning ascribed to it in § 1-3-105;

(9) “Property” includes real property, personal property, and interests in real or personal property;

(10) “Qualified affidavit” means a sworn affidavit signed by the transferor before a disposition of assets to an investment services trust that meets the requirements of § 35-16-103. In the event of a disposition by a transferor who is a trustee, the affidavit shall be signed by the transferor who made the original disposition to the trustee, or a predecessor trustee, in a form that meets the requirements of subdivisions (7)(B) and (C) and shall state facts as of the time of the original disposition;

(11) “Qualified disposition” means a disposition by or from a transferor with or without consideration, to an investment services trust after the transferor executes a qualified affidavit;

(12) “Qualified trustee” means a person who:

(A) In the case of a natural person, is a resident of this state, or, in all other cases, is authorized by the law of this state to act as a trustee and whose activities are subject to supervision by the Tennessee department of financial institutions, the federal deposit insurance corporation, the comptroller of the currency, or the office of thrift supervision or any successor to them;

(B) Maintains or arranges for custody in this state of some or all of the property that is the subject of the qualified disposition, maintains records for the investment services trust on an exclusive or nonexclusive basis, prepares or arranges for the preparation of required income tax returns for the investment services trust, or otherwise materially participates in the administration of the investment services trust; and

(C) Is not the transferor;

(13) “Spouse” or “former spouse” means only persons to whom the transferor was legally married at, or before, the time the qualified disposition is made; and

(14) “Transferor” means a person who, as an owner of property, is a holder of a power of appointment that authorizes the holder to appoint in favor of the holder, the holder's creditors, the holder's estate or the creditors of the holder's estate, or as a trustee, directly or indirectly makes a disposition or causes a disposition to be made.

CREDIT(S)

[2007 Pub.Acts, c. 144, § 2, eff. July 1, 2007](#); [2008 Pub.Acts, c. 1010, § 1, eff. July 1, 2008](#).

HISTORICAL AND STATUTORY NOTES

2008 Pub.Acts, c. 1010, § 1, added subsec. (13), defining spouse or former spouse.

RESEARCH REFERENCES

Forms

[Asset Protection: Legal Planning, Strat. & Forms ¶ 6.10](#), Summary of Domestic Self-Settled Asset Protection Trust Laws.

Treatises and Practice Aids

[Tenn. Prac., Tennessee Probate Law App II](#), Author's Summary of 2008-2009 Supplement.

[Tenn. Prac., Tennessee Probate Law § 16B:2](#), Requirements.

[Tenn. Prac., Tennessee Probate Law § 16B:4](#), Use Opportunities.

T. C. A. § 35-16-102, TN ST § 35-16-102

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Title 35. Fiduciaries and Trust Estates

▢ [Chapter 16. Tennessee Investment Services Act of 2007 \(Refs & Annos\)](#)

→ **§ 35-16-103. Qualified affidavit; contents**


A qualified affidavit shall state that:

- (1) The transferor has full right, title, and authority to transfer the assets to the trust;
- (2) The transfer of the assets to the trust will not render the transferor insolvent;
- (3) The transferor does not intend to defraud a creditor by transferring the assets to the trust;
- (4) The transferor does not have any pending or threatened court actions against the transferor, except for those court actions identified by the transferor on an attachment to the affidavit;
- (5) The transferor is not involved in any administrative proceedings, except for those administrative proceedings identified on an attachment to the affidavit;
- (6) The transferor does not contemplate filing for relief under the provisions of the federal bankruptcy code; and
- (7) The assets being transferred to the trust were not derived from unlawful activities.

CREDIT(S)

[2007 Pub.Acts, c. 144, § 3, eff. July 1, 2007.](#)

LIBRARY REFERENCES

[Trusts](#)  [11\(1\), 30.5, 33, 55.](#)

[Westlaw Topic No. 390.](#)

[C.J.S. Trusts §§ 22 to 23, 51 to 54, 59, 62 to 63, 89.](#)

T. C. A. § 35-16-103, TN ST § 35-16-103

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Title 35. Fiduciaries and Trust Estates

▢ [Chapter 16. Tennessee Investment Services Act of 2007 \(Refs & Annos\)](#)

→ **§ 35-16-104. Claims or actions against property subject to qualified disposition; claims or actions against trustees**

(a) Notwithstanding any law to the contrary, no action of any kind, including, but not limited to, an action to enforce a judgment entered by a court or other body having adjudicative authority, shall be brought at law or in equity for an attachment or other provisional remedy against property that is the subject of a qualified disposition to an investment services trust or for the avoidance of a qualified disposition to an investment services trust, unless the action is brought pursuant to the provisions of the Uniform Fraudulent Transfer Act, compiled in title 66, chapter 3, part 3.

(b) A creditor's claim under subsection (a) shall be extinguished unless:

(1) The creditor's claim arose before the qualified disposition to an investment services trust was made, and the action is brought within the limitations of [§ 66-3-310](#) in effect on the date of the qualified disposition; or

(2) Notwithstanding [§ 66-3-310](#), the creditor's claim arose concurrent with or subsequent to the qualified disposition and the action is brought within four (4) years after the qualified disposition is made.

(c) For purposes of this chapter, a qualified disposition that is made by means of a disposition by a transferor who is a trustee shall be deemed to have been made as of the time, whether before, on or after July 1, 2007, the property that is the subject of the qualified disposition was originally transferred to the transferor acting in the capacity of trustee, or any predecessor trustee, in a form that meets the requirements of [§ 35-16-102\(7\)\(B\)](#) and (C).

(d) Notwithstanding any law to the contrary, a creditor, including a creditor whose claim arose before or after a qualified disposition, or any other person shall have only the rights with respect to a qualified disposition that are provided in this section and [§ 35-16-106](#), and neither the creditor nor any other person shall have any claim or cause of action against the trustee, or an advisor of an investment services trust, or against any person involved in the counseling, drafting, preparation, execution or funding of an investment services trust. For purposes of this section, counseling, drafting, preparation, execution or funding of an investment services trust includes the counseling, drafting, preparation, execution and funding of a limited partnership or a limited liability company if interests in the limited partnership or limited liability company are subsequently transferred to the investment services trust.

