

**New York Trust Law for the 21st Century: The Proposed New York Trust
Code and New York Uniform Directed Trust Act**

Estate Planning Council of Eastern New York, Inc.

January 2018

Ira Mark Bloom
Justice David Josiah Brewer Distinguished Professor of Law
Albany Law School
80 New Scotland Avenue
Albany, NY 12208

New York Trust Law for the 21st Century: The Proposed New York Trust Code and New York Uniform Directed Trust Act

Ira Mark Bloom¹

I. INTRODUCTION

On November 4, 2017, the House of Delegates of the New York State Bar Association (NYSBA) approved the recommendation by NYSBA's Executive Committee and the Executive Committee of NYSBA's Trusts and Estates Law Section that New York enact a modern New York Trust Code. Earlier in 2017, the President of the New York City Bar Association approved enactment of the New York Trust Code as affirmative legislation based on the recommendations of the Trusts and Estates and Surrogate's Court Committee and the Estate and Gift Tax Committee of the City Bar Association.

In September 2018, the Executive Committee of NYSBA's Trusts and Estates Law Section approved enactment of the New York Uniform Directed Trust Act, which is the New York version of the recently-approved Uniform Directed Trust Act. In November of 2017, the Trusts and Estates and Surrogate's Court Committee of the New York City Bar Association approved enactment of the New York Uniform Directed Trust Act, which will be submitted to the President for City Bar approval. On January 26, 2018, NYSBA's House of Delegates will be asked to approve the New York Uniform Directed Trust Act as affirmative legislation.

Hopefully both the New York Trust Code and the New York Uniform Directed Trust Act will be enacted during the 2018 legislative session.

Part II of the paper sets forth and explains the proposed changes to New York trust law based on the New York Trust Code. Part III sets forth and explains the proposed changes to New York trust law based on the New York Uniform Directed Trust Act. Some interesting trust planning and drafting considerations will be highlighted throughout the presentation.

¹ Justice David Josiah Brewer Distinguished Professor of Law, Albany Law School. Professor Bloom is the Chair of the Trusts and Estates Law Section's NYUTC Committee, a member of the NYUTC-Legislative Advisory Group's Steering Committee and Co-Reporter for the New York Trust Code Project. Professor actively participated in the formulation of the proposed New York Uniform Directed Trust Act.

II. PROPOSED NEW YORK TRUST CODE

This portion of the paper sets forth and explains the proposed New York Trust Code.²

ARTICLE 7-A NEW YORK TRUST CODE SUMMARY OF ARTICLE

Part 1. In General

- Section 7-A-1.1 Short title.
7-A-1.2 Scope.
7-A-1.2-A Purchase-money resulting trust abolished.
7-A-1.3 Definitions.
7-A-1.4 Knowledge.
7-A-1.5 Default and mandatory rules.
7-A-1.6 Common Law and principles of equity.
7-A-1.7 Governing law.
7-A-1.8 Principal place of administration.
7-A-1.9 Methods and waiver of notice.
7-A-1.10 Others treated as qualified beneficiaries.
7-A-1.11 Nonjudicial settlement agreements.
7-A-1.12 [Reserved].

Part 2. Judicial Proceedings

- Section 7-A-2.1 Role of court in administration of trust.
7-A-2.2 Jurisdiction over trustee and beneficiary.

Part 3. Representation [Reserved]

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

- Section 7-A-4.1 Methods of creating trust.
7-A-4.2 General requirements for trust creation.
7-A-4.2-A Specific rules for creation of lifetime trusts.
7-A-4.1-B Trustee of passive trust not to take.
7-A-4.2-C When trust interests not to merge.
7-A-4.3 Trusts created in other jurisdictions.
7-A-4.4 Trust purposes.
7-A-4.4-A Supplemental needs trusts established for persons with severe and chronic or persistent disabilities.
7-A-4.5 Charitable purposes; enforcement.

² Conforming amendments are not included in the paper.

- 7-A-4.6 Creation of trust induced by fraud, duress, or undue influence or the result of mistake.
- 7-A-4.7 Oral trusts not recognized.
- 7-A-4.8 Trusts for pets.
- 7-A-4.9 Noncharitable trust without ascertainable beneficiary.
- 7-A-4.9-A Amendment of trust other than by trust contributor.
- 7-A-4.10 Modification, termination, or reformation of trust; proceedings for approval or disapproval.
- 7-A-4.11 Revocation or amendment of irrevocable lifetime trust initiated by consent.
- 7-A-4.12 Modification or termination because of unanticipated circumstances or inability to administer trust effectively.
- 7-A-4.13 Cy pres.
- 7-A-4.14 Modification or termination of uneconomical trust.
- 7-A-4.15 Reformation to correct mistakes.
- 7-A-4.16 Modification to achieve settlor's tax or supplemental needs trust objectives.
- 7-A-4.17 Combination and division of trusts.

Part 4-A. Bank Accounts in Trust Form

- Section 7-A-4-A.1 Definitions.
- 7-A-4-A.2 Terms of a trust account.
- 7-A-4-A.3 Payment to beneficiary.
- 7-A-4-A.4 Effect of payment.
- 7-A-4-A.5 Rights not affected.
- 7-A-4-A.6 Joint depositors.
- 7-A-4-A.7 Multiple beneficiaries.
- 7-A-4-A.8 Application.

Part 5. Rights of Beneficiaries and Creditors; Spendthrift and Discretionary Trusts

- Section 7-A-5.1 Rules regarding transfer of income interest in trust; rights of creditors.
- 7-A-5.2 Rules regarding transfer of principal interest in trust; rights of creditors.
- 7-A-5.2-A When proceeds of life insurance policy inalienable.
- 7-A-5.3 Special creditor exceptions to restraints on involuntary alienation.
- 7-A-5.4 Discretionary trusts.
- 7-A-5.5 Creditor's claim against trust contributor to a revocable trust.
- 7-A-5.5-A Creditor claims to contribution of trust property by trust beneficiary.
- 7-A-5.6 Overdue distribution.
- 7-A-5.7 Personal obligations of trustee.

Part 6. Revocable Trusts

- Section 7-A-6.1 Capacity of trust contributor of revocable trust.
7-A-6.2 Revocation or amendment of revocable trust.
7-A-6.3 Rights duties in revocable trusts; powers of withdrawal.
7-A-6.4 Limitation on action contesting validity of revocable trust; distribution of trust property.

Part 7. Office of Trustee

- Section 7-A-7.1 Accepting or declining trusteeship of a lifetime trust.
7-A-7.2 Trustee's bond.
7-A-7.3 Co-trustees.
7-A-7.4 Vacancy in trusteeship; appointment of successor.
7-A-7.4-A Suspension of powers of trustee in war service.
7-A-7.5 Resignation of trustee.
7-A-7.6 Removal of trustee.
7-A-7.7 Delivery of property by former trustee.
7-A-7.8 Compensation of trustee.
7-A-7.9 Reimbursement of expenses.
7-A-7.10 Accounting by trustee in supreme court.

Part 8. Duties and Powers of Trustee

- Section 7-A-8.1 Duty to administer trust.
7-A-8.2 Duty of loyalty.
7-A-8.3 Duty of impartiality.
7-A-8.4 Duty of prudent administration.
7-A-8.5 Duty regarding costs of administration.
7-A-8.6 Duty to exercise trustee's special skills and expertise.
7-A-8.7 Powers and duties regarding delegation by trustee to agent or another trustee.
7-A-8.8 [Reserved].
7-A-8.9 Duty to control and protect trust property.
7-A-8.10 Duty regarding recordkeeping and identification of trust property.
7-A-8.11 Duty to enforce and defend claims.
7-A-8.12 Duty to collect trust property.
7-A-8.13 Duty to inform and report.
7-A-8.14 Duty regarding discretionary powers.
7-A-8.15 General powers of trustee.
7-A-8.16 Specific powers of trustee.
7-A-8.17 Duties and powers regarding distribution upon termination.
7-A-8.18 Power of trustee to pay income or principal to trust contributor as reimbursement for income taxes.
7-A-8.19 Powers and duties regarding decanting.
7-A-8.20 Duty when resulting trust arises.

Part 9. [Reserved]

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

- Section 7-A-10.1 Remedies for breach of trust.
7-A-10.2 Liability for breach of trust.
7-A-10.3 Damages in absence of breach.
7-A-10.4 Compensation of attorneys, costs and allowances.
7-A-10.5 Limitation of action against trustee.
7-A-10.6 Reliance on trust instrument.
7-A-10.7 Event affecting administration or distribution.
7-A-10.8 Exculpation of trustee and trust director.
7-A-10.9 Beneficiary's consent, release, or ratification.
7-A-10.10 Limitation on personal liability of trustee.
7-A-10.11 Interest as general partner.
7-A-10.12 Protection of person dealing with trustee.
7-A-10.13 Certification of trust.

Part 11. Miscellaneous Provisions

- Section 7-A-11.1 [Reserved].
7-A-11.2 Electronic records and signatures.
7-A-11.3 Severability clause.
7-A-11.4 Effective date.
7-A-11.5 [Reserved].
7-A-11.6 Application to existing relationships.

PART 1. In General

§ 7-A-1.1 Short title

This article may be cited as the New York Trust Code.

Section 7-A-1.1 establishes the short title of Article 7-A as the New York Trust Code.

§ 7-A-1.2 Scope

(a) This article applies to express trusts (as defined by section 7-A-1.3(7)), to resulting trusts, and where expressly made applicable to bank accounts in trust form.

(b) This article does not apply to constructive trusts.

(c) Cross-reference. Article 8 also applies to charitable trusts.

Section 7-A-1.2 clarifies that Article 7-A applies to express trusts that are gratuitous in nature, resulting trusts, and (where expressly made applicable) to bank accounts in trust form. This section also makes clear that this article will not apply to constructive trusts.

§ 7-A-1.2-A Purchase-money resulting trust abolished

A disposition of property to one person for a valuable consideration paid, in whole or in part, by another is presumed fraudulent as against the creditors of the payor at the time of such

disposition and, unless the presumption is rebutted, a trust results in favor of such creditors to the extent necessary to satisfy their claims; but title to the property vests in the transferee and no trust results to the payor unless the transferee either:

(a) Takes such property, in his own name, as an absolute transfer without the consent or knowledge of the payor; or

(b) In violation of some trust, purchases the property so transferred with money or property belonging to another.

Section 7-A-1.2 replaces EPTL section 7-1.3, and includes the same language abolishing purchase money resulting trusts.

§ 7-A-1.3 Definitions

In this article:

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

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

(3) “Beneficiary” means a person that:

(A) has a present or future beneficial interest in a trust, vested or contingent, including a person who would be entitled to trust property if a resulting trust arose, or

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

(4) “Charitable trust” means a trust, or portion of a trust, created for a charitable purpose described in section 8-1.1.

(5) “Creator” means a person defined in section 1-2.2.

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

(7) “Express trust,” is defined as follows:

(A) Except as provided in paragraph (B), an express trust means a fiduciary relationship with respect to property arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for:

(i) one or more persons, at least one of whom is not the sole trustee, or

(ii) the benefit of charity, or

(iii) the care of an animal as provided in section 7-A-4.8, or

(iv) a noncharitable purpose as provided in section 7-A-4.9, and includes a trust created pursuant to any other statute, judgment, or decree that requires the trust to be administered in the manner of an express trust.

(B) An express trust shall not include a trust for the benefit of creditors, a business trust where certificates of beneficial interest are issued to the beneficiary, an investment trust, voting trust, a security instrument such as a deed of trust and a mortgage, a liquidation or reorganization trust, a trust for the sole purpose of paying dividends, interest, interest coupons, salaries, wages, pensions or profits, instruments wherein persons are mere nominees for others, any other type of trust created for a business or commercial purpose, or a bank account in trust form.

(8) “Guardian for property” means a guardian for property management as appointed under SCPA article 17 or 17A or under article 81 of the mental hygiene law or any person appointed by a court outside of New York for property management of an incapacitated person. The term does not include a guardian ad litem.

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

(10) “Internal Revenue Code” means the United States Internal Revenue Code of 1986, as amended. Such references, however, shall be deemed to constitute references to any corresponding provisions of any subsequent federal tax code.

(11) “Irrevocable trust” means a trust that is not a revocable trust.

(12) “Jurisdiction,” with respect to a geographic area, includes a State or country, or similar governmental entity.

(13) “Lifetime trust” means an express trust, including all amendments thereto, created other than by will.

(14) “Person” means a person as defined in section 1-2.12. As the context indicates, person may include more than one person.

(15) “Power of withdrawal” means a presently exercisable general power of appointment, as defined in sections 10-3.2(b) and 10-3.3(b) other than a power: (A) limited by an ascertainable standard; or (B) exercisable by any person only upon consent of a person holding a substantial adverse interest.

(16) “Property” means property as defined by section 1-2.15.

(17) “Qualified beneficiary” means a beneficiary who, on the date the beneficiary’s status as qualified beneficiary is determined:

(A) is entitled to receive or is a permissible recipient of trust income or principal; or

(B) would be entitled to receive or would be a permissible recipient of trust income or principal if the interests of the recipients described in subparagraph (A) terminated on that date without causing the trust to terminate; or

(C) would be entitled to receive or would be a permissible recipient of trust income or principal if the trust terminated on that date.

(18) “Resulting trust” means a trust that arises in favor of the settlor or the settlor’s successor’s interest on the failure of an express trust in whole or in part.

(19) “Revocable” as applied to a trust, means revocable by a trust contributor without the consent of a person holding a substantial adverse interest.

(20) “Settlor” means the person, including the testator, who

(A) initially transfers property of the person to a trustee; or

(B) declares as the owner of property that the person holds identifiable property as trustee; or

(C) exercises a power of appointment in favor of a trustee, where the terms of such trust are created in connection with the exercise of the power of appointment, including the exercise by a trustee of a discretionary power in favor of a trustee.

For purposes of this subdivision, if a person authorized to act on behalf of a person acts with respect to property owned by that person, the person owning the property shall be deemed to have taken the action.

(D) Cross references. *See* sections 3-3.7 (devise to trustee) and 13-3.3 (beneficiary designation of trustee).

(21) “Spendthrift provision” means the restraint on the voluntary transfer of a beneficiary’s interest as provided by the terms of a trust or by application of sections 7-A-5.1 and 7-A-5.2 and the restraint on involuntary transfer of a beneficiary’s interest as provided by any statutory rule restraining the involuntary transfer of a beneficiary’s interest. “Terms of a trust” includes any provision stating that the interest of a beneficiary is held subject to a “spendthrift trust” or words of similar import.

(22) “State” means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the

United States. The term includes an Indian tribe or band recognized by federal law or formally acknowledged by a State.

(23) “Terms of a trust” means

(A) except as otherwise provided in subdivision (B), the manifestation of the settlor’s intent regarding a trust’s provisions as:

- (i) expressed in the trust instrument; or
- (ii) established by other evidence that would be admissible in a judicial proceeding; or

(B) the trust’s provisions as established, determined, or amended by:

- (i) a trustee or trust director in accord with applicable law; or
- (ii) court order; or
- (iii) nonjudicial settlement agreement under section 7-A-1.11.

(24) “Testamentary trust” means an express trust created under a will.

(25) “Trust,” unless otherwise provided, means a lifetime trust and a testamentary trust but does not include a resulting trust.

(26) “Trust contributor” means

(A) a settlor as defined by subdivision (20) other than a person who exercises, or who is considered to exercise, a special power of appointment in favor of a trustee; or

(B) a person who transfers or is deemed to transfer property owned by that person to the trustee of an existing trust, except to the extent another person has the power to revoke or has a non-lapsing power of withdrawal over the transferred property.

For purposes of paragraph (B):

(i) The exercise of a presently exercisable general power of appointment is deemed to be a transfer of property owned by the powerholder, and

(ii) a person is deemed to transfer property owned by that person if the person’s fiduciary actually transfers the property to, or exercises a power of appointment in favor of, a trustee

(C) if more than one person contributes property to the trustee of an existing trust, each person is the trust contributor of the portion of the trust property attributable to that person’s contribution, except to the extent another person has the power to revoke or has a non-lapsing power of withdrawal over that portion.

(27) “Trust director” means

(A) a person, other than as provided in paragraph (B), who is granted by the terms of a trust a power to direct a trustee in the administration of the trust to the extent the power is exercisable while the person is not then serving as a trustee, whether or not the terms of the trust designate the person as a trust director, trust protector, trust adviser or as a member of a committee.

(B) A trust director does not include a person who has a

(i) power of appointment as defined by section 10-3.1(a);

(ii) power to appoint or remove a trustee or trust director;

(iii) power of a trust contributor to the extent the trust contributor has a power to revoke the trust;

(iv) power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects:

(I) the beneficial interest of the beneficiary; or

(II) the beneficial interest of another beneficiary represented by the beneficiary under SCPA 315 with respect to the exercise or nonexercise of the power; or

(v) power over a trust if:

(I) the terms of the trust provide that the power is held in a nonfiduciary capacity; and

(II) the power must be held in a nonfiduciary capacity to achieve the settlor’s tax objectives under the Internal Revenue Code.

(28) “Trust instrument” means a properly executed instrument that contains terms of the trust, including any amendments thereto.

(29) “Trustee” means a person who has accepted an appointment as trustee or has been issued letters of trusteeship. “Trustee” includes an original, additional, and successor trustee, and a co-trustee.

Section 7-A-1.3 adds new definitions for implementing the provisions of Article 7-A. Notable definitions include the following:

Express Trust: This definition is based on the traditional definition for an express trust, but has been amplified to reflect the recognition of pet trusts and purpose trusts. The definition also includes trusts that are created by other statutes and courts that will be administered as express trusts. In addition, the definition limits express trusts to gratuitous trusts.

Qualified Beneficiary: This is an important definition used throughout Article 7-A. Generally, qualified beneficiaries are beneficiaries who would be entitled to notice for proceedings involving the trust under the principles of virtual representation as they currently exist in the law of New York. Only qualified beneficiaries are entitled to notice of some actions by the trustee or to demand information from the trustee. All other beneficiaries are non-qualified beneficiaries. **Settlor:** This definition is critical because it is employed throughout Article 7-A. It is intended to be precise enough to reflect the many nuances of trust law. For example, a person who exercises a special power of appointment in favor of a trustee effectively creates a trust, and should therefore be treated as a settlor. By including the donee of a special power of appointment, the uncertain general application of the relation back doctrine would be discarded. Similarly, the trustee who decants all or part of trust property is the settlor of the appointed trust because the exercise of a decanting power is considered to be the exercise of a special power of appointment. *See* EPTL section 7-A-8-19(c).

Trust Contributor: A separate definition is provided for “trust contributor” because that concept, which includes many settlors (but not persons who exercise special powers of appointment), has significance, especially in the area of creditors’ rights and for certain revocable trust issues. Excluded from the definition of “trust contributor” are persons who contribute property to a trust revocable by another person and persons who contribute property if another person has a non-lapsing power of withdrawal over the contributed property.

§ 7-A-1.4 Knowledge

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

(1) has actual knowledge of it;

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

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

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

Section 7-A-1.4 defines when an organization has notice or knowledge of a fact involving a trust.

§ 7-A-1.5 Default and mandatory rules

(a) Except as otherwise provided in the terms of the trust, court order or decree or other applicable law, this article governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.

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

(1) the rules for the governing law of a trust (as provided in section 7-A-1.7);

(2) the rules regarding the principal place of administration (as provided in section 7-A-1.8);

(3) the rules for judicial proceedings (as provided in sections 7-A-2.1 and 7-A-2.2);

(4) the requirements for creating and amending a trust (as provided in sections 7-A-4.1 to 7-A-4.9-A);

(5) the rules for commencing a proceeding (as provided in section 7-A-4.10(b)) and the limitations on modification and termination (as provided in section 7-A-4.10(c));

(6) the power of the court to amend or revoke a trust under section 7-A-4.11(c), to modify or terminate a trust under section 7-A-4.12 and sections 7-A-14 through 7-A-4.16 or to combine or divide trusts under section 7-A-4.17;

(7) the rights of creditors of trust beneficiaries (as provided in part 5);

(8) the power of the court to require, dispense with, or modify or terminate a bond (as provided in section 7-A-7.2);

(9) the requirement that a trustee of a testamentary trust provide the court with written notice of resignation (as provided in section 7-A-7.5(d));

(10) the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust (as provided in section 7-A-8.1);

(11) the duty to administer the trust (as provided in section 7-A-8.4).

(12) the duties relating to delegation if a delegation is made (as provided in section 7-A-8.7);

(13) the duties relating to recordkeeping and identification of property (as provided in section 7-A-8.10);

(14) Beginning at the death of the later to die of the settlor or the settlor's surviving spouse or after 21 years if the settlor is not an individual, the duty under section 7-A-8.13(a) to respond to the reasonable request of a beneficiary of an irrevocable trust for information related to the administration of a trust;

(15) Beginning at the death of the later to die of the settlor or the settlor's surviving spouse, or after 21 years if the settlor is not an individual, the duty under section 7-A-8.13(b)(2) and (3) to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their right to request information related to the administration of the trust;

(16) the duty under section 7-A-8.19(g) and the restrictions on powers (as provided in section 7-A-8.19);

(17) the principles for the computation of damages (as provided in section 7-A-10.2);

(18) the effect of an exculpatory provision (as provided in 7-A-10.8);

(19) the rights under sections 7-A-10.10 through 7-A-10.13 of a person other than a trustee or beneficiary;

(20) periods of limitation for commencing a judicial proceeding; and

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

Section 7-A-1.5 provides that most rules set forth in EPTL Article 7-A are default rules subject to modification by the terms of a trust, court order or decree or other applicable law. *See* section 7-A-1.5(a). Some of those rules, however, embody public policies that are too important to be overridden by the terms of the trust. These mandatory trust rules

are listed in section 7-A-1.5(b) by reference to the numbers of the sections that set out the rules. Most of these rules set forth the fiduciary duties at the heart of trust law. Some involve the authority of the court to act with regard to a trust at the trustee's or beneficiaries' request—such as modifying, terminating, combining or dividing trusts and the principles for the computation of damages—as provided in the Code. Others are even more fundamental such as the rules governing the determination of the governing law and principal place of administration of the trust. The Code allows a trust to be “quiet” for only a limited period of time by requiring that the trustee inform, and furnish requested information about an irrevocable trust to, qualified beneficiaries over the age of 25 after the later death of the settlor or the settlor's spouse (and if the settlor was not an individual for a maximum of 21 years).

§ 7-A-1.6 Common law and principles of equity

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

Section 7-A-1.6 makes clear that the common law of trusts and principles of equity supplement Article 7-A unless these are otherwise modified by Article 7-A or another statute.

§ 7-A-1.7 Governing law

(a) As used in this section:

(1) “Real property” means land or any estate in land, including leaseholds, fixtures and mortgages or other liens thereon.

(2) “Personal property” means any property other than real property, including tangible and intangible things.

(3) “Intrinsic validity” relates to the rules of substantive law by which a jurisdiction determines the legality of a disposition in trust, including the general capacity of the settlor and the rule against perpetuities.

(4) “Effect” relates to the legal consequences attributed under the law of a jurisdiction to a valid disposition in trust.

(5) “Interpretation” relates to the procedure of applying the law of a jurisdiction to determine the meaning of language employed by the settlor where the settlor's intention is not otherwise ascertainable.

(6) “Local law” means the law which the courts of the jurisdiction apply in adjudicating legal questions that have no relation to another jurisdiction.

Notwithstanding the definition of “real property” in this paragraph, whether an estate in, leasehold of, fixture, mortgage or other lien on land is real or personal is determined by the local law of the jurisdiction in which the land is situated.

(b) The intrinsic validity, effect, interpretation and amendment of any term of a lifetime trust, created by a domiciliary or non-domiciliary, and the revocation of a lifetime trust, by a domiciliary or non-domiciliary, are determined by:

(1) the law of the jurisdiction designated in the trust instrument unless the designation of that jurisdiction's law is contrary to a mandatory trust rule or a strong public policy, including the rule against perpetuities, of the jurisdiction having the most significant relationship to the matter at issue., except where the law of a jurisdiction other than this state is designated in the trust instrument, this state shall not be the jurisdiction having the most significant relationship to any matter at issue that does not involve real property located in this state so long as none of the trustees are domiciled in this state, whether or not this state is the domicile of the settlor or of any of the beneficiaries; or

(2) in the absence of a controlling designation in the trust instrument, the law of the jurisdiction where the settlor was domiciled at the time of execution to the matter at issue, except

(i) that with respect to real property the law of the situs shall govern, and

(ii) with respect to the interpretation of the terms of the trust applying to personal property the local law of the jurisdiction in which the settlor was domiciled at the time of execution shall govern.

(c) Notwithstanding anything to the contrary in paragraph (b), whenever a person, not domiciled in this state, creates a lifetime trust which provides that one or more terms shall be governed by the laws of this state, such provision shall be given effect by using the local law of this state to determine the intrinsic validity, effect, interpretation and amendment of the designated term or terms and the revocation of a lifetime trust with respect to:

- (1) any trust property situated in this state at the time the trust is created;
- (2) any trust property situated in this state at the time such property is added to the trust; and
- (3) personal property, wherever situated, if the trustee of the trust is a person residing, incorporated or authorized to do business in this state or a national bank having an office in this state.

(d) The law governing any aspect of the administration of a trust, created by a domiciliary or non-domiciliary, is the law so designated in the trust instrument unless the designation of that jurisdiction's law is contrary to a mandatory trust rule or a strong public policy of the jurisdiction of the trust's principal place of administration, as determined by section 7-A-1.8. If the terms of the trust do not designate the governing law, both of the following apply:

(1) The law of the trust's principal place of administration, as determined under section 7-A-1.8, governs the administration of the trust.

(2) If the trust's principal place of administration is transferred to another jurisdiction under section 7-A-1.8, the law of the new principal place of administration of the trust governs the administration of the trust from the time of the transfer.

(e) Notwithstanding anything to the contrary in paragraph (d), whenever a person, not domiciled in this state, creates a trust which provides that one or more terms for trust administration shall be governed by the laws of this state, such provision shall be given effect by using the local law of this state with respect to:

- (1) any trust property situated in this state at the time the trust is created;
- (2) any trust property situated in this state at the time such property is added to the trust; and
- (3) personal property, wherever situated, if the trustee of the trust is a person residing, incorporated or authorized to do business in this state or a national bank having an office in this state.

(f) Cross-reference. *See* section 3-5.1 (relating to the choice of law rules involving testamentary trusts) and section 7-A-4.3 (relating to the formal validity of lifetime trusts).

Section 7-A-1.7 Section 7-A-1.7 principally provides comprehensive conflict of laws rules for lifetime trusts (as contrasted with the limited provision of repealed EPTL 7-1.10) that for the most part follow the conflict of laws rules governing testamentary trusts in EPTL 3-5.1. The most important difference between the two provisions allows the settlor of a lifetime trust to designate the law of any jurisdiction to govern the trust or some aspects of the trust so long as the law of the designated jurisdiction does not conflict with a mandatory trust provision or violate some strong public policy of the jurisdiction having the most significant relationship to the matter of issue, such as the rule against perpetuities. The section also provides flexible conflict of laws rules.

§ 7-A-1.8 Principal place of administration

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

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

(2) a trust director's usual place of business is located in or a trust director is a resident of the designated jurisdiction; or

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

(b) Unless designated under paragraph (a):

(1) If there is one trustee, the principal place of administration of a trust is the trustee's usual place of business for administering trusts or, if the trustee has no such usual place of business, the trustee's residence.

(2) If there are two or more co-trustees, the principal place of administration is:

(A) If there is only one corporate co-trustee, the usual place of business for administering trusts of that trustee;

(B) If there is more than one corporate co-trustee, the place agreed upon by the co-trustees where any corporate co-trustee has its the usual place of business for administering trusts or if the co-trustees do not agree, the place where a majority of the trust administration occurs, or if there is no such place, as a court may determine;

(C) If there is no corporate co-trustee, the place agreed upon by the co-trustees where any co-trustee carries on the work of trust administration or if the co-trustees do not agree, the place where a majority of the trust administration occurs or if there is no such place, as a court may determine.

(c) Notwithstanding paragraph (b), if a corporate trustee is designated as the trustee of a trust and the corporate trustee has offices in multiple states and performs administrative functions for the trust in multiple states, the corporate trustee may designate which is the corporate trustee's usual place of business for administering trusts with respect to a particular trust by providing notice to the qualified beneficiaries and trust directors. The notice is valid and controlling if the corporate trustee has a connection to the jurisdiction designated in the notice, including an office where trustee services are performed and the actual performance of some administrative functions for that particular trust take place in that particular jurisdiction. The subsequent transfer of some of the administrative functions of the corporate trustee to another state or states does not transfer the principal place of administration as long as the corporate trustee continues to maintain an office and perform some administrative functions in the jurisdiction designated in the notice and the corporate trustee does not notify the qualified beneficiaries of a change in the principal place of administration pursuant to paragraph (f).

(d) A trustee may transfer the trust's principal place of administration of a testamentary trust to another State or to a jurisdiction outside of the United States upon the approval of the Court that has most recently issued letters of trusteeship to the trustee of the trust.

(e) A trustee may transfer the principal place of administration of a lifetime trust to another State or to a jurisdiction outside of the United States

(1) upon the approval of any Court that has jurisdiction over the trustee;

(2) without the approval of any Court and in the absence of any objection by a qualified beneficiary.

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

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

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

- (3) an explanation of the reasons for the proposed transfer;
- (4) the date on which the proposed transfer is anticipated to occur; and
- (5) the date, not less than 45 days after the giving of the notice, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.

(g) In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed pursuant to section 7-A-7.4.

(h) If there are two or more co-trustees of a trust, decisions made with respect to actions described in this section are governed by section 7-A-7.3.

(i) Nothing in this section shall limit the application of section 7-A-8.19 to any trust.

(j) Notwithstanding any other provision of this Code, the trustee has no duty to inform beneficiaries about the availability of this section and further has no duty to review the trust instrument to determine whether any action should be taken under this section unless requested to do so in writing by a beneficiary then entitled to receive reports and information related to the administration of the trust.

Section 7-A-1.8 provides ways that a settlor can designate the principal place of administration of the trust as well as default rules for determining principal place of administration, including where there are multiple trustees and where corporate trustees are involved. The section also provides that the trustee may change the principal place of administration of a testamentary trust with court approval, and may change the principal place of administration of a lifetime trust with court approval or if the qualified beneficiaries do not object to the change.

§ 7-A-1.9 Methods and waiver of notice

(a) Notice to a person under this article or the sending of a document to a person under this article must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document to the person's last known place of residence or place of business include (but are not limited to) first-class mail, special mail service, or personal delivery.

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

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

(d) Notice to an incapacitated person may be given to any guardian for property of such incapacitated person or to a parent or other person with whom such incapacitated person resides.

(e) Notice of a judicial proceeding must be given as provided in the SCPA and other applicable rules of civil procedure.

(f) The notice provision of section 7-A-8.19(i)(2) with respect to the exercise of the power to appoint to an appointed trust under paragraph (a) or (b) of section 7-A-8.19 shall apply in lieu of the notice provision this section.

Section 7-A-1.9 makes clear what constitutes notice to a person under this Article.

§ 7-A-1.10 Others treated as qualified beneficiaries

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

- (1) is entitled to receive or is a permissible recipient of trust income or principal;

(2) would be entitled to receive or is a permissible recipient of trust income or principal upon the termination of the interests of others entitled to receive or permissible recipients then receiving or eligible to receive distributions; or

(3) would be entitled to receive or is a permissible recipient of trust income or principal if the trust terminated on that date.

(b) A person appointed to enforce a trust created for the care of an animal or another noncharitable purpose as provided in section 7-A-4.8 or 7-A-4.9 has the rights of a qualified beneficiary under this article.

(c) The attorney general of this State has the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in this State.

Section 7-A-1.10 addresses situations in which other persons or entities would be treated as “qualified beneficiaries” as defined in EPTL section 7-A-1.3, including charitable organizations, persons appointed to enforce trusts for the care of animals or other noncharitable purposes, and the Attorney General.

§ 7-A-1.11 Nonjudicial settlement agreements

(a) For purposes of this section, “interested persons” means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court determined by taking into account SCPA 315 as if the settlement were the result of a proceeding in which process was required to be served on all persons interested in the trust. The following persons if not described by the foregoing sentence shall be deemed interested persons: the settlor if no adverse income or transfer tax results would arise from the settlor's participation and the currently serving trustee or trustees.

(b) Except as otherwise provided in paragraph (c), interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving the trust.

(c) A nonjudicial settlement agreement is valid only to the extent it (1) does not violate the purposes of the trust unless the settlor is a party to the agreement and (2) includes terms and conditions that could be approved by the court pursuant to this article or other applicable law. Notwithstanding the prior sentence, a nonjudicial settlement agreement shall not be used to transfer the principal place of administration of a testamentary trust or accomplish any of the following actions for which court approval is specifically required: trust termination under section 7-A-4.12(b), modification of dispositive provisions under section 7-A-4.12(b), cy pres reformation under section 8-1.1(c), removal from this state of trust property in a testamentary trust under SCPA 710(4); and appointment of a successor or co-trustee of a testamentary trust under section SCPA 706(2) and 1502.

(d) Matters that may be resolved by a nonjudicial settlement agreement include but are not limited to:

(1) the interpretation or construction of the terms of the trust;

(2) the approval of a trustee's report or accounting;

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

(4) the resignation or appointment of a trustee and the determination of a trustee's compensation;

(5) transfer of the principal place of administration of a lifetime trust; and

(6) liability of a trustee for an action or omission to act relating to the trust.

(e) A nonjudicial settlement agreement shall be in writing and executed by all interested persons described in paragraph (a) in the manner required by the laws of this state for the conveyance of real property.

(f) An agreement entered into in accordance with this section is final and binding on all beneficiaries, the trustee and all other persons identified in paragraph (a) as if ordered by a court with jurisdiction over the trust. The failure of a court to approve a nonjudicial settlement agreement as provided in paragraph (g) has no effect on the binding nature of the agreement.