(e) Notwithstanding any law to the contrary, no action of any kind, including, but not limited to, an action to enforce a judgment entered by a court or other body having adjudicative authority, shall be brought at law or in equity against a trustee or an advisor of an investment services trust, or against any person involved in the counseling, drafting, preparation, execution or funding of an investment services trust, if, as of the date such action is brought, an action by a creditor with respect to the investment services trust would be barred under this section.

(f) In circumstances where more than one (1) qualified disposition is made by means of the same investment services trust, then:

(1) The making of a subsequent qualified disposition shall be disregarded in determining whether a creditor's claim with respect to a prior qualified disposition is extinguished as provided in subsection (b); and

(2) Any distribution to a beneficiary shall be deemed to have been made from the latest qualified disposition.

(g) If, in any action brought against an investment services trust, a court takes any action whereby the court declines to apply the law of this state in determining the effect of a spendthrift provision of the trust, the trustee of the trust shall immediately upon the court's action and without the further order of any court, cease in all respects to be trustee of the trust and a successor trustee shall succeed as trustee in accordance with the terms of the trust or, if the trust does not provide for a successor trustee and the trust would otherwise be without a trustee, a court of this state, upon the application of any beneficiary of the trust, shall appoint a successor trustee upon the terms and conditions it determines to be consistent with the purposes of the trust and this chapter. Upon the trustee's ceasing to be trustee, the trustee shall have no power or authority other than to convey the trust property to the successor trustee named in the trust in accordance with this section.

(h) An investment services trust shall be subject to this section whether or not the transferor retains any or all of the powers and rights described in [§ 35-16-111](#) or serves as an investment advisor pursuant to [§ 35-16-109](#).

(i)(1) Notwithstanding any provisions of subsection (a) or (b) to the contrary, the limitations on actions by creditors in law or equity shall not apply and such creditors' claims shall not be extinguished if the transferor is indebted on account of an agreement, judgment or order of a court for the payment of one (1) of the following:

(A) Past due child support;

(B) Past due alimony in solido of a spouse or former spouse;

(C) Past due alimony or support of a spouse or former spouse; or

(D) A written agreement, judgment or order of a court for division of marital property of a spouse or former spouse, but only to the extent of such debt, legally mandated interest and the reasonable cost of collection.

(2)(A) A claim provided under this subsection (i) shall be asserted against a trustee only:

(i) Upon a final non-appealable determination of a Tennessee court or a fully domesticated, final non-appealable order of a foreign court that such debt is past due; and

(ii) After the court has determined that the claimant has made reasonable attempts to collect the debt from any other sources of the transferor or that such attempts would be futile.

(B) Nothing in this subdivision (i)(2) shall be construed to prohibit the court from making the findings required in subdivisions (i)(2)(A)(i) and (ii) in the same proceeding and order.


#### CREDIT(S)

[2007 Pub.Acts, c. 144, § 4, eff. July 1, 2007; 2008 Pub.Acts, c. 1010, § 2, eff. July 1, 2008.](#)

#### HISTORICAL AND STATUTORY NOTES

2008 Pub.Acts, c. 1010, § 2, added subsec. (i), relating to child support and alimony.

#### LIBRARY REFERENCES

[Trusts](#)  [11\(1\)](#), [30.5](#), [33](#), [55](#).

[Westlaw Topic No. 390](#).

[C.J.S. Trusts §§ 22 to 23, 51 to 54, 59, 62 to 63, 89](#).

#### RESEARCH REFERENCES

##### Forms

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[Tenn. Prac., Tennessee Probate Law § 16B:2](#), Requirements.

[Tenn. Prac., Tennessee Probate Law § 16B:4](#), Use Opportunities.

T. C. A. § 35-16-104, TN ST § 35-16-104

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▢ [Chapter 16. Tennessee Investment Services Act of 2007 \(Refs & Annos\)](#)


→ **§ 35-16-105. Transferor's powers and rights**

A transferor shall have only the powers and rights conferred by the Investment Services Trust. Except as permitted by §§ [35-16-109](#) and [35-16-111](#), the transferor shall have no rights or authority with respect to the corpus of the investment services trust or the income from the trust, and any agreement or understanding purporting to grant or permit the retention of any greater rights or authority shall be void.

CREDIT(S)

[2007 Pub.Acts, c. 144, § 5, eff. July 1, 2007.](#)

LIBRARY REFERENCES

[Trusts](#)  31.

Westlaw Topic No. [390](#).

[C.J.S. Trusts § 68](#).

RESEARCH REFERENCES

Forms

[Asset Protection: Legal Planning, Strat. & Forms ¶ 6.10](#), Summary of Domestic Self-Settled Asset Protection Trust Laws.

T. C. A. § 35-16-105, TN ST § 35-16-105

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▢ [Chapter 16. Tennessee Investment Services Act of 2007 \(Refs & Annos\)](#)

→ **§ 35-16-106. Avoidance of qualified disposition**

(a) A qualified disposition to an Investment Services Trust shall be avoided only to the extent necessary to satisfy the transferor's debt to the creditor at whose instance the disposition had been avoided, together with costs, including attorneys' fees, that the court may allow.

(b) In the event any qualified disposition shall be avoided as provided in subsection (a), then:

(1) If the court is satisfied that a qualified trustee has not acted in bad faith in accepting or administering the property that is the subject of the qualified disposition:

(A) The qualified trustee shall have a first and paramount lien against the property that is the subject of the qualified disposition in an amount equal to the entire cost, including attorneys' fees, properly incurred by the qualified trustee in the defense of the action or proceedings to avoid the qualified disposition;

(B) The qualified disposition shall be avoided subject to the proper fees, costs, preexisting rights, claims and interests of the qualified trustee and of any predecessor qualified trustee that has not acted in bad faith; and

(C) For purposes of this subdivision (b)(1), it shall be presumed that the qualified trustee did not act in bad faith merely by accepting the property; and

(2) If the court is satisfied that a beneficiary of an investment services trust has not acted in bad faith, the avoidance of the qualified disposition shall be subject to the right of the beneficiary to retain any distribution made upon the exercise of a trust power or discretion vested in the qualified trustee or qualified trustees of the investment services trust, which power or discretion was properly exercised prior to the creditor's commencement of an action to avoid the qualified disposition. For purposes of this subdivision (b)(2), it shall be presumed that the beneficiary, including a beneficiary who is also a transferor of the trust, did not act in bad faith merely by creating the trust or by accepting a distribution made in accordance with the terms of the trust.


(c) A disposition by a trustee that is not a qualified trustee to a trustee that is a qualified trustee shall not be treated as other than a qualified disposition solely because the trust instrument fails to meet the requirements of [§ 35-16-102\(7\)\(A\)](#).

(d) In the case of a disposition to more than one (1) trustee, a disposition that is otherwise a qualified disposition shall not be treated as other than a qualified disposition solely because not all of the recipient trustees are qualified trustees.

CREDIT(S)

[2007 Pub.Acts, c. 144, § 6, eff. July 1, 2007.](#)

LIBRARY REFERENCES

[Trusts](#)  33, 55.

Westlaw Topic No. 390.

[C.J.S. Trusts §§ 59, 89.](#)

RESEARCH REFERENCES

Forms

[Asset Protection: Legal Planning, Strat. & Forms ¶ 6.10](#), Summary of Domestic Self-Settled Asset Protection Trust Laws.

T. C. A. § 35-16-106, TN ST § 35-16-106

Current with laws from the 2009 First Reg. Sess., eff. through April 15, 2009.

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**C**

West's Tennessee Code Annotated [Currentness](#)

Title 35. Fiduciaries and Trust Estates

▢ [Chapter 16](#). Tennessee Investment Services Act of 2007 ([Refs & Annos](#))


→ **§ 35-16-107. Spendthrift restriction**

A spendthrift provision as described in [§ 35-16-102\(7\)\(C\)](#) shall be deemed to be a restriction on the transfer of the transferor's beneficial interest in the trust that is enforceable under applicable nonbankruptcy law within the meaning of [§ 541\(c\)\(2\) of the Bankruptcy Code](#), codified in [11 U.S.C. § 541\(c\)\(2\)](#), or any successor provision.

CREDIT(S)

[2007 Pub.Acts, c. 144, § 7, eff. July 1, 2007.](#)

LIBRARY REFERENCES

[Trusts](#)  [12, 31.](#)

[Westlaw Topic No. 390.](#)

[C.J.S. Trusts §§ 23, 68.](#)

RESEARCH REFERENCES

Forms

[Asset Protection: Legal Planning, Strat. & Forms ¶ 6.10](#), Summary of Domestic Self-Settled Asset Protection Trust Laws.

T. C. A. § 35-16-107, TN ST § 35-16-107

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West's Tennessee Code Annotated [Currentness](#)

Title 35. Fiduciaries and Trust Estates

▢ [Chapter 16](#). Tennessee Investment Services Act of 2007 ([Refs & Annos](#))

→ [§ 35-16-108](#). **Qualified trustee; advisors**

(a) For purposes of this chapter, neither the transferor nor any other natural person who is a nonresident of this state nor an entity that is not authorized by the law of this state to act as a trustee or whose activities are not subject to supervision as provided in [§ 35-16-102\(12\)\(A\)](#) shall be considered a qualified trustee; however, nothing in this chapter shall preclude a transferor from appointing one (1) or more advisors, including, but not limited to:

(1) Advisors who have authority under the terms of the trust instrument to remove and appoint qualified trustees or trust advisors;

(2) Advisors who have authority under the terms of the trust instrument to direct, consent to or disapprove distributions from the trust; and

(3) Investment advisors, whether or not the advisors would meet the requirements imposed by [§ 35-16-102\(12\)](#).

(b) For purposes of subsection (a), “advisor” includes a trust “protector” or any other person who, in addition to a qualified trustee, holds one (1) or more trust powers.

CREDIT(S)

[2007 Pub.Acts, c. 144, § 8, eff. July 1, 2007.](#)

LIBRARY REFERENCES

[Trusts](#)  155.

Westlaw Topic No. 390.

[C.J.S. Trusts](#) §§ 288 to 289.

RESEARCH REFERENCES

Forms

[Asset Protection: Legal Planning, Strat. & Forms ¶ 6.10](#), Summary of Domestic Self-Settled Asset Protection Trust Laws.

T. C. A. § 35-16-108, TN ST § 35-16-108

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Title 35. Fiduciaries and Trust Estates

▢ [Chapter 16. Tennessee Investment Services Act of 2007 \(Refs & Annos\)](#)

→ **§ 35-16-109. Investment advisors; service**

A person may serve as an investment advisor notwithstanding that the person is the transferor of the qualified disposition, but the person may not otherwise serve as advisor to a trust that is a qualified disposition except with respect to the retention of the veto right permitted by [§ 35-16-111\(1\)](#).

CREDIT(S)

[2007 Pub.Acts, c. 144, § 9, eff. July 1, 2007.](#)

LIBRARY REFERENCES

[Trusts](#)  155.

Westlaw Topic No. 390.

[C.J.S. Trusts §§ 288 to 289.](#)

RESEARCH REFERENCES

Forms

[Asset Protection: Legal Planning, Strat. & Forms ¶ 6.10](#), Summary of Domestic Self-Settled Asset Protection Trust Laws.

T. C. A. § 35-16-109, TN ST § 35-16-109

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Title 35. Fiduciaries and Trust Estates

▢ [Chapter 16. Tennessee Investment Services Act of 2007 \(Refs & Annos\)](#)

→ **§ 35-16-110. Failure to meet requirements; qualified trustees**

In the event that a qualified trustee of an investment services trust ceases to meet the requirements of [§ 35-16-102\(12\)\(A\)](#), and there remains no trustee that meets the requirements, the qualified trustee shall be deemed to have resigned as of the time of that cessation, and thereupon the successor qualified trustee provided for in the investment services trust shall become a qualified trustee of the investment services trust, or in the absence of any successor qualified trustee provided for in the investment services trust, then a court of this state shall, upon application of any interested party, appoint a successor qualified trustee.