(g) Notwithstanding paragraph (f), any interested person may petition the court to approve or disapprove a proposed or an executed ~~a~~ nonjudicial settlement agreement. Such petition may request a court to determine any issue regarding the agreement including whether the representation as provided in SCPA 315 is adequate, whether the agreement contains terms and conditions that violate the purposes of the trust or whether the agreement contains terms and conditions that the court could properly approve.

(h) A petition described in paragraph (g) must be filed no later than 60 days after the effective date of the agreement absent a showing of good cause why the petition was not timely filed. Process must issue to all other interested persons described in paragraph (a).

(i) An interested person may also commence a proceeding to interpret, apply or enforce a nonjudicial settlement agreement. Process must issue to all other interested persons described in paragraph (a).

(j) Cross reference. *See* Section 7-A-4.11 (revocation or amendment of irrevocable trust initiated by consent).

Section 7-A-1.11 expands current New York law in order to allow for nonjudicial settlement of various trust matters by interested persons besides nonjudicial settlements of accounts by fiduciaries, which are governed by SCPA 315, subsection 8. Matters which may be resolved under section 7-A-1.11 include, but are not limited to, the interpretation or construction of trust terms, the approval of a trustee's report or accounting; the ability to direct a trustee to refrain from performing a particular act or to grant a trustee any necessary or desirable power; the resignation or appointment of a trustee and the determination of trustee compensation; the transfer of the principal place of administration of a lifetime trust; and the liability of a trustee for an act or failure to act in relation to a trust.

§ 7-A-1.12 [Reserved]

Section 7-A-1.12 is a reserved section for possible future use.

PART 2 Judicial Proceedings

§ 7-A-2.1 Role of court in administration of trust

The rules for court involvement in the administration of a trust are provided by numerous sections of the estates, powers and trusts law, the surrogate's court procedure act, and the civil practice law and rules.

Section 7-A-2.1 makes clear that there are existing rules for court involvement in the administration of a trust which are provided in the EPTL, SCPA and the CPLR.

§ 7-A-2.2 Jurisdiction over trustee and beneficiary

The jurisdiction over trusts, trustees and beneficiaries is provided in article 2 of the SCPA. Section 7-A-2.2 makes clear that jurisdiction over trustees and beneficiaries is covered by Article 2 of the SCPA.

PART 3 [Reserved]

Part 3 of Article 7-A is Reserved for possible future use.

PART 4 Creation, Validity, Amendment, Modification, and Termination of Trust

§ 7-A-4.1 Methods of creating trust

(a) Subject to the requirements of sections 7-A-4.2, 7-4.2-A, and 7-A-4.4, a trust may be created by:

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

(2) a declaration by the owner of property that the owner holds identified property as trustee;

(3) the exercise of a power of appointment in favor of a trustee where the terms of such trust are created by the exercise of the power of appointment, including the exercise by a trustee of a discretionary power in favor of a trustee; or

(4) a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust.

(b) For purposes of subparagraph (a)(1), a transfer of property shall include a beneficiary designation as provided in section 13-3.3.

(c) Cross reference. *See* section 3-3.7 (disposition in will to trustee).

Section 7-A-4.1 codifies the methods for creating a trust which are currently part of the New York common law.

§ 7-A-4.2 General requirements for trust creation

(a) In addition to the requirements for creating a lifetime trust pursuant to section 7-A-4.2-A and the formality requirements to create a testamentary trust, and subject to section 7-A-4.4, a trust is created under section 7-A-4.1 only if:

(1) the settlor (or a person authorized to act for the settlor who acts for the settlor) has capacity to create a trust;

(2) the settlor (or a person properly acting on behalf of the settlor) indicates an intention to create the trust;

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

(A) a charitable trust;

(B) a trust for the care of an animal, as provided in section 7-A-4.8; or

(C) a trust for a noncharitable purpose, as provided in section 7-A-4.9;

(4) the trustee has duties to perform, *see also* section 7-A-4.2-B; and

(5) the same person is not the sole trustee and sole beneficiary. *See also* section 7-A-4.2-C.

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

Section 7-A-4.2 consolidates into a single section the formal requirement for trust creation currently found in various statutory sections.

§ 7-A-4.2-A Specific rules for creation of lifetime trusts

(a) Any person may by lifetime trust dispose of real and personal property. A natural person who creates a lifetime trust shall be eighteen years of age or older.

(b) Every estate in property may be disposed of by lifetime trust.

(c) Every lifetime trust shall be in writing, and shall be executed by the settlor or the person authorized to act on behalf of the settlor and unless such person is the sole trustee, by at least one trustee thereof. The signature of the settlor (or the person authorized to act on behalf of the settlor) must be either (i) affixed to the document in the presence of two witnesses, who then affix their signatures to the document, or (ii) acknowledged by the settlor (or the person authorized to act on behalf of the settlor) in the manner required by the laws of this state for the conveyance of real

property. If the signature of a trustee is required, the signature of the trustee must be either (i) affixed to the document in the presence of two witnesses, who then affix their signatures to the document, or (ii) acknowledged by the trustee in the manner required by the laws of this state for the conveyance of real property.

(d) A lifetime trust shall be valid as to any assets therein to the extent the assets have been transferred to the trustee. A transfer is not accomplished by recital of assignment, holding or receipt in the trust instrument. An asset will be deemed to have been transferred to a trustee on the delivery of the asset to the trustee except that when the settlor is the sole trustee, (a) in the case of assets capable of registration such as real estate, stocks, bonds, bank and brokerage accounts and the like, such assets are deemed transferred on the recording of the deed or the completion of registration of the asset in the name of the trust or trustee, and (b) in the case of other assets such assets are deemed transferred to the trustee (i) by a written assignment, either in the trust instrument or by a separate writing, describing the asset with particularity or (ii) by describing with particularity, either in the trust instrument or in a schedule attached to the trust instrument, the asset held in the trust or (iii) by affixing the asset to the trust instrument.

(e) A lifetime trust shall be irrevocable unless the terms of the trust expressly provide that it is revocable.

Section 7-A-4.2-A replaces EPTL sections 7-1.14, 7-1.15, 7-1.16 (first sentence), and 7-1.17(a), and expands EPTL section 7-1.18, in order to consolidate the rules for the creation of lifetime trusts into a single statutory section.

§ 7-A-4.2-B Trustee of passive trust not to take

Every disposition of property shall be made directly to the person in whom the right to possession and income is intended to be vested and not to another in trust for such person, and if made to any person in trust for another, no estate, legal or equitable, vests in the trustee. But neither this section nor section 7-A-4.2-C shall apply to trusts arising or resulting by implication of law.

Section 7-A-4.2-B replaces EPTL section 71.2, which addresses trustees of passive trusts, without changing its provisions.

§ 7-A-4.2-C When trust interests not to merge

A trust is not merged or invalid because a person, including but not limited to the settlor of the trust, is or may become the sole trustee and the sole holder of the present beneficial interest therein, provided that one or more other persons hold a beneficial interest therein, whether such interest be vested or contingent, present or future, and whether created by express provision of the instrument or as a result of reversion to the settlor's estate.

Section 7-A-4.2-C replaces EPTL section 7-1.1, which addresses when trust interests do not merge, without substantively changing its provisions.

§ 7-A-4.3 Trusts created in other jurisdictions

(a) A lifetime trust is validly created if it is in writing and its creation complies with

(1) the law of the jurisdiction in which the trust instrument was executed, or

(2) the law of the jurisdiction in which, at the time of creation:

(i) the settlor was domiciled, had a place of abode, or was a national; or

(ii) a trustee was domiciled or had a place of business; or

(3) any trust property was situated.

(b) A testamentary trust is validly created if the will creating the trust may be admitted to probate in New York under section 3-5.1(c), provided, however, if the trust property includes real

property, the trust must be validly created under the law of the jurisdiction in which the land is situated.

Section 7-A-4.3 addresses the validity of lifetime trusts created in other jurisdictions. The validity of testamentary trusts is addressed in EPTL section 3-5.1.

§ 7-A-4.4 Trust purposes

A trust may be created only to the extent its purposes are lawful, and not contrary to public policy.

Section 7-A-4.4, which replaces EPTL section 7-1.4, is makes clear that a trust may be created only to the extent that its purposes are lawful and not contrary to public policy. Current EPTL section 7-1.4 addresses only the lawfulness requirement; the public policy requirement is currently a common law doctrine.

§ 7-A-4.4-A Supplemental needs trusts established for persons with severe and chronic or persistent disabilities

Section 7-A-4.4-A replaces EPTL section 7-1.12, which addresses the establishment of supplemental needs trusts, without substantively changing its provisions. The statute is omitted.

§ 7-A-4.5 Charitable purposes; enforcement

The rules for charitable purposes and enforcement are provided in article 8.

Section 7-A-4.5 makes clear that the rules for charitable purposes and enforcement are to be found in Article 8.

§ 7-A-4.6 Creation of trust induced by fraud, duress, or undue influence or the result of mistake

A trust is voidable to the extent its creation, amendment or restatement was induced by fraud, duress, or undue influence or the creation, amendment or restatement of the trust was the result of a mistake.

Section 7-A-4.6 codifies the rule that a trust is voidable if created through fraud, duress, undue influence or mistake. This concept is currently governed by New York common law.

§ 7-A-4.7 Oral trusts not recognized

Other than a testamentary trust in a nuncupative will created pursuant to section 3-2.2, no oral trust can be created in New York.

Section 7-A-4.7 supplements EPTL section 7-1.17(a) by providing that oral trusts may not be created, except for a testamentary trust in a nuncupative will created pursuant to EPTL section 3-2.2.

§ 7-A-4.8 Trusts for pets

(a) A trust for the care of a designated domestic or pet animal is valid. Such trust shall terminate when the living animal beneficiary or beneficiaries of such trust are no longer alive.

(b) The intended use of the principal or income of a trust that is authorized pursuant to paragraph (a) may be enforced by a person designated for that purpose in the trust instrument. If no person is appointed to act or the person appointed is unable or unwilling to act, a court may appoint a person to act. A trustee or person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.

(c) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the benefit of all covered animals.

(d) Upon termination, the trustee shall transfer the unexpended trust property as directed in the trust instrument or, if there are no such directions in the trust instrument, the property shall pass to the settlor or to the settlor's successors in interest.

(e) A court may reduce the amount of the property transferred if it determines that amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property pursuant to paragraph (d) of this section.

(f) If no trustee is designated or no designated trustee is willing or able to serve, a court shall appoint a trustee and may make such other orders and determinations as are advisable to carry out the intent of the settlor and the purposes of this section.

Section 7-A-4.8 replaces New York's present pet trust statute (EPTL section 7-8.1). While generally consistent with EPTL section 7-8.1, this section modifies that statute to (i) set out, in a separate paragraph, provisions for enforcing the intended use of the trust, (ii) clarify that any person, not just an individual, may be appointed as an enforcer of the trust's intended use and (iii) provide that unexpended property passes to the settlor or the settlor's successors in interest, rather than to the successor's estate.

§ 7-A-4.9 Noncharitable trust without ascertainable beneficiary

Except as otherwise provided in section 7-A-4.8 or by another statute, the following rules apply:

(1) A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. The trust may not be enforced for more than 21 years.

(2) A trust authorized by this section shall or may be enforced by a person appointed in the terms of the trust or if no person is appointed, or if the person so appointed is unwilling or unable to act, by a person appointed by the court.

(3) Property of a trust authorized by this section may be applied only for its intended purpose. Except as otherwise provided by the terms of the trust, if the court determines that not all of the trust property is required for its intended purpose, the excess property must be distributed to the settlor or to the settlor's successors in interest.

Section 7-A-4.9 codifies current New York common law in order to explicitly provide for the creation of trusts for noncharitable purposes (so-called "honorary trusts"). The term of any such trust is to be limited to 21 years, consistent with current law. This section also supplements current law by giving the court the authority to appoint an enforcer if an appointed enforcer is unable or unwilling to act, and by providing that trust property not required for its intended purpose be distributed to the settlor or the settlor's successors in interest.

§ 7-A-4.9-A Amendment of trust other than by trust contributor

(a) A trust may be amended by a person other than the trust contributor to the extent the trust terms provide.

(b) Any authorized trust amendment by a person other than the trust contributor shall be in writing and executed by the person authorized to amend the trust, and except as otherwise provided in the governing instrument, shall be acknowledged or witnessed in the manner required by paragraph (c) of section 7-A.4.2-A, and shall take effect as of the date of such execution. Written notice of such amendment shall be delivered to at least one other trustee within a reasonable time if the person executing such amendment is not the sole trustee, but failure to give such notice shall not affect the validity of the amendment or the date upon which same shall take effect. No trustee shall be liable for any act reasonably taken in reliance on an existing trust instrument prior to actual receipt of notice of amendment thereof. Absent written consent, no trustee shall be liable for the failure to comply with an amendment that expands, restricts or otherwise modifies the trustee's

duties, powers, obligations, or compensation for a period of 60 days after receipt of notice of amendment.

Section 7-A-4.9-A replaces and supplements current EPTL section 7-1.17(b). It maintains that section's current authority for trust amendments to be made by a person other than a settlor, as well as the formality requirements for making such amendments. Section 7-A-4.9-A supplements current law by shielding a trustee from liability for failure to comply with an amendment that modifies the trustee's powers, obligations or compensation for a period of 60 days after being notified of the amendment.

§ 7-A-4.10 Modification, termination, or reformation of trust; proceedings for approval or disapproval

(a) A trust terminates when and to the extent:

(1) The terms of the trust so provide, including by the valid exercise of a power to revoke pursuant to the terms of the trust;

(2) No purpose of the trust remains to be achieved;

(3) The purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve;

(4) All of the trust property has been distributed by the trustee in accordance with the terms of the trust;

(5) A trust is revoked pursuant to section 7-A-4.11; or

(6) A court orders a termination in a proceeding brought under sections 7-A-4.12 or 7-A-4.14.

(b) A proceeding to approve or disapprove a modification or termination under sections 7-A-4.12, 7-A-4.14 and 7-A-4.16, or a reformation under section 7-A-4.15 may be commenced solely by a trustee or beneficiary on notice to the parties interested in the proceeding. The parties interested in such a proceeding shall include the trustee and any person or persons upon whom service of process would be required in a proceeding for the judicial settlement of the account of the trustee, taking into account SCPA 315. In addition, the party commencing any proceeding described in the first sentence of this paragraph shall notify the settlor in writing that such proceeding has been commenced.

(c) Notwithstanding anything in sections 7-A-4-12, 7-A-4-14 and 7-A-4-16 to the contrary, a trust shall not be modified or terminated to the extent doing so would jeopardize (i) the deduction or exclusion originally claimed with respect to any contribution to the trust that qualified for the annual exclusion under section 2503(b) of the Internal Revenue Code, the marital deduction under section 2056(a) or 2523(a) of the Internal Revenue Code, or the charitable deduction under section 170(a), 642(c), 2055(a) or 2522(a) of the Internal Revenue Code, (ii) the qualification of a transfer as a direct skip under section 2642(c) of the Internal Revenue Code, or (iii) any other specific tax benefit for which a contribution originally qualified for income, gift, estate, or generation-skipping transfer tax purposes under the internal revenue code, or (iv) a beneficiary's eligibility for, or a beneficiary's receipt of, public benefits or both.

Section 7-A-4.10 codifies current New York common law by setting forth all of the circumstances under which a trust may terminate. This section supplements current New York law by providing procedural rules for modifying or terminating a trust, and provides limitations for when a trust can be modified or terminated.

§ 7-A-4.11 Revocation or amendment of irrevocable lifetime trust initiated by consent

(a) Upon the written consent, acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property, of all the living persons beneficially interested in a trust of property, heretofore or hereafter created, the creator of such trust may revoke

or amend the whole or any part thereof by an instrument in writing acknowledged or proved in like manner, and thereupon the estate of the trustees ceases with respect to any part of such trust property, the disposition of which has been revoked. If the conveyance or other instrument creating a trust of property was recorded in the office of the clerk or register of any county of this state, the instrument revoking or amending such trust, together with the consents thereto, shall be recorded in the same office of every county in which the conveyance or other instrument creating such trust was recorded.

(b) For the purposes of paragraph (a)(1), a disposition, contained in a trust created on or after September first, nineteen hundred fifty-one, in favor of a class of persons described only as the heirs, next of kin or distributees (or by any term of like import) of the creator of the trust does not create a beneficial interest in such persons.

(c) If not all of the beneficiaries consent to a revocation or amendment of the trust under paragraph (a)(1) and the creator so consents, the revocation or amendment may be approved by the court in a proceeding brought by the creator or a beneficiary if the court is satisfied that:

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

(2) the interests of a beneficiary who does not or cannot consent will be adequately protected; and

(3) the revocation or amendment will not jeopardize any tax described in section 7-A-4.10(c)(i)-(iii).

(4) the revocation or amendment will not jeopardize a beneficiary's eligibility for, or a beneficiary's receipt of, public benefits or both.

(d) A trustee is not an interested person for purposes of paragraph (c).

(e) For purposes of this section, a trustee who exercises a power under section 7-A-8.19 is not a creator.