CREDIT(S)

[2007 Pub.Acts, c. 144, § 10, eff. July 1, 2007.](#)

LIBRARY REFERENCES

[Trusts](#)  169.

Westlaw Topic No. 390.

[C.J.S. Trusts](#) §§ 288 to 294, 298 to 299.

RESEARCH REFERENCES

Forms

[Asset Protection: Legal Planning, Strat. & Forms ¶ 6.10](#), Summary of Domestic Self-Settled Asset Protection Trust Laws.

T. C. A. § 35-16-110, TN ST § 35-16-110

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West's Tennessee Code Annotated [Currentness](#)

Title 35. Fiduciaries and Trust Estates

▢ [Chapter 16. Tennessee Investment Services Act of 2007 \(Refs & Annos\)](#)

→ **§ 35-16-111. Revocation**

An Investment Services Trust shall not be deemed revocable on account of its inclusion of one (1) or more of the following:

- (1) A transferor's power to veto a distribution from the trust;
- (2) A power of appointment, other than a power to appoint to the transferor, the transferor's creditors, the transferor's estate or the creditors of the transferor's estate, exercisable by will or other written instrument of the transferor effective only upon the transferor's death;
- (3) The transferor's potential or actual receipt of income, including rights to the income retained in the trust;
- (4) The transferor's potential or actual receipt of income or principal from a charitable remainder unitrust or charitable remainder annuity trust as those terms are defined in [§ 664 of the Internal Revenue Code of 1986](#), codified in [26 U.S.C. § 664](#), and any successor provision;
- (5) The transferor's receipt each year of an amount specified in the trust, the amount not to exceed five percent (5%) of the initial value of the trust or its value determined from time to time pursuant to the trust;
- (6) The transferor's potential or actual receipt or use of principal if the potential or actual receipt or use of principal would be the result of a qualified trustee's or qualified trustees' acting:
  - (A) In the qualified trustee's or qualified trustees' discretion. For purposes of this section, a qualified trustee is presumed to have discretion with respect to the distribution of principal unless the discretion is expressly denied to the trustee by the terms of the trust;
  - (B) Pursuant to a standard that governs the distribution of principal and does not confer upon the transferor a power to consume, invade or appropriate property for the benefit of the transferor, unless the power of the transferor is limited by an ascertainable standard relating to the health, education, support, or maintenance within the meaning of [§ 2041\(b\)\(1\)\(A\)](#) or [§ 2514\(c\)\(1\) of the Internal Revenue Code of 1986](#), codified in [26 U.S.C. § 2041\(b\)\(1\)\(A\)](#) or [26 U.S.C. § 2514\(c\)\(1\)](#), as in effect on July 1, 2007, or as later amended; or

(C) At the direction of an advisor described in [§ 35-16-108](#) who is acting:

(i) In the advisor's discretion; or

(ii) Pursuant to a standard that governs the distribution of principal and does not confer upon the transferor a power to consume, invade, or appropriate property for the benefit of the transferor, unless the power of the transferor is limited by an ascertainable standard relating to the health, education, support, or maintenance within the meaning of [§ 2041\(b\)\(1\)\(A\)](#) or [§ 2514\(c\)\(1\) of the Internal Revenue Code of 1986, 26 U.S.C. § 2041\(b\)\(1\)\(A\)](#) or [26 U.S.C. § 2514\(c\)\(1\)](#), as in effect on July 1, 2007, or as later amended;

(7) The transferor's right to remove a trustee or advisor and to appoint a new trustee or advisor; provided, however, that the right shall not include the appointment of a person who is a related or subordinate party with respect to the transferor within the meaning of [§ 672\(c\) of the Internal Revenue Code of 1986, 26 U.S.C. § 672\(c\)](#), and any successor provision; and

(8) The transferor's potential or actual use of real property held under a qualified personal residence trust within the meaning of the term as described in [§ 2702\(c\) of the Internal Revenue Code of 1986, codified in 26 U.S.C. § 2702\(c\)](#), and any successor provision.

CREDIT(S)

[2007 Pub.Acts, c. 144, § 11, eff. July 1, 2007.](#)

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[Trusts](#)  59.

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[C.J.S. Trusts §§ 103 to 116.](#)

T. C. A. § 35-16-111, TN ST § 35-16-111

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Title 35. Fiduciaries and Trust Estates

▢ [Chapter 16. Tennessee Investment Services Act of 2007 \(Refs & Annos\)](#)

→ **§ 35-16-112. Application of chapter**

This chapter applies to qualified dispositions to Investment Services Trusts and dispositions by transferors who are trustees made on or after July 1, 2007.

CREDIT(S)

[2007 Pub.Acts, c. 144, § 12, eff. July 1, 2007.](#)

RESEARCH REFERENCES

Treatises and Practice Aids

[Asset Protection: Domestic & Int'l Law & Tactics § 1:5](#), Domestic Strategies.

[Asset Protection: Domestic & Int'l Law & Tactics § 20:2](#), Introduction to Conceptual Issues.

[Bogert - the Law of Trusts and Trustees § 223](#), Settlor Creates Spendthrift Trust for Self.