Section 7-A-4.11 replaces in substance, and adds to, EPTL section 7-1.9, by allowing irrevocable trusts to be terminated or modified with the consent of the creator and all living beneficiaries, clarifying, based on a Court of Appeals holding, that the consent of only living beneficiaries is required. Further, this section clarifies that a court can act in certain circumstances if the creator and only some beneficiaries consent; it also clarifies that a trustee who exercises a special power of appointment is not a creator.

§ 7-A-4.12 Modification or termination because of unanticipated circumstances or inability to administer trust effectively

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

(b) The court may modify the dispositive terms of a trust (other than a wholly charitable trust or a supplemental needs trust that conforms to the provisions of section 7-A-4.4-A) or terminate such trust if, because of circumstances not anticipated by the settlor, including changes in law, modification or termination will further the purposes of the trust, provided, however, no modification may be made if the trust terms expressly provide that the settlor does not intend an invasion of principal for an income beneficiary's health, education, maintenance or support. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

(c) Upon termination of a trust under this section, the trustee shall distribute the trust property in accordance with the terms of the trust or as the court may otherwise direct.

Section 7-A-4.12 codifies current law to allow the court to modify the administrative terms of a trust due to changed circumstances. This section also supplements current law to allow the court to modify the dispositive terms of a trust or terminate a trust due to changed circumstances (and, in the case of an administrative modification, when the court finds another compelling reason for the modification).

§ 7-A-4.13 Cy pres

The rules for cy pres are provided in section 8-1.1(1).

Section 7-A-4.13 clarifies that the cy pres rules are provided for in EPTL section 8-1.1(c)(1).

§ 7-A-4.14 Modification or termination of uneconomical trust

(a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value less than \$100,000 may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration. Upon termination of a trust under this paragraph, the trustee shall distribute the trust property as the trustee determines will best effectuate the settlor's intention.

(b) The court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines under the circumstances that the value of the trust property is insufficient to justify the cost of administration. Upon termination of a trust under this paragraph, the trust property shall be distributed as the court determines will best effectuate the settlor's intention. Nothing in this paragraph shall be deemed to supersede the provisions of section 8-1(c)(2) governing a wholly charitable trust.

(c) Notwithstanding paragraphs (a) and (b), a trust may not be terminated if the express terms of the trust prohibit its early termination.

(d) This section does not apply to

1. an easement for conservation or preservation, or
2. a supplemental needs trust which conforms to the provisions of section 7-A-4.4-A, or
3. a wholly charitable trust. *See* § 8.1(c)(2).

Section 7-A-4.14 replaces EPTL section 7-1.19, which permits judicial termination of certain lifetime or testamentary trusts when the expense of administering such a trust is uneconomical. This section modifies EPTL section 7-1.19 by giving authority, except in certain situations, to (1) trustees to terminate trusts of \$100,000 or less without a court proceeding and (2) the court to terminate any uneconomical trust if the value of the trust property is insufficient to justify the cost of administration. This section also provides that on termination the trust property is distributed as the trustee or court, as the case may be, determines will best effectuate the settlor's intention.

§ 7-A-4.15 Reformation to correct mistakes

The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence what was the settlor's intention and that specific terms of the trust do not carry out that intention because the specific terms were affected by a mistake of fact or law, whether in expression or inducement.

Section 7-A-4.15 modifies current New York law by allowing the court to reform even unambiguous terms of a trust that fails to carry out the settlor's intent because of a mistake.

§ 7-A-4.16 Modification to achieve settlor's tax or supplement needs trust objectives

(a) The court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention in order to (a) achieve the settlor's tax objectives or (b) to conform such trust to the requirements of section 7-A-4.4-A. The court may provide that the modification has retroactive effect.

(b) Cross reference. *See* section 11-1.11 (limited power of trustee to amend trust for certain tax purposes.)

Section 7-A-4.16 allows courts to modify a trust, possibly with retroactive effect, to accomplish the settlor's tax objectives or the settlor's supplemental needs trust objectives.

§ 7-A-4.17 Combination and division of trusts

(a) After notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts and distribute the trust property to the trustee of each separate trust if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trust, including any tax purposes.

(b) The court having jurisdiction of an express trust, upon the petition of the trustee or of any qualified beneficiary and upon notice to all qualified beneficiaries, may direct the combination of two or more trusts for any reason not directly contrary to the primary purpose of each trust, or may direct the establishment of two or more separate trusts for any reason not directly contrary to the primary purpose of the trust.

(c) Unless the court otherwise directs, the trusts established under this section by the division of an existing trust shall be deemed to have been created as of the date the divided trust was created; provided that the separate trusts created under paragraph (a) of this section may be deemed created upon the date or dates provided in the instrument or instruments required by paragraph (g) of this section.

(d) Unless the court otherwise directs, a trust established by the combination of two or more trusts under paragraph (a) of this section shall be deemed to be created on the date specified by the trustee.

(e) Unless the court otherwise directs, and except as provided in paragraph (f), the property distributed to the separate trust shall be fairly representative of appreciation or depreciation and shall be based upon the fair market value of the assets on the date or dates of the distributions of such assets to the separate trusts.

(f) Where separate trusts are to be created to segregate property transferred in trust by a creator (including but not limited to a transfer treated as made by a spouse by reason of section 2513 of the United States Internal Revenue Code) (i) from property transferred in trust by one of more different creators or (ii) from property transferred pursuant to a disposing instrument from property transferred by the same creator pursuant to another disposing instrument, paragraph (e) shall not apply if the original assets transferred remain or can be traced.

(g) Separate trusts or a trust resulting from the combination of existing trusts shall be established under paragraph (a) of this section by an instrument or instruments in writing, signed and acknowledged by the trustee. Such instruments shall be filed in the office of the clerk of the court having jurisdiction over the trust; except that where the divided trust was a lifetime trust or where all of the combined trusts were lifetime trusts and the divided trust or all of the combined trusts have not been the subject of a proceeding in surrogate's court, no filing is required. Whether or not filing is required, a copy of the instrument or instruments shall be served on all qualified beneficiaries of the trusts (or the guardian of the property, committee, conservator, adult guardian, or personal representative of such persons), by registered or certified mail, return receipt requested, or by personal delivery or upon application of the trustee in any other manner directed by the court.

(h) In any case where the Internal Revenue Code requires that an election or other action be made or taken by the executor or if no trustee of a trust under a will has qualified, the term "trustee" as used in this section shall mean the executor or administrator of an estate. In any such case, the trustee shall comply with any action taken by the executor or administrator under this section.

(i) For purposes of this section, a division of a trust into two or more separate trusts to permit one or more such trusts to be governed by article 11-A and another one or more such trusts to be

governed by section 11-2.4 shall be deemed to be for a reason which is not directly contrary to the primary purpose of the trust unless such division is expressly prohibited by the terms of the disposing instrument.

(j) Unless the terms of the trust that is divided into separate trusts provide otherwise, the commissions allowed to a trustee as determined under article 23 of the SCPA, as amended from time to time, shall not be increased by reason of the establishment of separate trusts pursuant to this section unless the court otherwise permits an increase, provided, however, that such trustee shall be entitled to charge the trust for any additional reasonable and necessary expenses incurred in the administration of such separate trusts.

Section 7-A-4.17 restates, modifies and liberalizes EPTL section 7-1.13, which governs the division of existing trusts. This section modifies EPTL section 7-1.13 by generally permitting a trustee to combine or divide an existing trust for any purpose without obtaining beneficiary consent or court approval, provided that “qualified beneficiaries” are notified. This section continues to allow a trustee or “qualified beneficiary” to seek a court order authorizing the combination or division of an existing trust. This section then sets forth the rules governing the combination or division of existing trusts.

PART 4-A Bank Accounts in Trust Form

Part 4-A of Article 7-A of the Estates, Powers and Trusts Law replaces EPTL Part 5 of EPTL Article 7 (Bank Accounts in Trust Form). Statutes omitted.

PART 5 Rights of Beneficiaries and Creditors; Spendthrift and Discretionary Trusts

§ 7-A-5.1 Rules regarding transfer of income in trust; rights of creditors

(a) A right of a beneficiary to receive income from property and apply it to the use of or pay it to any person may not be transferred by assignment or otherwise unless a power to transfer such right, or any part thereof, is conferred upon such beneficiary by the instrument creating or declaring the trust. The preceding sentence shall not apply to (1) a beneficiary’s income interest with respect to trust property attributable to that beneficiary; or (2) the proceeds of a life insurance policy governed by section 7-A-5.2-A.

(b) Notwithstanding paragraph (a):

(1) The beneficiary of a trust who has the right to receive income from property and apply it to the use of or pay it to any person may, unless otherwise provided in the instrument creating or declaring such trust, transfer any amount in excess of ten thousand dollars of the annual income to which the beneficiary is entitled from such trust to the spouse, issue, ancestors, brothers, sisters, uncles, aunts, nephews or nieces of the beneficiary, or to a trustee, guardian for property, committee, conservator, curator, custodian, or the donee of a power during minority for the benefit only of any such person bearing such relationship to the beneficiary, provided that such transfer is evidenced by a written instrument signed and acknowledged by the beneficiary and delivered to the trustee of the trust, together with an affidavit by the beneficiary that such transfer and any like transfer concurrently in effect are for all or part of the excess over ten thousand dollars of the annual income from such trust to which such beneficiary is entitled, and that the beneficiary has not received and is not to receive any consideration in money or money's worth for the transfer.

(2) Any such transfer shall be effective in any year only as to income from such trust in excess of ten thousand dollars to which such beneficiary is entitled, and for this purpose all previous like transfers applicable to a given year shall be taken into account. If two or more transfers are made

in or for any year in a total amount exceeding the sum of ten thousand dollars, transferees shall be preferred in the order in which the instruments of transfer were delivered to the trustee.

(3) A trustee shall be exonerated and fully discharged for any payment made to a transferee in reliance on the affidavit of a beneficiary described in subparagraph (1).

(4) The provisions of this paragraph do not apply to sections 7-A-5.2-A and 7-A-5.4.

(c) A transferee of income may, if he has not received or is not to receive any consideration in money or money's worth therefor, make a further transfer of such income only to one or more of the permissible transferees referred to in subparagraph (b)(1), other than a prior transferor; provided, however, that upon the death of a transferee any income not so transferred by him shall be an asset of his estate, subject to his testamentary disposition or passing to his distributees under the statutes of descent and distribution.

(d) A beneficiary who has the right to receive the income from property and apply it to the use of or pay it to any person is not precluded by anything contained in this section from transferring by assignment or otherwise any part or all of such income to or for the benefit of persons whom the beneficiary is legally obligated to support.

(e) To the extent a trust beneficiary validly transfers an income interest during lifetime or at death if the interest has not terminated, the transferee becomes a beneficiary of the trust.

(f) A beneficiary's income interest is subject to the claims of creditors of the beneficiary to the extent provided by law, including article 52 of the civil practice law and rules and sections 7-A-5.3 and 7-A-5.5-A.

Section 7-A-5.1 replaces, with minor alterations, EPTL section 7-1.5 as it applies to a beneficiary's income interest. This section provides that unless the trust instrument provides otherwise, the income interest of a trust beneficiary is not transferrable, subject to specific exceptions described in this section. The rule as it applies to (1) self-settled trusts is described in EPTL section 7-A-5.5-A and (2) life insurance proceeds trusts is described in EPTL section 7-A-5.2-A. This section also clarifies that the transferee of a valid transfer becomes a beneficiary, and that a beneficiary's income interest remains subject to the claims of creditors to the extent provided by law.

§ 7-A-5.2 Rules regarding transfer of principal interests in trust; rights of creditors

(a) Trusts created prior to the effective date of this article. The right of a beneficiary of a trust to receive principal may be transferred by assignment or otherwise unless such transfer is prohibited by the instrument creating or declaring the trust. Such a provision shall not apply to a beneficiary's interest in principal with respect to property attributable to that trust beneficiary.

(b) Trusts created on or after the effective date of this article. The right of a beneficiary of a trust to receive principal may not be transferred by assignment or otherwise unless a power to transfer such right, or any part thereof, is conferred upon such beneficiary by the instrument creating or declaring the trust. The preceding sentence shall not apply to a beneficiary's interest in principal with respect to property attributable to that trust beneficiary, or to proceeds of a life insurance policy as provided in section 7-A-5.2-A.

(c) Whenever a trust is created,

(1) To the extent a trust beneficiary validly transfers an interest in principal during lifetime or at death if the interest has not terminated, the transferee becomes a beneficiary of the trust.

(2) A beneficiary's interest in principal is subject to the claims of creditors of the beneficiary to the extent provided by law, including article 52 of the civil practice law and rules, and sections 7-A-5.3 and 7-A-5.5-A.

Section 7-A-5.2 replaces and modifies EPTL section 7-1.5(a) as it applies to a beneficiary's principal interest. Section 7-A-5.2 provides that unless the trust instrument provides otherwise, the principal interest of a trust beneficiary is not transferrable for trusts created on or after the effective date of Article 7-A. Section 7-A-5.2 also clarifies that the

transferee of a valid transfer becomes a beneficiary, and that a beneficiary's principal interest remains subject to the claims of creditors to the extent provided by law.

§ 7-A-5.2-A When proceeds of life insurance policy inalienable

The proceeds of a life insurance policy which, under a trust or other agreement, are upon the death of the insured left with the insurance company may not be

- (1) transferred,
- (2) subject to commutation or encumbrance, or
- (3) subject to legal process except in an action for necessities, if provisions to such effect were

incorporated in such trust or other agreement.

Section 7-A-5.2-A replaces EPTL section 7-1.5(a)(2), which generally prohibits the alienation of the proceeds of a life insurance policy left with the insurance company upon the death of the insured, without changing its provisions.

§ 7-A-5.3 Special creditor exceptions to restraints on involuntary alienation

(a) An order of support directing the payment of alimony, maintenance, support or child support can be enforced against the income interest of a beneficiary that is subject to a spendthrift provision as provided in CPLR section 5241 and against a principal interest that is subject to a spendthrift provision.

(b) A spendthrift provision is unenforceable against:

(1) a judgment creditor who has provided goods or performed services suitable to the condition in life of the person to whom they are furnished or for whose benefit they are performed and which meet his or her actual needs at the time such goods are provided or services performed;

(2) a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust; and

(3) a claim of this State or the United States to the extent a statute of this State or federal law so provides.

(c) Nothing in this section shall be construed to limit the rights of creditors as otherwise provided by law.

Section 7-A-5.3 codifies current New York law by listing special creditors against whom a spendthrift provision in a trust is unenforceable.

§ 7-A-5.4 Discretionary trusts

(a) A beneficiary may not transfer his or her discretionary trust interest whether or not the interest is spendthrifted.

(b) A beneficiary's discretionary trust interest is subject to the claims of creditors of the beneficiary to the extent provided by law, including section 7-A-5.5-A and article 52 of the civil practice law and rules.

(c) A beneficiary of a discretionary trust interest has the right to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

Section 7-A-5.4 prohibits a beneficiary from transferring his discretionary trust interest irrespective of any spendthrift clause, although this interest remains subject to the claims of creditors to the extent provided by law. This section also allows the beneficiary to sue a trustee for abusing trustee discretion or for failing to comply with a standard for distribution.

§ 7-A-5.5 Creditor's claim against trust contributor to a revocable trust

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

(1) During the lifetime of the trust contributor, the property of a trust over which the trust contributor has the power to revoke is subject to claims of the trust contributor's creditors.

(2) After the death of a trust contributor, and subject to the trust contributor's right to direct the source from which liabilities will be paid, the property of a trust over which immediately before the trust contributor's death the trust contributor has the power to revoke is subject to claims of the trust contributor's creditors, costs of administration of the trust contributor's estate, and the expenses of the trust contributor's funeral and disposal of the trust contributor's remains to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, and expenses.

(b) For purposes of paragraph (a), a trust created before the date of the enactment of this article is a revocable trust only if the creator reserved an unqualified power of revocation described in section 10-10.6.

(c) During the period the holder of a power of withdrawal may exercise the power, the property subject to the power is subject to the claims of the powerholder's creditors, the creditors of the powerholder's estate and the expense of administering the powerholder's estate to the extent provided by section 10-7.2.

Section 7-A-5.5 allows the creditors of a trust contributor to reach property in a revocable trust during the contributor's lifetime unless revocation requires the consent of an adverse person. This property would also be reachable after the contributor's death to cover claims and certain expenses.

§ 7-A-5.5-A Creditor claims to contribution property by trust beneficiary

(a) To the extent that trust property is attributable to property contributed by a beneficiary the interest of the beneficiary in the trust property is subject to the claims of the beneficiary's existing and subsequent creditors whether or not the beneficiary's interest is subject to a spendthrift provision.

(b) For purposes of paragraph (a), upon the lapse, release, or waiver of a power of withdrawal, the holder of the power of withdrawal is treated as making a contribution to the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greatest amount specified in section 2041(b)(2), 2503(b) or 2514(e) of the Internal Revenue Code, on the date of the lapse, release, or waiver.

(c) Paragraph (a) shall not apply to property contributed by a beneficiary to a trust for the beneficiary's spouse described in (i) section 2523(e) of the Internal Revenue Code or (ii) for which the election described in section 2523(f) of the Internal Revenue Code has been made and (iii) to a trust to the extent the assets of that trust are attributable to a trust described in (i) or (ii) after the death of the beneficiary's spouse.

(d) (1) Paragraph (a) does not apply to all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either an individual retirement account plan which is qualified under section 408 or section 408A of the Internal Revenue Code, or a Keogh (HR-10), retirement or other plan established by a corporation, which is qualified under section 401 of the Internal Revenue Code, or created as a result of rollovers from such plans pursuant to sections 402 (a) (5), 403 (a) (4), 408 (d) (3) or 408A of the Internal Revenue Code, or a plan that satisfies the requirements of section 457 of the Internal Revenue Code, even though the individual making any contribution is (i) in the case of an individual retirement account plan, an individual who is the settlor of and depositor to such account plan, or (ii) a self-employed individual, or (iii) a partner of the entity sponsoring the Keogh (HR-

10) plan, or (iv) a shareholder of the corporation sponsoring the retirement or other plan or (v) a participant in a section 457 plan.

(2) All trusts, custodial accounts, annuities, insurance contracts, monies, assets, or interests described in subparagraph 1 of this paragraph shall be conclusively presumed to be trusts with spendthrift provisions under this section and the common law of the state of New York for all purposes, including, but not limited to, all cases arising under or related to a case arising under sections one hundred one to thirteen hundred thirty of title eleven of the United States Bankruptcy Code, as amended.

(3) This section shall not impair any rights an individual has under a qualified domestic relations order as that term is defined in section 414(p) of the Internal Revenue Code.

(4) Additions to an asset described in subparagraph one of this paragraph shall not be exempt from application to the satisfaction of a money judgment if (i) made after the date that is ninety days before the interposition of the claim on which such judgment was entered, or (ii) deemed to be fraudulent conveyances under article ten of the debtor and creditor law.

(e) A provision in any trust, other than a testamentary trust or a trust which meets the requirements of subparagraph two of paragraph (b) of paragraph two of section three hundred sixty-six of the social services law and of the regulations implementing such clauses, which provides directly or indirectly for the suspension, termination or diversion of the principal, income or beneficial interest of either the creator or the creator's spouse in the event that the creator or creator's spouse should apply for medical assistance or require medical, hospital or nursing care or long term custodial, nursing or medical care shall be void as against the public policy of the state of New York, without regard to the irrevocability of the trust or the purpose for which the trust was created.

(f) Paragraph (a) shall not apply by reason of the trustee's authority to pay trust income or principal to the trust contributor pursuant to section 7-A-8.18. Nor shall paragraph (a) apply where the trustee, as defined in paragraph (b) of section 7-A-8.18, is authorized under the trust instrument or any other provision of law to pay or reimburse the trust contributor for any tax on trust income or trust principal that is payable by the trust contributor under the law imposing such tax or to pay any such tax directly to the taxing authorities. No creditor of a trust contributor shall be entitled to reach any trust property based on the discretionary powers described in this paragraph.

Section 7-A-5.5-A replaces and modifies certain provisions of EPTL 7-3.1, allowing a creditor to reach property contributed by a beneficiary of a trust (i.e., a self-settled trust). Section 7-A-5.5-A clarifies the extent to which the lapse, release or waiver of a power of withdrawal is treated as a contribution, and clarifies that the donor is not treated as a contributing beneficiary of certain marital deduction trusts.

§ 7-A-5.6 Overdue distribution

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

(b) Whether or not a trust contains a spendthrift provision, a creditor may compel the trustee to make a mandatory distribution of income or principal, including a distribution upon termination of the trust, to the beneficiary if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.

Section 7-A-5.6 gives a creditor the power to compel the trustee to distribute an overdue distribution to the beneficiary. Once the beneficiary receives the property, creditors will then be able to reach the property.

§ 7-A-5.7 Personal obligations of trustee

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

Section 7-A-5.7 makes explicit the basic implication of New York trust law that the trustee takes an estate in the trust property only to the extent necessary to carry out the duties imposed by the trust's terms.

PART 6 Revocable Trusts

§ 7-A-6.1 Capacity of trust contributor of revocable trust

The trust contributor's capacity to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will. Notwithstanding the foregoing, the trust contributor's capacity required to irrevocably release a power to revoke or amend such a trust is the same as that required to make a gift.

Section 7-A-6.1 makes explicit that the capacity required by a trust contributor to create, revoke, or amend a trust is the same as that required to make a will; and that the capacity required to relinquish a power to revoke a trust is the same as that required to make a gift.

§ 7-A-6.2 Revocation or amendment of revocable trust

(a) If a revocable trust has more than one trust contributor:

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

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

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

(b) The trust contributor may revoke or amend a revocable trust:

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

(2) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by:

(A) a later will that expressly refers to the trust or a particular provision thereof; or

(B) by executing an instrument that both expressly refers to the trust or a particular provision thereof and complies with the formalities for the creation of a lifetime trust as provided in section 7-A-4.2-A(c), and the revocation or amendment shall take effect as of the date of such execution.

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

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

(e) A guardian of the trust contributor may exercise a trust contributor's powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the guardianship.

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

(g) Written notice of such amendment or revocation by the trust contributor shall be delivered to at least one other trustee within a reasonable time if the trust contributor is not the sole trustee but failure to give such notice shall not affect the validity of the amendment or revocation or the date upon which the amendment or revocation shall take effect. No trustee shall be liable for any act reasonably taken in reliance on an existing trust instrument prior to actual receipt of notice of amendment or revocation thereof. Absent written consent, no trustee shall be liable for the failure to comply with an amendment that expands, restricts or otherwise modifies the trustee's duties, powers, obligations, or compensation for a period of 60 days after receipt of notice of amendment.

(h) Cross reference. *See* section 7-A-4.2-A(e) (lifetime trust is irrevocable unless the terms of the trust expressly provide that the trust is revocable).

Section 7-A-6.2 maintains the presumption in New York law (current EPTL section 7-1.16) that a trust is irrevocable unless its terms expressly state that it is revocable, and provides rules for amending and revoking trusts, including the writing requirements of current EPTL section 7-1.17(b)). Section 7-A-6.2 supplements current law by shielding a trustee from liability for failure to comply with an amendment that revokes the trust or modifies the trustee's powers, obligations or compensation for a period of 60 days after being notified of the amendment.

§ 7-A-6.3 Rights and duties in revocable trusts; power of withdrawal

(a) While a trust is revocable, the trustee shall follow a direction of the person having the unqualified power to revoke the trust that is contrary to the terms of the trust.

(b) While a trust is revocable and the person having the power to revoke the trust is the only present beneficiary, rights of all other beneficiaries are subject to the control of, the duties of the trustee are owed exclusively to, and the trustee is exclusively accountable to the person having the power to revoke.

(c) After the death of a person described in paragraph (b), the beneficiaries of the trust have standing to petition the court for an order compelling the trustee to account for the period before the death of the person having the power to revoke and have standing to file objections on the grounds that the trustee violated the trustee's duties to the person having the power to revoke and consequently impaired the interests of the objectants in the trust.

(d) If the person having the power to revoke the trust loses the capacity to exercise the power to revoke and if by reason of that loss of capacity additional persons become present beneficiaries of the trust, the trustee's duties are owed to those persons as well so long as they are present beneficiaries of the trust.

(e) During the period the power may be exercised, the holder of a non-lapsing power of withdrawal shall be treated, for purposes of paragraph (a) and paragraph (b) of this section, as if the holder of the non-lapsing power of withdrawal were the person having a power to revoke the trust to the extent of the property subject to the power.

Section 7-A-6.3 codifies New York common law setting forth the trustee's duty in a revocable trust and the requirement that the trustee follow the directions of the person with the power of revocation (or with a non-lapsing power of withdrawal).

§ 7-A-6.4 Limitations on action contesting validity of revocable trust; distribution of trust property

(a) The following persons may commence a judicial proceeding after the settlor's death to contest the validity of a trust that was revocable at the settlor's death:

(1) the personal representative of the settlor;

(2) the trustee of a trust created under the will of the settlor duly admitted to probate by a court of competent jurisdiction;

(3) the trustee of a trust to which a disposition was validly made by the will of the settlor duly admitted to probate by a court of competent jurisdiction;

(4) an adversely-affected beneficiary of the will of the settlor admitted to probate by any court of competent jurisdiction or the guardian of or the agent duly authorized under a power of attorney granted by such beneficiary; or

(5) any adversely-affected distributee of the settlor.

A person who has been issued limited letters under SCPA 702(9) may also commence a proceeding under this paragraph (a).

(b) A petition to contest the validity of a revocable trust must be filed by the earlier of

(1) six years after the settlor's death; or

(2) 120 days after the trustee sent the persons described in paragraph (a)(1)-(5) a copy of the trust instrument and a notice informing those persons of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding. Notice given to some but not all of the persons described in paragraph (a)(1)-(5) is effective only as to the persons or persons receiving such notice.

(c) Process must issue to the following persons if not petitioners:

(1) all trustees of the trust that was revocable at the settlor's death;

(2) all persons designated as beneficiaries in the trust that was revocable at the settlor's death;

(3) all distributees of the settlor;

(4) the administrator of the settlor's estate, if any;

(5) the executor or executors named in and the beneficiaries under the will of the settlor admitted to probate or offered for probate in any court of competent jurisdiction; and

(6) the trustee of a trust to which a disposition was validly made by the will of the settlor duly admitted to probate or offered for probate in a court of competent jurisdiction;

(7) such other persons as the court in its discretion may determine.

(d) In any proceeding concerning the validity of a trust that was revocable at the settlor's death, the burden of proof on the issue of the settlor's capacity, the existence of undue influence, and the existence of fraud shall be on the person or persons seeking to challenge the validity of the trust instrument.

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

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

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

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

(g) Where applicable, this section shall apply to a trust contributor who is not a settlor.

Section 7-A-6.4 codifies existing law, which allows for the contest of the validity of a revocable trust. The law is significantly clarified by providing important standing and procedural rules. Standing is given to those who are interested in the trust, including distributees of the settlor who are adversely effected by the trust, the trustees of testamentary trusts, and trusts receiving pour-overs from the settlor's will. The proceeding must commence within 6 years of the settlor's death, a period which can be shortened to 120 days by sending a copy of the trust instrument and notice of the 120-day period to those who have standing.

PART 7 Office of Trustee

§ 7-A-7.1 Accepting or declining trusteeship of a lifetime trust

(a) Except as otherwise provided in paragraph (c), a person designated as trustee of a lifetime trust accepts the trusteeship:

(1) by complying with the execution requirements of section 7-A-4.2-A(c), or

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

or

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

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

(c) A person designated as trustee of a lifetime trust, without accepting the trusteeship, may:

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

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

Section 7-A-7.1 codifies current New York common law governing the acceptance of lifetime trusts. SCPA Article 7 will continue to govern testamentary trusts.

§ 7-A-7.2 Trustee's bond

(a) Except as provided in SCPA 710(2) and by paragraph (c), a trustee shall give bond to secure performance of the trustee's duties only if the court finds that a bond is needed to protect the interests of the beneficiaries or is required by the terms of the trust and the court has not dispensed with the requirement.

(b) The court may specify the amount of a bond, its liabilities, and whether sureties are necessary. The court may modify or terminate a bond at any time.

(c) A trust company, as defined by Banking law section 2(2), any bank authorized to exercise fiduciary powers and any national bank having a principal, branch or trust office in this state and duly authorized to exercise fiduciary powers need not give a bond unless a bond is expressly required of the trust company or bank by the terms of the trust.

Section 7-A-7.2 deals with the posting of a bond by a trustee and continues the provisions of SCPA section 806 the exception of that section's default requirement that every testamentary trustee furnish a bond. Under the new section, a corporate trustee must obtain a bond but only if the terms of the trust expressly require it to do so.

§ 7-A-7.3 Co-trustees

(a) Co-trustees who are unable to reach a unanimous decision with respect to the exercise of a joint power may act by majority decision.

(b) If a vacancy occurs in a co-trusteeship, the remaining co-trustees may continue to act as trustees.

(c) A co-trustee must participate in carrying out the trustee's duties and in exercising joint powers unless the co-trustee is unavailable to do so because of absence, illness, disqualification under other law, or other temporary incapacity or the co-trustee has properly delegated the performance of the duty or exercise of the joint power to an agent or another trustee pursuant to section 8.7(e).

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

(e) The rules for delegation by a trustee to another trustee are provided in section 8.7(e).

(f) Except as otherwise provided in paragraph (h), a trustee who does not join in an action of another trustee is not liable for the action if the trustee is unavailable to join in the action due to absence, illness, disqualification under other law or other temporary incapacity, or if the trustee has properly delegated the performance of the action pursuant to section 8.7.

(g) Except as otherwise provided in paragraph (h), a dissenting trustee who joins in carrying out a decision of a majority of the trustees and who notified in writing any co-trustee of the dissent at or before the time of the carrying out the decision is not liable for the consequences of the majority decision.

(h) A trustee is not excused from liability for failing to exercise reasonable care to:

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

(i) For purposes of this section, a joint power includes a power in a trustee to invade trust principal under section 7-A-8.19 or under the terms of the dispositive instrument.

Section 7-A-7.3 provides rules for co-trustees, including the expansion of reasons for which a co-trustee may act alone.

§ 7-A-7.4 Vacancy in trusteeship; appointment of successor

(a) A vacancy in a trusteeship occurs if:

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

(b) If one or more co-trustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustee. If for any reason the trust has no remaining trustee, the trust estate immediately vests in the supreme court or surrogate's court, as the case may be, unless the settlor provides otherwise.

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

- (1) by a person designated in the terms of the trust to act as successor trustee;
- (2) by a person appointed by unanimous agreement of the qualified beneficiaries; or
- (3) by a person appointed by the court.

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

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

(2) by a person selected by the charitable organizations expressly designated to receive distributions under the terms of the trust if the attorney general concurs in the selection; or

(3) by a person appointed by the court.

(e) A vacancy in a trusteeship of a testamentary trust that is required to be filled shall be filled pursuant to SCPA 706 or 1502 by the court having jurisdiction of the decedent's estate.

(f) Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee as provided in SCPA 1502.

(g) Nothing in this section shall be construed to limit the application of SCPA 706 and any other application of SCPA 1502.

Section 7-A-7.4 deals with vacancies in the office of trustee and the appointment of successors. The section sets forth a hierarchy of persons who can fill a vacancy in the trusteeship of a noncharitable lifetime trust. It gives first priority to a designation in the trust instrument. If there is no such designation, it allows appointment by unanimous agreement of the qualified beneficiaries. Finally, as a last resort, it allows appointment by the court. There are similar rules for lifetime charitable trusts. A vacancy in the trusteeship of a testamentary trust must be filled by the court under SCPA section 706 or section 1502.

§ 7-A-7.4-A Suspension of powers of trustee in war service

(a) Whenever a trustee of an express trust is engaged in war service, as defined in this section, such trustee or any other person interested in the trust estate may present a petition to the supreme court or the surrogate's court, as the case may be, to suspend the powers of such trustee while he is so engaged and until the further order of the court, and if the suspension of such trustee will leave no person acting as trustee or leave a beneficiary of such trust as the only acting trustee thereof, the petition must pray for the appointment of a successor trustee, unless a successor has been named in the trust instrument and is not engaged in war service or is not for any other reason unable or unwilling to act as such trustee.

(b) For the purposes of this section, a trustee is engaged in war service in any of the following cases:

(1) If the trustee is a member of the armed forces of the United States or of any of its allies, or if the trustee has been accepted for such service and is awaiting induction.

(2) If the trustee is engaged in any work abroad in connection with a governmental agency of the United States or with the American Red Cross Society or any other body with similar objectives.

(3) If the trustee is interned in any enemy country or is in a foreign country or a possession or dependency of the United States and is unable to return to this state.

(4) If the trustee is a member of the Merchant Marine or similar service.

(c) Where the application is made by a trustee engaged in war service, notice shall be given to such persons and in such manner as the court may direct. Where the application is made by any other person interested in the trust estate and the trustee is in the armed forces of the United States, notice shall be given to such trustee in such manner as the court may direct. In every other case, where the application is made by a person other than the trustee, notice thereof shall be given to such persons and in such manner as the court may direct.

(d) Upon the filing of the petition and proof of service of notice prescribed in paragraph (c), the court may, notwithstanding any other provision of law, suspend the trustee engaged in war service from the exercise of all of the trustee's powers and duties while engaged in such service and until the further order of the court. The order may further provide that the remaining trustee or, if there is none, the successor named in the trust instrument or appointed by the court may exercise all of the powers and be subject to all of the duties of the original trustee.

(e) The successor trustee shall be limited to commissions as computed under SCPA 2308 or 2309, whichever is applicable, upon income received and disbursed and upon principal disbursed. Commissions may also be allowed under 2308 or 2309 upon rents if the trustee is authorized or required to collect the rents of and manage real property. In case of the resignation or removal of the suspended trustee, or in the event of such trustee's death, the foregoing basis for computing the commissions shall not apply and the trustee's commissions shall be computed in the same manner as those of any other trustee.