T. C. A. § 35-16-112, TN ST § 35-16-112

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## Trusts Study Group subcommittee recommendations – October 1, 2009

### **II. Uniform Acts Subcommittee recommendations:**

#### *Uniform Principal and Income Act*

1. The subcommittee recommends adopting the Uniform Principal and Income Act (effective January 1, 2011) with the following modifications:
  - a. Safe harbor provisions – § 104
    - i. Adding language providing a safe harbor to trustees who make an adjustment to increase net trust accounting income of between 4% and 6% of the trust asset's value in a given year. An adjustment within this range would be deemed presumptively reasonable.
    - ii. For purposes of computing the 4%-6% range, the subcommittee suggests that a three-year rolling average of the value of the trust assets as of December 31 be used (similar to Ohio). For trusts less than three years old, the value would be a two-year rolling average for trusts at least two years old, and for trusts less than two years old, the value would be based on December 31 values.
  - b. Oil and gas – § 411
    - i. The subcommittee recommends adopting an approach providing that trusts in existence before the effective date of the act would have the option of using the existing 27.5% allocation OR converting to the provisions of the act. Trusts created after the effective date would fall under the act unless the terms of the trust instrument stated otherwise. For purposes of this provision, a testamentary trust would be considered to be effective as of the testator's date of death.
  - c. Delayed pecuniary bequests – § 201
    - i. The subcommittee recommends that this provision be modified to provide that interest begins accruing on a bequest that is not paid within one year of date of death. The interest rate would be the IRS mid-term applicable federal rate in effect on the date interest begins to accrue.
  - d. Omitting § 506(b)
    - i. The subcommittee recommends omitting this provision. By doing so, the trustee would have the discretion to determine whether to make transfers between income and principal when expenses are deducted on the estate's fiduciary income tax return (instead of the estate tax return).

#### *Uniform Trust Code*

The subcommittee recommends:

1. Adopting articles 8 and 10 of the Uniform Trust Code with the following modifications:
  - a. Trustee's duty of loyalty – § 802(f)
    - i. Replacing uniform provision with the following language from Tennessee's implementation of the UTC.
      1. "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

## Trusts Study Group subcommittee recommendations – October 1, 2009

fiduciary interests of the trustee if the investment complies with the prudent investor rule of [Miss. Code Ann. § 91-9-601]. 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 [by the UTC] to receive a copy of the trustee's annual report of the rate and method by which the compensation was determined.”

- b. Trustee's duty to report – § 813
  - i. Modify to provide that this section only applies unless otherwise provided in the trust instrument;
  - ii. Insert language stating that unless otherwise provided by the trust agreement, a trustee must provide an annual report only to the beneficiaries who receive a distribution from the trust during that year.
  - iii. In addition, a trustee would NOT be required to provide an annual report to a beneficiary who receives a specific bequest.
  - iv. A trustee must also provide an annual report upon request of any other beneficiary, except for a beneficiary who receives a specific bequest.
- c. Damages in absence of breach of trust – § 1003
  - i. Omit subsection (a), which reads “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.”
- d. Limitation of action against trustee – § 1005
  - i. Change limitations period in subsection (c) from five years to three years to conform with the general limitations period in Mississippi.

### *Repeals*

The subcommittee recommends that concurrently with the adoption of the above acts, the following be repealed:

1. The Uniform Trustees' Powers Act, Miss. Code Ann. § 91-9-101 et seq. (though language in the existing §§ 91-9-107(4), (5), and (3)(x) would be added to § 816 of the Uniform Trust Code).
2. 1962 Uniform Principal and Income Law, Miss. Code Ann. § 91-17-1 et seq.

## Uniform Principal and Income Act – selected provisions

### SECTION 104. TRUSTEE'S POWER TO ADJUST.

(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 rules in Section 103(a), that the trustee is unable to comply with Section 103(b).

(b) In deciding whether and to what extent to exercise the power conferred by subsection (a), a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant:

- (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; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; 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 allocated to income under the other sections of this [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 spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;
- (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;

## Uniform Principal and Income Act – selected provisions

- (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;
  - (5) if possessing or exercising the power to make an adjustment causes 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 causes 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; or
  - (8) if the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly.
- (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 conferred by 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 will cause a result described in subsection (c)(1) through (6) or (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 described 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 of adjustment conferred by subsection (a).

## Uniform Principal and Income Act – selected provisions

### SECTION 411. MINERALS, WATER, AND 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 as follows:

(1) If received as nominal delay rental or nominal annual rent on a lease, a receipt must be allocated to income.

(2) If 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) If an amount received as a royalty, shut-in-well payment, take-or-pay payment, bonus, or delay rental is more than nominal, 90 percent must be allocated to principal and the balance to income.

(4) If an amount is received from a working interest or any other interest not provided for in paragraph (1), (2), or (3), 90 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, 90 percent of the amount must be allocated to principal and the balance to income.

(c) This [Act] 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 [Act]], the trustee may allocate receipts from the interest as provided in this [Act] or in the manner used by the trustee before [the effective date of this [Act]]. If the trust acquires an interest in minerals, water, or other natural resources after [the effective date of this [Act]], the trustee shall allocate receipts from the interest as provided in this [Act].



## Uniform Principal and Income Act – selected provisions

### SECTION 201. DETERMINATION AND DISTRIBUTION OF NET INCOME.

After a decedent dies, in the case of an estate, or after an income interest in a trust ends, the following rules apply:

(1) A fiduciary 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 under the rules in [Articles] 3 through 5 which apply to trustees and the rules in paragraph (5). The fiduciary shall distribute the net income and net principal receipts to the beneficiary who is to receive the specific property.

(2) A fiduciary shall determine the remaining net income of a decedent's estate or a terminating income interest under the rules in [Articles] 3 through 5 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, but 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 will 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) A fiduciary shall distribute to a beneficiary who receives a pecuniary amount outright the interest or any other amount provided by the will, the terms of the trust, or applicable law from net income determined under paragraph (2) or from principal to the extent that net income is insufficient. 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 or applicable law, the fiduciary shall distribute the interest or other amount to which the beneficiary would be entitled under applicable law if the pecuniary amount were required to be paid under a will.

(4) A fiduciary shall distribute the net income remaining after distributions required by paragraph (3) in the manner described in Section 202 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.

(5) A fiduciary may not reduce principal or income receipts from property described in paragraph (1) because of a payment described in Section 501 or 502 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

## Uniform Principal and Income Act – selected provisions

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.

### **SECTION 506. ADJUSTMENTS BETWEEN PRINCIPAL AND INCOME BECAUSE OF TAXES.**

(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 described 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.