(f) When the suspended trustee ceases to be engaged in war service the trustee may, upon application to the court and upon such notice as the court may direct, be reinstated as trustee if any of the duties of such office remain unexecuted. If the suspended trustee is reinstated the court shall thereupon remove the trustee's successor and make such other order as justice requires, but such removal shall not bar the successor from subsequently qualifying as a trustee if for any reason it thereafter becomes necessary to appoint a trustee.

Section 7-A-7.4-A makes EPTL section 7-2.5 (suspension of powers during war service) applicable to trusts under EPTL Article 7-A.

§ 7-A-7.5 Resignation of trustee

(a) A trustee may resign:

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

(2) with the approval of the court.

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

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

(d) The resignation of a trustee of a testamentary trust shall not be effective until the trustee provides written notice of such resignation to the court that has taken jurisdiction over the trust.

Section 7-A-7.5 changes the current law of resignation of trustees. Under this section the trustee of a revocable trust may resign on 30 days' notice to the trust contributor and all other trustees and a testamentary trustee may resign by giving 30 days' notice to the qualified beneficiaries, or with court approval. However, resignation has no effect on the trustee's possible liability for actions taken as trustee. The resignation of a testamentary trustee is not effective until written notice is given to the court that has jurisdiction over the trust.

§ 7-A-7.6 Removal of trustee

(a) In addition to any provision for removal in the trust instrument, the settlor, a co-trustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.

(b) The court may remove a trustee if:

(1) the trustee has committed a serious breach of trust;

(2) lack of cooperation among co-trustees substantially impairs the administration of the trust;

(3) because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or

(4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, provided that the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with the purposes of the trust, and a suitable co-trustee or successor trustee is available.

(c) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under section 7-A-10.1(b) as may be necessary to protect the trust property or the interests of the beneficiaries.

(d) For purposes of this section, “court” shall refer to the supreme court and the surrogate’s court.

(e) Nothing in this section shall be construed to limit the application of SCPA 711, 712, 713 and 719.

Section 7-A-7.6 maintains existing law with the addition of allowing a court to remove a trustee if there has been “a substantial change of circumstances,” or if a majority of the qualified beneficiaries request removal and the court finds that removal is in the interests of all beneficiaries and is not inconsistent with the purposes of the trust.

§ 7-A-7.7 Delivery of property by former trustee

(a) Unless a co-trustee remains in office or the court otherwise orders, and until the trust property is delivered to a successor trustee or other person entitled to it, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the trust property.

(b) A trustee who has resigned or been removed shall proceed expeditiously to deliver the trust property within the trustee’s possession (subject to a reasonable reserve for the expenses of such trustee’s accounting) to the co-trustee, successor trustee, or other person entitled to it.

Section 7-A-7.7 codifies the procedures that well-advised fiduciaries currently follow for the delivery of trust property, such as the procedures in SCPA section 716.

§ 7-A-7.8 Compensation of trustee

The rules for compensating a trustee are provided in SCPA 2308 through 2313.

Section 7-A-7.8 cross references with SCPA sections 2308 through 2313, in order to explicitly provide that those statutory sections should continue to govern the compensation of both individual and corporate trustees.

§ 7-A-7.9 Reimbursement of expenses

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

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

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

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

Section 7-A-7.9 expressly allows a trustee to collect appropriate interest at a reasonable rate when the trustee advances the trustee’s her own funds for the benefit of the trust.

§ 7-A-7.10 Accounting by trustee in supreme court

Any proceeding for an accounting or other relief brought by a trustee or by a substituted or successor trustee may be commenced by such notice to the beneficiaries of the trust as the supreme court may direct.

Section 7-A-7.10 clarifies that any proceeding for an accounting may be commenced by such notice to the beneficiaries of the trust as the Supreme Court may direct. The text of section 7-A-7.10 is identical to current section EPTL 2-7(a).

PART 8 Duties and Powers of Trustee

§ 7-A-8.1 Duty to administer trust

The trustee shall administer the trust in good faith, in accordance with its terms and purposes, and in accordance with this article and other applicable law.

Section 7-A-8.1 codifies New York's rule that a trustee has a non-waivable duty both to act in good faith and follow the terms of the trust when administering the trust.

§ 7-A-8.2 Duty of loyalty

(a) As between a trustee and the beneficiaries, the duty of loyalty requires that 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 7-A-10.11, 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 a breach of the duty of loyalty and voidable by a qualified beneficiary unless:

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

(2) the transaction was approved by the court;

(3) the qualified beneficiary did not commence a judicial proceeding within the time allowed by section 7-A-10.4;

(4) the qualified beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with section 7-A-10.8; or

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

(c) For purposes of paragraph (b), a sale, encumbrance, or other transaction involving the investment or management of trust property is conclusively 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 issue, 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 described in subparagraph (1), (2) or (3), 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 qualified beneficiary that does not concern trust property but that occurs during the existence of the trust, and which is outside the ordinary course of the trustee's business or on terms and conditions substantially less favorable than those the trustee generally offers customers similarly situated, is voidable by the qualified 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 is affected by a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust. Such transaction is a breach of the duty of loyalty and is voidable by a qualified beneficiary, subject to the exceptions in paragraphs (b)(1)-(5).

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

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

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

(2) payment of reasonable compensation to the trustee;

(3) a transaction between a trustee and another trustee of another trust or decedent's estate or guardianship of which the trustee is a fiduciary or in which a beneficiary has an interest;

(4) a deposit of trust money in a bank, banking department or insured depository institution operated by the trustee or an affiliate; or

(5) an advance by the trustee of money for the protection of the trust.

(h) 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.

(i) Cross reference. *See* section 7-A-10.1 (providing other remedies for a breach of trust) and section 7-A-10.2(b)(2) (trustee's liability may require restoration of trust property).

Section 7-A-8.2 codifies New York's rule that the trustee has a duty of loyalty to the beneficiaries. The section also expands the related no-further-inquiry rule (when a trustee is on both sides of a transaction) to include indirect self-dealing cases. The section does not extend the exemption under EPTL 11-2.3(d) from the ban on self-dealing for investments in a corporate trustee's proprietary mutual funds to investments of other sorts, for example, investment in the hedge funds managed by the trustee or its affiliate. However, a settlor may affirmatively provide for this exemption.

§ 7-A-8.3 Duty of impartiality

If a trust has two or more beneficiaries, the trustee has the duty to act impartially in investing, managing, distributing and otherwise administering the trust property, giving due regard to the beneficiaries' respective interests.

Section 7-A-8.3 codifies New York's rule that a trustee must act impartially, including with regard to administrative functions, unless otherwise directed by the settlor.

§ 7-A-8.4 Duty of prudent administration

(a) A trustee has the duty to administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

(b) Cross-reference. *See* section 11-2.3 (duties under prudent investor act).

Section 7-A-8.4 applies to the duty of administering the trust the same duty of care as that provided under the Prudent Investor Act.

§ 7-A-8.5 Duty regarding costs of administration

In administering a trust, the trustee has a duty to incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee taking into account sections 7-A-8.7 to the extent those sections apply.

Section 7-A-8.5 imposes on the trustee the duty of only paying expenses that are reasonable in their relation to the trust's purpose or property.

§ 7-A-8.6 Duty to exercise trustee's special skills and expertise

A trustee who has represented that such trustee has special skills (other than special investment skills) or expertise, shall use those special skills or expertise, subject to the rules governing trustees with special investment skills provided in section 11-2.3(b)(6).

Section 7-A-8.6 imposes a duty on specially skilled trustees to utilize their expertise. This excludes special investment skills, which are governed by current EPTL section 11-2.3(b)(6).

§ 7-A-8.7 Powers and duties regarding delegation by trustee to agent or another trustee

(a) A trustee may delegate to an agent duties and powers that a prudent trustee could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

(1) selecting an agent suitable to exercise the delegated function, taking into account the nature and value of the assets subject to such delegation and the expertise of the agent;

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

(3) periodically reviewing the agent's exercise of the delegated function and compliance with the scope and terms of the delegation.

(4) taking any appropriate action based on the trustee's review; and

(5) controlling the overall cost by reason of the delegation.

(b) In performing a delegated function, an agent owes a duty to the trustee and the beneficiaries to comply with the scope and terms of the delegation and to exercise the delegated function with reasonable care, skill and caution. An attempted exoneration of the agent from liability for failure to meet such duty is contrary to public policy and void.

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

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

(e) A trustee may delegate duties and powers to a co-trustee that a prudent trustee could properly delegate under the circumstances. Unless a delegation was irrevocable, a trustee may revoke a delegation previously made.

(1) In making a delegation under this paragraph, the trustee shall exercise reasonable care, skill, and caution in:

(A) selecting a trustee suitable to exercise the delegated function;

(B) establishing the scope and terms of the delegation consistent with the purposes of the governing instrument; and

(C) periodically reviewing the trustee's exercise of the delegated function and compliance with the scope and terms of the delegation.

(2) A trustee who complies with paragraph (e)(1) is not liable for an action of the trustee to whom the function was delegated.

(3) Unless a delegation was irrevocable, a trustee may revoke a delegation previously made under this paragraph (e).

Section 7-A-8.7 extends the authority to delegate investment functions or management functions under the Prudent Investor Act (EPTL 11-2.3(b)(4)(C)) to all duties and powers subject the use of reasonable care, skill, and caution in making the delegation. Under paragraph (c), a trustee may delegate to a co-trustee using reasonable care, skill and caution.

§ 7-A-8.8 [Reserved]

Section 7-A-8.8 is a reserved section for potential future use. The previous proposal (the "6th Report") recommended using-section 7-A-8.8 for a directed trust statute, but it is now proposed that the New York directed trust statute currently being drafted be placed in its own Article (specifically, EPTL Article 7-B) rather than inserted here.

§ 7-A-8.9 Duty to control and protect trust property

A trustee has the duty to take reasonable steps to take control of and protect the trust property. Section 7-A-8.9 codifies the protection of trust property already required under New York common law.

§ 7-A-8.10 Duty regarding recordkeeping and identification of trust property

(a) A trustee has the duty to keep adequate records of the administration of the trust.

(b) A trustee has the duty to keep trust property separate from the trustee's own property.

(c) Except as otherwise provided in paragraph (d) or elsewhere in this article, a trustee has the duty to cause the trust property to be designated as held in the trustee's capacity as trustee so that the interest of the trustee, to the extent capable of registration, appears in records maintained by a party other than a trustee or beneficiary.

(d) If the trustee may invest as a whole the property in which the trustee has interests under two or more trust instruments, the trustee has the duty to maintain records clearly indicating the respective interests of the trustee under each trust instrument.

(e) Notwithstanding anything in this section to the contrary, this section shall not be construed to abridge in any way any duties imposed, or any powers conferred, upon a trustee under any other provision of this chapter, including without limitation under section 11-1.6.

Section 7-A-8.10 requires a trustee to keep adequate and clear records, and to keep trust property separate from the trustee's own property. This section expands on and overlaps with EPTL sections 11-1.6 and 11-1.1, but such sections, and other relevant EPTL provisions, shall continue to apply.

§ 7-A-8.11 Duty to enforce and defend claims

A trustee has the duty to take reasonable steps to enforce claims of the trustee in the trustee's capacity as such and to defend claims against the trustee in such capacity.

Section 7-A-8.11 codifies current New York common law requiring a trustee to take reasonable steps to enforce claims and to defend against claims.

§ 7-A-8.12 Duty to collect trust property

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

Section 7-A-8.12 codifies existing standards and requires a trustee to take reasonable steps to compel a former trustee or other person to deliver trust property to the current trustee, and to redress a breach of trust known to the current trustee to have been committed by a former trustee. Present New York law can be found in SCPA section 1506 and various cases.

§ 7-A-8.13 Duty to inform and report

(a) Unless unreasonable under the circumstances, a trustee has the duty to promptly respond to a beneficiary's request for information related to the administration of the trust, including a report containing the information referred to in paragraph (c).

(b) A trustee:

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

(2) within 60 days after accepting a trusteeship, has the duty to 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, the trustee has the duty to 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 paragraph (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 has the duty to send to current recipients or permissible recipients 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 co-trustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative 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) Paragraphs (b)(2) and (3) do not apply to a trustee who accepted a trusteeship or was issued letters of trusteeship before the effective date of this article, to an irrevocable trust created before the effective date of this article, or to a revocable trust that becomes irrevocable before the effective date of this article.

(f) Nothing in this section shall be construed to limit the application of SCPA 2102(1), 2309(4) and 2312(6).

(g) Cross-reference. *See* §7-A-6.3 (Rights and duties in revocable trusts).

Section 7-A-8.13 strengthens the law found in SCPA sections 2102, 2309, and 2312 regarding a trustee's duty to inform and report. The section requires a trustee to respond to a beneficiary's request for both information related to the administration of the trust and to obtain a copy of the trust instrument. It also provides time limits within which a trustee must inform qualified beneficiaries about certain aspects about the trust. As noted under section 7-A-1.5, the duty to furnish requested information and to fulfill certain notification duties are "mandatory provisions" with respect to qualified beneficiaries who have attained 25 years of age except with regard to lifetime trusts during the lifetimes of the settlor and the settlor's spouse (and if the settlor was not an individual for a maximum of 21 years). Section 7-A-8.13 also mandates that a trustee furnish annual reports to most beneficiaries and to other requesting beneficiaries. Beneficiaries can waive their rights to be informed and to receive reports.

§ 7-A-8.14 Duty regarding discretionary powers

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

(b) The trustee shall not be compelled to exercise the trustee's discretion under paragraph (a) in such a way that would jeopardize a beneficiary's eligibility for, or receipt of, public benefits or both.

(c) The rules that address the exercise of discretionary powers by a trustee-beneficiary are set forth in section 10-10.1.

Section 7-A-8.14 codifies current New York common law: Notwithstanding the discretion granted to a trustee, the trustee has the duty to exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust. In addition, the trustee shall not be compelled to exercise such discretion in a way that would jeopardize a beneficiary's eligibility for public benefits.

§ 7-A-8.15 General powers of trustee

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

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

(2) except as limited by the terms of the trust, court order or decree or other applicable law:

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

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

(C) any other powers conferred by this article.

(b) The court having jurisdiction of the trust may authorize the trustee to exercise any power which in the judgment of the court is necessary for the proper administration of the trust.

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

Section 7-A-8.15 provides a default rule that a trustee, without authorization by the court, may exercise powers conferred by the terms of the trust and, unless limited by the trust, court order, decree or other law, all powers over trust property that an individual would have over individually owned property, any other powers appropriate to achieve proper investment, management, and distributions, and any other powers conferred by Article 7-A. The court may authorize additional powers which are deemed necessary. Reference to trustees in EPTL 11-1.1(a) 11 will be repealed, including the more restrictive default rules for trustees under EPTL 11-1.1(b).

§ 7-A-8.16 Specific powers of trustee

Without limiting the authority conferred, or the restrictions imposed, by section 7-A-8.15, a trustee may:

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

(2) acquire or sell trust property at public or private sale, and on such terms as in the opinion of the trustee will be most advantageous to those interested therein;

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

(4) deposit trust money in an account in a bank or other insured depository institution.

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

(6) with respect to an interest in a proprietorship (and subject to SCPA 2108), partnership, limited liability company, business trust, corporation, or other form of business or enterprise, continue the business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization or contributing additional capital;

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

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

(B) employ a financial institution as custodian of any such stock or other securities as in the same manner as authorized for a fiduciary in section 11-1.1(b)(9);

(C) cause any such stock or other securities to be registered and held in the name of a nominee in the same manner as authorized for a fiduciary in section 11-1.1(b)(10);

(D) cause any such stock or other securities to be deposited in the same manner as authorized for a fiduciary in sections 11-1.8 and 11-1.9;

(E) employ a broker-dealer as a custodian of any such stock or other securities and to register such securities in the name of the such broker-dealer in the same manner as authorized for a fiduciary in section 11-1.10;

(F) pay calls, assessments, and other sums chargeable or accruing against the securities, in the same manner as authorized for a fiduciary in section 11-1.1(b)(15); and

(G) sell or exercise stock subscription or conversion rights, participate in foreclosures, reorganizations, consolidations, mergers or liquidations, and consent to corporate sales, leases and encumbrances in the same manner as authorized for a fiduciary in section 11-1.1(b)(16).

(8) with respect to repairs and other actions;

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

(B) for an interest in tangible personal property, make repairs to, conserve or improve such property.

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

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

(11) effect and keep in force fire, rent, title, liability casualty or other insurance to protect the property of the trust and to protect the trustee;

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

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

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

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

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

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

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

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

(15) pay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust, including the reasonable expense of obtaining and continuing the trustee's bond and any reasonable counsel fees the trustee may necessarily incur;

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

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

(18) make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans;

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

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

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

(A) paying it to the beneficiary's guardian;

(B) paying it to the beneficiary's custodian under New York's Uniform Transfers to Minors Act and, for that purpose, creating a custodianship pursuant to sections 7-6.5 and 7-6.6;

(C) if the amount is not in excess of \$10,000 paying the amount to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf;

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

(E) if the sum payable to a patient in an institution in the state department of mental hygiene is not in excess of the amount which the director of the institution is authorized to receive under section 29.23 of the mental hygiene law, paying such sum to such director for use as provided in that section.

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

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

(24) contest, compromise or otherwise settle any claim in favor of the trust or trustee or in favor of third persons and against the trust or trustee;

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

(26) on termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it;

(27) acquire the remaining undivided interest in the property of a trust in which the trustee, in the trustee's capacity, holds an undivided interest;

(28) invest and reinvest property of the trust under the provisions of the will, deed or other instrument or as otherwise provided by law;

(29) take possession of, collect the rents from and manage any property or any estate therein owned by the trustee;

(30) with respect to any mortgage on property owned by the trustee (A) continue the same upon and after the maturity, with or without renewal or extension, upon such terms as the trustee deems advisable; (B) foreclose, as an incident to collection of any bond or note, any mortgage securing such bond or note, and to purchase the mortgaged property or acquire the property by deed from the mortgagor in lieu of foreclosure;

(31) in the case of a successor or substitute trustee, succeed to all of the powers, duties and discretion of the original trustee, with respect to the trust, as were given to the original trustee unless the exercise of such powers, duties or discretion of the original fiduciary are expressly prohibited by the will, deed or other instrument to any successor or substituted fiduciary;

(32) hold the property of two or more trusts or parts of such trusts created by the same instrument as an undivided whole without separation as between such trusts or parts, provided that such separate trusts or parts shall have undivided interests and provided further that not such holding shall defer the vesting of any estate in possession or otherwise;

(33) invest as a whole the property in which the trustee has interests under two or more trusts instruments; and

(34) in addition to those expenses specifically provided for in this sub paragraph, to pay all other reasonable and proper expenses of administration from the property of the or trust, including the reasonable expense of obtaining and continuing the trustee's bond his bond and any reasonable counsel fees the trustee may necessarily incur.

Section 7-A-8.16 enumerates common trustee powers, including many that are currently found in EPTL sections 11-1.1(b) as well as powers under EPTL 11-1.8 through 11-1.10, without limiting the authority conferred or restrictions imposed by EPTL section 7-A-8.15.

§ 7-A-8.17 Duties and powers regarding distribution upon termination

(a) Upon termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. Subject to the provisions of paragraph (c) hereof, the right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within 30 days after the proposal was sent but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection.

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

(c) A release by a beneficiary of a trustee from liability for breach of trust is invalid to the extent:

(1) it was induced by improper conduct of the trustee; or

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

Section 7-A-8.17 codifies current New York law and provides that, upon full or partial termination of a trust, a trustee may send to the beneficiaries a proposal for distribution. The right of a beneficiary to object to the proposed distribution terminates 30 days after the proposal is sent. Subject to a reasonable reserve, the trustee shall proceed expeditiously to distribute the trust property. In addition, a release by a beneficiary for breach of trust is invalid under certain circumstances.

§ 7-A-8.18 Power of trustee to pay income or principal to trust contributor as reimbursement for income taxes

(a) Notwithstanding any contrary provision of law, the trustee, unless otherwise provided in the disposing instrument, may, from time to time pay to, or apply on behalf of, a trust contributor of such trust an amount equal to any income taxes on any portion of the trust income or trust principal of which such trust contributor is treated as the owner under Part 1 of Subchapter J of Subtitle 1 of the Internal Revenue Code. If the income tax is based on amounts allocated to trust income payment shall be made from trust income. If the income tax is based on amounts allocated to trust principal payment shall be made from trust principal.

(b) For purposes of paragraph (a), a trustee does not include a trust contributor unless the trust contributor has a power of revocation with respect to the trust.

(c) Paragraph (a) shall not apply if the application or the possibility of the application of paragraph (a) to any trust would reduce or eliminate a charitable deduction otherwise available to any person under any provision of the Internal Revenue Code.

(d) Paragraph (a) shall not apply if the application or the possibility of the application of paragraph (a) to any trust would reduce or eliminate for any person a gift tax marital deduction or a gift tax annual exclusion under the Internal Revenue Code.

(e) Paragraph (a) shall not apply if its application or possible application would reduce or eliminate a public benefit otherwise available to the trust contributor or to the trust contributor's spouse.

Section 7-A-8.18 expands upon EPTL section 7-1.11 and provides that, notwithstanding any contrary provision of law, the trustee, unless otherwise provided in the trust, may pay to or on behalf of a trust contributor that has a power of revocation an amount equal to the income taxes on any portion of the trust income or principal that the trust contributor is treated as owning. Section 7-A-8.18 also safeguards against estate inclusion under sections 2036(a) or 2038(a) of the Internal Revenue Code.

§ 7-A-8.19 Powers and duties regarding decanting

Section 7-A-8.19 consolidates the rules regarding decanting, which are currently found in EPTL section 10-6.6(b)-(t), with one modification. EPTL section 10-6.6(s)(1) ("For purposes of creating the new trust, the requirement of section 7-1.17 of this chapter that the instrument be signed by the creator shall be deemed satisfied by the signature of the trustee of the appointed trust") is deleted because its substance is continued in EPTL section 7-A-4.2-A(c). This lengthy statute is not included.

§ 7-A-8.20 Duty when a resulting trust arises

Subject to section 7-A-8.17, the trustee has the duty to distribute trust property to the settlor or the settlor's successors in interest when a resulting trust arises.

Section 7-A-8.20 clarifies the duty of the trustee when a resulting trust arises. Current EPTL section 7-1.7, which is based on 1830 trust legislation, is obsolete and will be repealed.

PART 9 [Reserved]

Part 9 of Article 7-A is reserved for possible future use.

PART 10 Liability of Trustees and Rights of Persons Dealing with Trustee

§ 7-A-10.1 Remedies for breach of trust

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

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

(1) compel the trustee to perform the trustee's duties;

(2) enjoin the trustee from committing a breach of trust;

(3) compel the trustee to redress a breach of trust by paying money, by restoring property, and by other means;

(4) order a trustee to account;

(5) appoint a successor trustee or co-trustee to take possession of the trust property and administer the trust as provided in SCPA section 1502;

(6) suspend the trustee;

(7) remove the trustee as provided in Section 7-A-7.6;

(8) reduce or deny compensation to the trustee;

(9) subject to section 7-A-10.11, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or

(10) order any other appropriate relief.

(c) Nothing in this section shall be construed to limit the court's application of remedial provisions that are provided in the surrogate's court procedure act.

Section 7-A-10.1 defines a breach of trust and provides remedies that the court may use for such breach, in order to create a consolidated listing of such remedies in a single EPTL section. Some of these remedies are from current sections of the EPTL or SCPA, and others are codifications of New York common law. Nothing in section 7-A-10.1 shall limit the court's application of remedial provisions that are in the SCPA. Present New York law can be found in EPTL sections 7-2.6 and 7-2.7 and SCPA sections 209, 711, 719, 1501, 1509, 2205 and 2206.

§ 7-A-10.2 Liability for breach of trust

(a) Unless section 7-A-10.9 applies, and except as otherwise provided in this section, a trustee who commits a breach of trust is chargeable with the value of the capital lost by reason of the breach plus prejudgment interest as determined by the court.

(b) Unless section 7-A-10.9 applies, a trustee who commits a serious breach of trust (other than breaching the duty of loyalty) by contravening an express term of the trust or by committing another serious breach of trust for any other reason is chargeable with the greater of

(1) the value of the capital lost by reason of the breach plus prejudgment interest as determined by the court or

(2) the amount at the time of the decree required to restore the values of the trust property to what they would have been if the portion of the trust affected by the breach had been properly administered.

(c) Unless section 7-A-10.9 applies, a trustee who commits a breach of trust by breaching the duty of loyalty is chargeable with

(1) the greater of

(A) the value of the capital lost by reason of the breach plus prejudgment interest as determined by the court or

(B) the amount required to restore the values of the trust property to what they would have been if the portion of the trust affected by the breach had been properly administered; or

(2) the amount of any benefit to the trustee personally as a result of the breach.

(d) In addition to charging the trustee as provided in paragraphs (b) and (c), a trustee may be additionally chargeable as the court deems appropriate to fashion complete equitable relief.

(e) Except as otherwise provided in this paragraph, if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee may be entitled to contribution from the other trustee or trustees in accordance with applicable law. A trustee is not entitled to contribution if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

(f) Cross reference. *See* section 7-A-8.2 (allowing qualified beneficiaries to void a transaction if a trustee breaches the duty of loyalty).

Section 7-A-10.2 codifies New York law and defines the amount that a trustee is charged with in various breach-of-trust situations in cases where EPTL section 7-A-10.9 does not apply. This section also allows for additional charges by the court and covers when a liable trustee may or may not be entitled to contribution from another liable trustee.

§ 7-A-10.3 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 7-A-10.3 codifies the rule that 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. However, absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation or for not having made a profit.

§ 7-A-10.4 Compensation of attorney's fees, costs and allowances

(a) In a judicial proceeding involving the administration of a trust a court is authorized to

- (1) fix and determine the compensation of an attorney as provided in SCPA 2110, and
- (2) award costs and allowances as provided in article 23 of the SCPA.

(b) Cross reference. Section 7-A-8.16(b)(34)(trustee's payment of reasonable counsel fees).

Section 7-A-10.4 references the statutory authority for courts to fix the compensation of an attorney (SCPA section 2110) and award costs and allowances (Article 23 of the SCPA).

§ 7-A-10.5 Limitation of action against trustee

A judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within six 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;
- (3) the termination of the trust; or
- (4) the open repudiation of the trust by the trustee.

Section 7-A-10.5 codifies current New York law and requires that a judicial proceeding by a beneficiary for breach of trust be commenced within six years after the first to occur of the removal, resignation, or death of the trustee, the termination of the beneficiary's interest, the termination of the trust, or the open repudiation of the trust by the trustee.

§ 7-A-10.6 Reliance on trust instrument

To the extent section 11-2.3 does not apply, a trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

Section 7-A-10.6 provides that to the extent EPTL 11-2.3 do not apply a trustee who acts in reasonable reliance on the terms of the trust is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

§ 7-A-10.7 Event affecting administration or distribution

If the happening of an event, including marriage, divorce, performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge.

Section 7-A-10.7 codifies current New York law, and provides that if the occurrence of an event affects the administration or distribution of a trust, then a trustee who has exercised reasonable care to ascertain the occurrence of the event is not liable for a loss resulting from the trustee's ignorance of the occurrence of the event.

§ 7-A-10.8 Exculpation of trustee and trust director

The rules for the exculpation of a trustee and a trust director are provided in section 11-1.7.

Section 7-A-10.8 provides that the rules for the exculpation (exoneration) of a lifetime trustee and trust director are found in EPTL section 11-1.7, as amended.

§ 7-A-10.9 Beneficiary's consent, release, or ratification

(a) A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented in writing to the conduct constituting the breach, executed a written release of the trustee from liability for the breach, or ratified in writing the transaction constituting the breach, unless:

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

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

(b) A consent, release, or ratification under paragraph (a) that is made by a beneficiary upon whom service of process would be required in a proceeding to settle the trustee's account is binding upon all persons upon whom service of process would not be required under SCPA 315 because process was served upon the beneficiary.

Section 7-A-10.9 codifies case law. Specifically, a trustee is not liable to a beneficiary for breach of trust if the beneficiary consented in writing to the conduct, executed a release of the trustee from liability, or ratified in writing the transaction constituting the breach, unless the beneficiary was induced by improper conduct or did not know of his or her rights or the material facts relating to the breach. Virtual representation will apply in determining the effect of such consent, release, or ratification.

§ 7-A-10.10 Limitation on personal liability of trustee

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

(b) A trustee is personally liable for torts committed in the course of administering a trust, or for obligations arising from ownership or control of trust property, including liability for violation of environmental law, only if the trustee failed to exercise reasonable care, diligence, and prudence.

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

(d) In any case where liability is found against the trustee as the result of an action or proceeding brought under paragraph (c), issues of liability as between the trustee in the trustee's fiduciary capacity and the trustee in the trustee's individual capacity shall, if necessary, be determined in an accounting proceeding brought pursuant to SCPA 2205.

Section 7-A-10.10 codifies current New York law by absolving a trustee who discloses his or her fiduciary capacity in a contract from personal liability on such contract. The section also and provides that if a trustee fails to exercise reasonable care, diligence, and prudence, such trustee is personally liable for torts committed in the course of administering a trust or for obligations arising from ownership or control of trust property. This section also simplifies existing law by allowing actions against a trustee in his or her fiduciary capacity whether or not the trustee will be personally liable. If liability of the trustee is found in a proceeding regarding an obligation or a tort, issues of liability as between the trustee in the trustee's fiduciary capacity or individual capacity shall be determined in an accounting proceeding.

§ 7-A-10.11 Interest as general partner

(a) Unless personal liability is imposed in the contract, a trustee who holds an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership after the trustee's acquisition of the interest if the fiduciary capacity was disclosed in the contract or in a statement previously filed pursuant to the partnership law.

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

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

Section 7-A-10.11 sets forth rules whether or not a trustee is liable when a trustee holds an interest as a general partner. There is no current New York law that corresponds to this section.

§ 7-A-10.12 Protection of person dealing with trustee

(a) Except in the case of a breach pursuant to section 7-A-8.2, a person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers, is protected from liability as if the trustee properly exercised the power.

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

(c) A person who in good faith transfers money or property to a trustee is not responsible for the proper application of such money or property; and any right or title derived by him from the trustee in consideration of such transfer is not affected by the trustee's misapplication of such money or property.

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

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

(f) Paragraphs (a) through (e) of this section apply only to transactions that occur after the effective date of this article.

(g) With respect to transactions between a trustee or trustees and any person occurring before the effective date of this article:

(1) If the trust is expressed in the instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee, in contravention of the trust, except as authorized in this article and by any other provision of law, is void.

(2) An express trust not declared in the disposition to the trustee or an implied or resulting trust does not defeat the title of a purchaser from the trustee for value and without notice of the trust, or the rights of a creditor who extended credit to the trustee in reliance upon his apparent ownership of the trust property.

Section 7-A-10.12 provides that, after the effective date of Article 7-A, a non-beneficiary who deals with a trustee in good faith without knowledge that the trustee was improperly exercising powers is protected from liability, except in the case of a breach of the duty of loyalty. In addition, such non-beneficiary is not required to inquire into the extent of the trustee's powers. A non-beneficiary who in good faith deals with a former trustee without knowledge that the trusteeship has terminated is protected from liability. A person who transfers property to a trustee in good faith is not responsible for the proper application of such property. Transactions before the date of enactment would be governed by EPTL sections 7-2.4 and 7-3.2, which are consolidated into paragraph (g).

§ 7-A-10.13 Certification of trust

(a) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing so much of the following information as is requested by such person:

- (1) that the trust exists and the date the trust instrument was executed;
 - (2) the identity of the settlor;
 - (3) the identity and address of the currently acting trustee;
 - (4) the powers of the trustee;
 - (5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
 - (6) the authority of co-trustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee;
 - (7) the manner of taking title to trust property.
- (b) A certification of trust may be signed or otherwise authenticated by any trustee.
 - (c) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.
 - (d) A certification of trust need not contain the dispositive terms of a trust.
 - (e) A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments which designate the trustee and confer upon the trustee the power to act in the pending transaction.
 - (f) A person who acts in reliance upon a certification of trust without knowledge that the representations contained therein are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the certification.
 - (g) A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.
 - (h) A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.
 - (i) This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.
- Section 7-A-10.13 provides that a trustee may furnish a certification of trust instead of a copy of the trust to a non-beneficiary and such certification need only provide the information requested, as outlined within this section. There is no current New York law that corresponds to this section.

PART 11 Miscellaneous Provisions

§ 7-A-11.1 [Reserved]

Section 7-A-11.1 is a reserved section for possible future use.

§ 7-A-11.2 Electronic records and signatures

The provisions of this article governing the legal effect, validity, or enforceability of electronic records or electronic signatures, and of contracts formed or performed with the use of such records or signatures, conform to the requirements of section 102 of the electronic signatures in global and national commerce act (15 U.S.C. § 7002) and supersede, modify, and limit the requirements of the electronic signatures in global and national commerce act.

Section 7-A-11.2 makes clear that any provisions of this Article governing electronic records or signatures are to conform to the requirements of section 102 of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7002) and supersede, modify, and limit the requirements of the Electronic Signatures in Global and National Commerce Act.

§ 7-A-11.3 Severability clause

If any provision of this article or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

Section 7-A-11.3 provides that any potential invalidity of any provision of EPTL Article 7-A does not affect other provisions or applications of EPTL Article 7-A, to the extent possible.

§ 7-A-11.4 Effective date

This article takes effect 180 days after enactment.

Section 7-A-11.4 sets forth that the effective date for EPTL Article 7-A is 180 days after enactment.

§ 7-A-11.5 [Reserved]

Section 7-A-11.5 is a reserved section for possible future use.

§ 7-A-11.6 Application to existing relationships

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

(1) this article applies to all trusts created before, on, or after its effective date;

(2) this article applies to all judicial proceedings concerning trusts commenced on or after its effective date;

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

(4) any rule of construction or presumption provided in this article applies to trust instruments executed before the effective date of the article unless there is a clear indication of a contrary intent in the terms of the trust; and

(5) an act done before the effective date of the article is not affected by this article.