## Uniform Trust Code – selected provisions

### SECTION 802. DUTY OF LOYALTY.

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

(b) Subject to the rights of persons dealing with or assisting the trustee as provided in Section 1012, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:

(1) the transaction was authorized by the terms of the trust;

(2) the transaction was approved by the court;

(3) the beneficiary did not commence a judicial proceeding within the time allowed by Section 1005;

(4) the beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with Section 1009; or

(5) the transaction involves a contract entered into or claim acquired by the trustee before the person became 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; or

(4) a corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

(d) A transaction between a trustee and a beneficiary that does not concern trust property but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary and from which the trustee obtains an advantage is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.

(e) A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests 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 [Article] 9. In addition to its compensation

## Uniform Trust Code – selected provisions

for acting as trustee, the trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust. If the trustee receives compensation from the investment company or investment trust for providing investment advisory or investment management services, the trustee must at least annually notify the persons entitled under Section 813 to receive a copy of the trustee's annual report of the rate and method by which that compensation was determined.

(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.

## Uniform Trust Code – selected provisions

### SECTION 813. DUTY TO INFORM AND REPORT.

(a) A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust.

(b) A trustee:

(1) upon request of a beneficiary, shall promptly furnish to the beneficiary a copy of the trust instrument;

(2) within 60 days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number;

(3) within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee's report as provided in subsection (c); and

(4) shall notify the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation.

(c) A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values. Upon a vacancy in a trusteeship, unless a cotrustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative, [conservator], or [guardian] may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.

(d) A beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. A beneficiary, with respect to future reports and other information, may withdraw a waiver previously given.

(e) Subsections (b)(2) and (3) do not apply to a trustee who accepts a trusteeship before [the effective date of this [Code]], to an irrevocable trust created before [the effective date of this [Code]], or to a revocable trust that becomes irrevocable before [the effective date of this [Code]].

## **Uniform Trust Code – selected provisions**

### **SECTION 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.

### **SECTION 1005. LIMITATION OF ACTION AGAINST TRUSTEE.**

- (a) A beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.
- (b) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.
- (c) If subsection (a) does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within five years after the first to occur of:
  - (1) the removal, resignation, or death of the trustee;
  - (2) the termination of the beneficiary's interest in the trust; or
  - (3) the termination of the trust.

Hereafter all declarations or creations of trusts or confidence of or in any real property shall be made and manifested by writing, signed by the party who declares or creates such trust, or by his last will, in writing, or else they shall be utterly void. Every writing declaring or creating a trust in real property (the "Trust Instrument"), other than a last will, may be acknowledged or proved as other writings and filed for record with the clerk of the chancery court in which the real property, or part of it, is located, and such filing shall serve as constructive notice of the existence and terms of the trust from and after filing.

In lieu of filing the Trust Instrument, there may be filed a memorandum or certificate of trust signed by the grantor, trustee or successor trustee and acknowledged or proved as other writings, which memorandum or certificate of trust shall contain the following information: (a) the name of the trust; (b) the street and mailing address of the office, and the name and street and mailing address and telephone number of the trustee; (c) the name and street and mailing address and telephone number of the grantor, creator or settlor of the trust; (d) a legally sufficient description of all interests in real property owned by or conveyed to the trust; (e) the anticipated date of termination of the trust or the event upon which the trust will be terminated; and (f) the general powers granted to the trustee. The memorandum or certificate of trust may be filed with the clerk of the appropriate chancery court either before or after a deed of conveyance of real property to the trust or trustee, in his capacity as such. In addition, the deed of conveyance may also serve as a memorandum or certificate of trust, or an amendment to such document as the case may be, so long as the deed of conveyance contains the required information for a memorandum or certificate of trust as set forth in this Section.

The trustee may amend the memorandum or certificate of trust. The memorandum or certificate of amendment shall set forth the amendment to the original memorandum or certificate with particularity. The amended memorandum or certificate of trust may be made effective on a future date, which must be a date certain. The memorandum or certificate of amendment must be signed by the trustee, acknowledged in a manner suitable for recordation, and filed in the office of the chancery clerk where the original Trust Instrument, or original memorandum or certificate of trust is filed.

Any person who in good faith deems it necessary to review the terms and conditions of the trust shall be entitled to inspect the Trust Instrument in the office of the trustee upon reasonable notice. If the trustee does not allow any such person to inspect the Trust Instrument as provided herein within thirty (30) days after receipt of reasonable notice, such person may petition the chancery court to compel the trustee to provide the Trust Instrument, or copy thereof, for inspection by the Petitioner. In the event the chancellor grants the petition, all necessary costs incurred by the petitioner, including reasonable attorneys' fees, shall be taxed against the trustee.

The foregoing provisions of this Section shall have no application to trusts of personal property, nor to any trust arising or resulting by implication of law out of conveyance of land. The failure to file a copy of a Trust Instrument, certificate of trust, memorandum of trust or deed of conveyance shall not affect the validity of the Trust Instrument.

## Trusts Study Group subcommittee recommendations – October 1, 2009

### **III. Uniform Prudent Management of Institutional Funds Act (UPMIFA) subcommittee:**

The subcommittee recommends adoption of the attached draft act, which departs from the uniform act as follows:

1. Definitions – § 2
  - a. Revising definition of “charitable purpose” to match definition found in Charitable Solicitations Act, Miss. Code Ann. § 79-11-501 et seq.
  - b. In definition of “institution,” clarify that the term does not include any bank, trust company, or other regulated financial institution.
2. Standards of conduct in managing and investing – § 3
  - a. Revising subsection (d) to make it clear that pooling of institutional funds is acceptable unless otherwise provided in the trust instrument;
  - b. Replacing the uniform subsection (e)(4) with language making it clear that if a trust instrument waives the trustee’s duty to diversify the investments of the fund, the trustee will not be held liable.
  - c. Adding language to subsection (e)(6) stating that uncompensated volunteers do not have a duty to use their special skills or expertise (if any) in managing the funds of the institution.
3. Appropriations for expenditure or accumulation of an endowment fund – § 4
  - a. Omits optional subsection (d), which would presume imprudence on the part of a trustee who spent more than 7% of a fund in a given year.
4. Delegation of management and investment functions – § 5
  - a. Modifies subsection (c) to state that a trustee may be held liable for delegation of duties only if the delegation was made recklessly or if the trustee was grossly negligent in making the delegation.
5. Release or modification of restrictions on management, investment, or purpose – § 6
  - a. Revises subsection (d) to allow release or modification of restrictions on trust assets after 60 days notice to the Secretary of State if the following conditions are met:
    - i. The institutional fund subject to the restriction has a total value of less than \$150,000; and
    - ii. More than 20 years have elapsed since the fund was established
  - b. Adds subsection (e), which provides that court actions to modify or release restrictions on trusts shall be made in the name of the institution to the chancery court of the county in which the principal activities of the institution are conducted

The subcommittee also recommends that the act become effective on January 1, 2011, and that the former version of the act (Miss. Code Ann. § 79-11-601 through § 79-11-617) be repealed.



## UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT

**SECTION 1. SHORT TITLE.** This ~~act~~chapter may be cited as the Uniform Prudent Management of Institutional Funds Act.

**SECTION 2. DEFINITIONS.** In this ~~act~~chapter:

~~(1)~~ ~~—~~ ~~(1)~~ “Charitable purpose” means ~~the relief of poverty, the advancement of education or religion, the promotion of health, the promotion of a governmental purpose, or any other purpose the achievement of which is beneficial to the community either:~~

~~a. Any purpose described in Section 501(c)(3) of the Internal Revenue Code;~~

~~or~~

~~a.b. Any voluntary health and welfare, charitable, benevolent, philanthropic, patriotic, educational, humane, scientific, public health, environmental conservation, civic, or other eleemosynary purpose.~~

(2) “Endowment fund” means an institutional fund or part thereof that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis. The term does not include assets that an institution designates as an endowment fund for its own use.

(3) “Gift instrument” means a record or records, including an institutional solicitation, under which property is granted to, transferred to, or held by an institution as an institutional fund.

(4) “Institution” means:

(A) a person, other than an individual, organized and operated exclusively for

charitable purposes;

(B) a government or governmental subdivision, agency, or instrumentality, to the extent that it holds funds exclusively for a charitable purpose; or

(C) a trust that had both charitable and noncharitable interests, after all noncharitable interests have terminated.

(D) The term “institution” does not include any bank, trust company, or other regulated financial institution.

(5) “Institutional fund” means a fund held by an institution exclusively for charitable purposes. The term does not include:

(A) program-related assets;

(B) a fund held for an institution by a trustee that is not an institution; or

(C) a fund in which a beneficiary that is not an institution has an interest, other than an interest that could arise upon violation or failure of the purposes of the fund.

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

(7) “Program-related asset” means an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment.

(8) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

**SECTION 3. STANDARD OF CONDUCT IN MANAGING AND INVESTING  
INSTITUTIONAL FUND.**

(a) Subject to the intent of a donor expressed in a gift instrument, an institution, in managing and investing an institutional fund, shall consider the charitable purposes of the institution and the purposes of the institutional fund.

(b) In addition to complying with the duty of loyalty imposed by law other than this ~~fact~~chapter, each person responsible for managing and investing an institutional fund shall manage and invest the fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

(c) In managing and investing an institutional fund, an institution:

(1) may incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the institution, and the skills available to the institution; and

(2) shall make a reasonable effort to verify facts relevant to the management and investment of the fund.

(d) Subject to the intent of a donor expressed in a gift instrument, An-an institution may pool two or more institutional funds for purposes of management and investment.

(e) Except as otherwise provided by a gift instrument, the following rules apply:

(1) In managing and investing an institutional fund, the following factors, if relevant, must be considered:

(A) general economic conditions;

(B) the possible effect of inflation or deflation;

(C) the expected tax consequences, if any, of investment decisions or

strategies;

(D) the role that each investment or course of action plays within the overall investment portfolio of the fund;

(E) the expected total return from income and the appreciation of investments;

(F) other resources of the institution;

(G) the needs of the institution and the fund to make distributions and to preserve capital; and

(H) an asset's special relationship or special value, if any, to the charitable purposes of the institution.

(2) Management and investment decisions about an individual asset must be made not in isolation but rather in the context of the institutional fund's portfolio of investments as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the fund and to the institution.

(3) Except as otherwise provided by law other than this ~~fact~~chapter, an institution may invest in any kind of property or type of investment consistent with this section.

(4) An institution shall reasonably manage the risk of concentrated holdings of assets by diversifying the investments of the institutional fund or by using some other appropriate mechanism, except as provided as follows:~~An institution shall diversify the investments of an institutional fund unless the institution reasonably determines that, because of special circumstances, the purposes of the fund are better served without diversification.~~

(A) The duty imposed by this paragraph shall not apply if the institution

reasonably determines that, because of special circumstances, or because of the specific purposes, terms, distribution requirements, and other circumstances of the institutional fund, the purposes of such fund are better served without complying with the duty. For purposes of this paragraph, special circumstances shall include an asset's special relationship or special value, if any, to the charitable purposes of the institution or to the donor;

(B) No person responsible for managing and investing an institutional fund shall be liable for failing to comply with the duty imposed by this paragraph to the extent that the terms of the gift instrument or express written agreement between the donor and the institution limits or waives the duty; and

(C) The governing board of an institution may retain property contributed by a donor to an institutional fund for as long as the governing board deems advisable.

(5) Within a reasonable time after receiving property, an institution shall make and carry out decisions concerning the retention or disposition of the property or to rebalance a portfolio, in order to bring the institutional fund into compliance with the purposes, terms, and distribution requirements of the institution as necessary to meet other circumstances of the institution and the requirements of this ~~act~~chapter.

(6) A person ~~that~~ who has special skills or expertise, or is selected in reliance upon the person's representation that the person has special skills or expertise, has a duty to use those skills or that expertise in managing and investing institutional funds. This subdivision does not apply to a volunteer who is not compensated beyond reimbursement for expenses.

**SECTION 4. APPROPRIATION FOR EXPENDITURE OR ACCUMULATION  
OF ENDOWMENT FUND; RULES OF CONSTRUCTION.**

(a) Subject to the intent of a donor expressed in the gift instrument ~~and to subsection (d)~~ or to any express written agreement between a donor and an institution, an institution may appropriate for expenditure or accumulate so much of an endowment fund as the institution determines is prudent for the uses, benefits, purposes, and duration for which the endowment fund is established. Unless stated otherwise in the gift instrument, the assets in an endowment fund are donor-restricted assets until appropriated for expenditure by the institution. In making a determination to appropriate or accumulate, the institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and shall consider, if relevant, the following factors:

- (1) the duration and preservation of the endowment fund;
- (2) the purposes of the institution and the endowment fund;
- (3) general economic conditions;
- (4) the possible effect of inflation or deflation;
- (5) the expected total return from income and the appreciation of investments;
- (6) other resources of the institution; and
- (7) the investment policy of the institution.

(b) ~~To~~ In order to limit the authority to appropriate for expenditure or accumulate under subsection (a), a gift instrument must specifically state the limitation.

(c) Terms in a gift instrument designating a gift as an endowment, or a direction or authorization in the gift instrument to use only “income”, “interest”, “dividends”, or “rents,

issues, or profits”, or “to preserve the principal intact”, or words of similar import:

(1) create an endowment fund of permanent duration unless other language in the gift instrument limits the duration or purpose of the fund; and

(2) do not otherwise limit the authority to appropriate for expenditure or accumulate under subsection (a).

~~————— [(d) The appropriation for expenditure in any year of an amount greater than seven percent of the fair market value of an endowment fund, calculated on the basis of market values determined at least quarterly and averaged over a period of not less than three years immediately preceding the year in which the appropriation for expenditure is made, creates a rebuttable presumption of imprudence. For an endowment fund in existence for fewer than three years, the fair market value of the endowment fund must be calculated for the period the endowment fund has been in existence. This subsection does not:~~

~~————— (1) apply to an appropriation for expenditure permitted under law other than this [act] or by the gift instrument; or~~

~~————— (2) create a presumption of prudence for an appropriation for expenditure of an amount less than or equal to seven percent of the fair market value of the endowment fund.]~~

## **SECTION 5. DELEGATION OF MANAGEMENT AND INVESTMENT**

### **FUNCTIONS.**

(a) ~~Except as otherwise provided in a gift instrument or in~~ Subject to any specific ~~limitation set forth in a gift instrument or in~~ law other than this ~~[act]~~chapter, an institution may delegate to an external agent the management and investment of an institutional fund to the extent that an institution could prudently delegate under the circumstances. An institution shall

act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, in:

(1) selecting an agent;

(2) establishing the scope and terms of the delegation, consistent with the purposes of the institution and the institutional fund; and

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

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

(c) Absent gross negligence, wantonness, recklessness, or deliberate misconduct, An-an institution that complies with subsection (a) is not liable for the decisions or actions of an agent to which the function was delegated.

(d) By accepting delegation of a management or investment function from an institution that is subject to the laws of this state, an agent submits to the jurisdiction of the courts of this state in all proceedings arising from or related to the delegation or the performance of the delegated function.

(e) An institution may delegate management and investment functions to its committees, officers, or employees as otherwise authorized by law ~~of this state other than this [act]~~.

#### **SECTION 6. RELEASE OR MODIFICATION OF RESTRICTIONS ON MANAGEMENT, INVESTMENT, OR PURPOSE.**

(a) If the donor consents in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or purpose of an



institutional fund. A release or modification may not allow a fund to be used for a purpose other than a charitable purpose of the institution.

(b) The court, upon application of an institution, may modify a restriction contained in a gift instrument regarding the management or investment of an institutional fund if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund. The institution shall notify the ~~Attorney General~~ Secretary of State of the application, and the ~~Attorney General~~ Secretary of State must be given an opportunity to be heard. To the extent practicable, any modification must be made in accordance with the donor's probable intention.

(c) If a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the charitable purposes expressed in the gift instrument. The institution shall notify the ~~Attorney General~~ Secretary of State of the application, and the ~~Attorney General~~ Secretary of State must be given an opportunity to be heard.

(d) If an institution determines that a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund is unlawful, impracticable, impossible to achieve, or wasteful, the institution, 60 days after notification to the ~~Attorney General~~ Secretary of State, may release or modify the restriction, in whole or part, if:

- (1) the institutional fund subject to the restriction has a total value of less than

~~[\$25,000]~~ \$150,000;

(2) more than 20 years have elapsed since the fund was established; and

(3) the institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument.

(e) An application to the court under subsections (b) or (c) of this Section shall be made in the name of the institution to the chancery court of the county in which the principal activities of the institution are conducted.

**SECTION 7. REVIEWING COMPLIANCE.** Compliance with this ~~fact~~chapter is determined in light of the facts and circumstances existing at the time a decision is made or action is taken, and not by hindsight.

**SECTION 8. APPLICATION TO EXISTING INSTITUTIONAL FUNDS.** This ~~fact~~chapter applies to institutional funds existing on or established after January 1, 2011~~the effective date of this act~~. As applied to institutional funds existing on January 1, 2011~~the effective date of this act~~, this ~~fact~~chapter governs only decisions made or actions taken on or after that date.

**SECTION 9. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.** This ~~fact~~chapter modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

Comment [DAJ1]: Further discussion necessary.

**SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** 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.

**SECTION 11. EFFECTIVE DATE.** This ~~act~~chapter takes effect January 1, 2011.

**SECTION 12. REPEAL.** The following acts and parts of acts are repealed:

(a) The Uniform Management of Institutional Funds Act, Miss. Code Ann. § 79-11-601 through § 79-11-617.