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

(c) The provisions of this article shall not impair or defeat any rights which have accrued under dispositions or appointments in effect prior to its effective date.

Section 7-A-11.6 provides rules regarding the application of EPTL Article 7-A, including its application to trusts created before, on, or after EPTL Article 7-A's effective date and to judicial proceedings concerning trusts commenced on or after its effective date. The section clarifies that if a right is acquired, extinguished, or barred under another statute upon the expiration of a period of time that has started to run before the effective date of EPTL Article 7-A, such other statute continues to apply even if it has been repealed or superseded. The section also makes clear that vested rights will not be adversely affected.

III. PROPOSED NEW YORK UNIFORM DIRECTED TRUST ACT

This portion of the paper sets forth and explains the proposed New York Uniform Directed Trust Act.

ARTICLE 7-B NEW YORK UNIFORM DIRECTED TRUST ACT SUMMARY OF ARTICLE

Part 1. In General

- Section 7-B-1.1 Short title.
7-B-1.2 Definitions.
7-B-1.3 Application; principal place of administration.
7-B-1.4 Common law of trusts; principles of equity.
7-B-1.5 Exclusions.

Part 2. Powers of Trust Director

- Section 7-B-2.1 Powers of trust director.
7-B-2.2 Limitations on powers of trust director.

Part 3. Duties and Liabilities of Trust Director and Directed Trustee.

- Section 7-B-3.1 Duties and liabilities of trust director.
7-B-3.2 Duties and liabilities of directed trustee.
7-B-3.3 Duty to provide information to trust director or trustee.
7-B-3.4 No duty to monitor, inform, or advise.

Part 4. Additional Rules Applicable to Trust Director

- Section 7-B-4.1 Limitation of action against trust director.
7-B-4.2 Defenses in action against trust director.
7-B-4.3 Jurisdiction over trust director.
7-B-4.4 Accepting or declining the position of trust director.
7-B-4.5 Compensation.
7-B-4.6 Trust director's bond.
7-B-4.7 Vacancy in the position of trust director; appointment of successor.
7-B-4.8 Resignation of trust director.
7-B-4.9 Removal of trust director.

Part 5. Application to Co-Trustee

- Section 7-B-5.1 Application to co-trustee.

Part 6. Miscellaneous Provisions

- Section 7-B-6.1 Uniformity of application and construction.
7-B-6.2 Severability clause.
7-B-6.3 Effective date.

PART 1 In General

§ 7-B-1.1 Short title.

This article may be cited as the New York uniform directed trust act.

Section 7-B-1.1 establishes the short title of Article 7-B as the New York Uniform Directed Trust Act.

§ 7-B-1.2 Definitions.

In this article:

(1) “Breach of trust” means a violation by a trust director or trustee of a duty imposed on that trust director or trustee by the terms of the trust, this article, or law of this state other than this article.

(2) “Directed trust” means a trust for which the terms of the trust grant a power of direction.

(3) “Directed trustee” means a trustee that is subject to a trust director’s power of direction.

(4) “Person” means a person as defined by section 1-2.12.

(5) “Power of direction” means a power over a trust granted to a person by the terms of the trust to the extent the power is exercisable while the person is not then serving as a trustee. The term includes a power over the investment, management, or distribution of trust property or other matters of trust administration. The term excludes the powers described in section 7-B-1.5(b).

(6) “Settlor” means a person as defined by section 7-A-1.3(20).

(7) “State” means state as defined in section 7-A-1.3(22).

(8) “Terms of a trust” means terms of a trust as defined by section 7-A-1.3(23).

(9) “Trust” means a trust as defined by section 7-A-1.3(25).

(10) “Trust contributor” means a person as defined by section 7-A-1.3(26).

(11) “Trust director” means a person that is granted a power of direction by the terms of a trust to the extent the power is exercisable while the person is not serving as a trustee. The person is a trust director whether or not the terms of the trust refer to the person as a trust director and whether or not the person is a beneficiary, settlor or trust contributor (other than a settlor) of the trust.

(12) “Trustee” means trustee as defined by 7-A-1.3(29).

(13) “Willful misconduct” means intentional wrongdoing, not mere negligence, gross negligence or recklessness and “wrongdoing” means malicious conduct or conduct designed to defraud or seek an unconscionable advantage.

Section 7-B-1.2 adds new definitions for implementing the provisions of Article 7-B, including definitions of a directed trust, directed trustee, power of direction, and trust director.

§ 7-B-1.3 Application; principal place of administration.

(a) This article applies to a trust, whenever created, that has its principal place of administration in this state, subject to the following rules:

(1) If the trust was created before the effective date of this article, this article applies only to a decision or action occurring on or after the effective date of this article.

(2) If the principal place of administration of the trust is changed to this state on or after the effective date of this article, this article applies only to a decision or action occurring on or after the date of the change.

(b) Without precluding other means to establish a sufficient connection with the designated jurisdiction in a directed trust, terms of the trust which designate the principal place of administration of the trust are valid and controlling if those terms satisfy the requirements of section 7-A-1.8(a).

Section 7-B-1.3 states that this Article applies to trusts which have their principal place of administration in New York, subject to certain limitations. It also clarifies that the terms of a directed trust which designate its principal place of administration will be valid and controlling if such designation satisfies the requirements of Section 7-A-1.8(a) of the EPTL.

§ 7-B-1.4 Common law of trusts; principles of equity.

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

Section 7-B-1.4 makes clear that the common law of trusts and principles of equity may supplement this Article.

§ 7-B-1.5 Exclusions.

(a) In this section, “power of appointment” means a power of appointment as defined by section 10-3.1(a).

(b) This article does not apply to a person who has a:

(1) power of appointment;

(2) power to appoint or remove a trustee or trust director;

(3) power of a trust contributor over a trust to the extent the trust contributor has a power to revoke the trust;

(4) power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects the beneficial interest of:

(A) the beneficiary; or

(B) another beneficiary represented by the beneficiary under SCPA 315 with respect to the exercise or nonexercise of the power; or

(5) power over a trust if:

(A) the terms of the trust provide that the power is held in a nonfiduciary capacity; and

(B) the power must be held in a nonfiduciary capacity to achieve the trust contributor’s tax objectives under the United States Internal Revenue Code of 1986, as amended, and regulations issued thereunder, as amended.

(c) A power granted to a person by the terms of the trust that would otherwise be a power of appointment is a power of direction if the terms of the trust impose fiduciary duties on that person’s exercise of the power.

Section 7-B-1.5 defines “power of appointment” by referencing the definition in Section 10-3.1(a) of the EPTL. This Section further provides that this Article does not apply to persons with certain powers, including, but not limited to, a power of appointment, a power to remove and replace trustees or trust directors, certain powers to affect beneficial interests, and certain powers held in a nonfiduciary capacity. Additionally, this Section provides that powers granted to persons which would otherwise be a power of appointment shall instead constitute a power of direction if the terms of the trust impose fiduciary duties on the exercise of such power.

PART 2 Powers of Trust Director

§ 7-B-2.1 Powers of trust director.

(a) The terms of a trust may grant to a trust director one or more powers of direction. Such powers, the listing of which is not exclusive but illustrative, may include a power to:

(1) direct investments;

(2) adjust between principal and income or convert to a unitrust;

(3) modify, reform, terminate, or decant a trust;

(4) direct a trustee's or another trust director's delegation of a trustee's or other trust director's powers;

(5) change the principal place of administration, situs, or governing law of the trust;

(6) ascertain the happening of an event that affects the administration of the trust;

(7) determine the capacity of a trustee, settlor, trust director, or beneficiary of the trust;

(8) determine the compensation to be paid to a trustee or trust director;

(9) prosecute, defend, or join an action, claim, or judicial proceeding relating to the trust;

(10) grant or withhold permission before a trustee or another trust director may exercise a power of the trustee or other trust director;

(11) release a trustee or another trust director from liability for an action proposed or previously taken by the trustee or other trust director;

(12) enforce a trust for pets pursuant to section 7-A-4.8; or

(13) enforce a non-charitable trust without an ascertainable beneficiary pursuant to section 7-A-4.9.

(b) For purposes of paragraph (a)(1), unless the terms of the trust provide otherwise, the power to direct investments means with respect to all of the trust's investments (or, if applicable, to investments specified in the governing instrument), the power to direct the retention, purchase, sale, exchange, tender or other transaction or decision affecting the ownership thereof or rights therein (including the powers to borrow and lend for investment purposes), to direct the exercise of all management, control and voting powers related directly or indirectly to such investments (including, without limitation, nonpublicly traded investments), to direct the selection of custodians or subcustodians other than the trustee, the selection and compensation of, and delegation to, investments advisers, managers or other investment providers, and with respect to nonpublicly traded investments, the valuation thereof.

(c) Unless the terms of a trust provide otherwise, a trust director may exercise any further power appropriate to the exercise or nonexercise of a power of direction granted to the trust director under paragraph (a). Such further powers, the listing of which is not exclusive but illustrative, may include a power to:

(1) incur reasonable costs and direct indemnification for those costs;

(2) make a report or accounting to a beneficiary or other interested party;

(3) direct a trustee to issue a certification of trust under section 7-A-10.13 of this chapter;

(4) prosecute, defend, or join an action, claim, or judicial proceeding relating to a trust; or

(5) employ a professional to assist or advise the trust director in the exercise or non-exercise or the trust director's powers;

(6) delegate the trust director's power to an agent without liability for the actions of the agent provided the trust director exercises the reasonable care, skill, and caution that is required of a trustee in making a delegation under section 7-A-8.7(a); or

(7) prosecute, defend, or join an action, claim, or judicial proceeding pertaining to the trust where appropriate under the circumstances to the trust director's exercise or non-exercise of the trust director's power of direction.

(d) Unless the terms of a trust provide otherwise, trust directors with joint powers must act by majority decision.

Section 7-B-2.1 provides illustrative examples of powers which may be granted to a trust director in the terms of a trust, including the powers to direct investments, amend or decant a trust, and change the law governing the trust. It also provides examples of further powers that a trust director may exercise in conjunction with a power of direction. The Section also states that unless the terms of a trust provide otherwise, trust directors with joint powers must act by majority decision.

§ 7-B-2.2 Limitations on powers of trust director.

A trust director having the power either to direct the trustee to make a discretionary distribution of principal or income to the trust director as a beneficiary or to consent to such a distribution is subject to the provisions of section 10-10.1 (other than the last sentence thereof) as if for purposes of that section the trust director were a trustee having the power to make a discretionary distribution to the trustee as beneficiary.

Section 7-B-2.2 imposes on trust directors the same limitations applicable to trustees with respect to distributions of income and principal as set forth in Section 10-10.1 of the EPTL.

PART 3 Duties and Liabilities of Trust Director and Directed Trustee

§ 7-B-3.1 General duties and liabilities of trust director.

(a) Subject to paragraph (b),

(1) the trust director has the same duties as a trustee under part 8 of article 7-A, and the same liabilities of a trustee under part 10 of article 7-A, that a trustee would have if the power of direction authorized under the terms of the trust or any further power under section 7-B-2.1(c) was held by a trustee. If the power is held jointly with a trustee or another trust director, the rules applicable to co-trustees under section 7-A-7.3 shall also apply to the trust director; and

(2) the terms of the trust may vary the trust director's duties or liabilities to the same extent the terms of the trust could vary the duties or liabilities of a trustee.

(b) Unless the terms of a trust provide otherwise, if a trust director is licensed, certified, or otherwise authorized or permitted by law other than this article to provide health care in the ordinary course of the trust director's business or practice of a profession, to the extent the trust director acts in that capacity, the trust director has no duty or liability under this article and section 7-B-4.5 shall not apply.

(c) The terms of a trust may impose a duty or liability on a trust director in addition to the duties and liabilities under this section.

(d) Cross reference. See §§ 7-B-3.3(b)(additional duties of trust director) and 7-B-3.4.

Section 7-B-3.1 provides that a trust director has the same duties and liabilities (as provided in parts 8 and 10 of Article 7-A of the EPTL, respectively) that a trustee with the same powers as the trust director would have and further clarifies that these duties and liabilities may be varied to the same extent such duties and liabilities of a trustee could be varied.

§ 7-B-3.2 Duties and liabilities of directed trustee with respect to power of direction.

(a) Subject to paragraph (b), a directed trustee must take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction or a further power under section 7-B-2.1(c) and notwithstanding section 11-1.7 the directed trustee is not liable for any loss resulting directly or indirectly from any action taken pursuant to such exercise of a power of direction or any action not taken pursuant to the nonexercise of a power of direction.

(b) A directed trustee must not comply with a trust director's exercise or nonexercise of a power of direction or further power under section 7-B-2.1(c) to the extent that by complying the trustee would engage in willful misconduct.

(c) A directed trustee that has reasonable doubt about its duty not to engage in willful misconduct may timely petition the court for instructions or present the issue in a pending proceeding.

(d) The terms of a trust may impose a duty or liability on a directed trustee in addition to the duties and liabilities under this section.

Section 7-B-3.2 provides that a directed trustee is not liable for losses resulting from taking reasonable steps to comply with a trust director's exercise or nonexercise of a power of direction. It also provides that a directed trustee must not comply with such exercise or nonexercise of a power of direction to the extent such compliance would constitute willful misconduct.

§ 7-B-3.3 Duty to provide information to trust director or trustee.

(a) Subject to section 7-B-3.4, a trustee shall provide information to a trust director to the extent the information is reasonably related both to:

- (1) the powers or duties of the trustee; and
- (2) the powers or duties of the trust director.

(b) Subject to section 7-B-3.4, a trust director shall provide information to a trustee or another trust director to the extent the information is reasonably related both to:

- (1) the powers or duties of the trust director; and
- (2) the powers or duties of the trustee or other trust director.

(c) Notwithstanding section 11-1.7, a trustee that acts in reliance on information provided by a trust director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trustee engages in willful misconduct.

(d) Notwithstanding section 11-1.7, a trust director that acts in reliance on information provided by a trustee or another trust director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trust director engages in willful misconduct.

Section 7-B-3.3 provides that, subject to Section 7-B-3.4 of the EPTL, trustees and trust directors are required to exchange information to the extent such information is reasonably related to their powers or duties, and further provides that, absent willful misconduct, neither trustees nor trust directors will be liable for a breach of trust resulting from reliance on the information so provided.

§ 7-B-3.4 No duty to monitor, inform, or advise.

(a) Unless the terms of a trust provide otherwise:

(1) a trustee does not have a duty to:

(A) monitor a trust director; or

(B) inform or give advice to a settlor, trust contributor (other than a settlor), beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the trust director; and

(2) by taking an action described in subparagraph (1), a trustee does not assume the duty excluded by subparagraph (1).

(b) Unless the terms of a trust provide otherwise:

(1) a trust director does not have a duty to:

(A) monitor a trustee or another trust director; or

(B) inform or give advice to a settlor, trust contributor (other than a settlor), beneficiary, trustee, or another trust director concerning an instance in which the trust director might have acted differently than a trustee or another trust director; and

(2) by taking an action described in subparagraph (1), a trust director does not assume the duty excluded by subparagraph (1).

Section 7-B-3.4 provides that trustees and trust directors do not have an affirmative duty to monitor the other, nor to inform any other party that such trustee or trust director might have acted differently, unless the terms of the trust provide otherwise.

PART 4. Additional Rules Applicable to Trust Director

§ 7-B-4.1 Limitation of action against trust director.

An action against a trust director for breach of trust must be commenced within the same limitation period as an action for breach of trust against a trustee under section 7-A-10.5.

Section 7-B-4.1 provides that an action against a trust director for breach of trust must be commenced within the same limitation period as an action for breach of trust against a trustee under Section 7-A-10.5 of the EPTL.

§ 7-B-4.2 Defenses in action against trust director.

In an action against a trust director for breach of trust, the trust director may assert the same defenses as a trustee could assert in an action for breach of trust against the trustee.

Section 7-B-4.2 provides that in an action against a trust director for breach of trust, the director may assert the same defenses as a trustee could assert in an action for breach of trust against the trustee.

§ 7-B-4.3 Jurisdiction over trust director.

(a) By accepting appointment as a trust director of a trust subject to this article, the trust director submits to the personal jurisdiction of the courts of this state regarding any matter related to a power or duty of the trust director.

(b) This section does not preclude other methods of obtaining jurisdiction over a trust director. Section 7-B-4.3 provides that by accepting an appointment as trust director of a trust which is subject to this Article, the trust director submits to personal jurisdiction in New York courts.

§ 7-B-4.4 Accepting or declining the position of trust director.

(a) A person designated as trust director accepts the position of trust director:

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

or

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

(b) A person designated as trust director who has not yet accepted the directorship may reject the position of trust director. A designated trust director of a lifetime trust who does not accept the position of trust director within a reasonable time after knowing of the designation and knowing of the occurrence of the event that makes the designation effective is deemed to have rejected the position of trust director.

Section 7-B-4.4 sets forth the ways in which a trust director may accept such directorship, including by complying with the method for acceptance set forth in the trust. This Section also provides that persons designated as a trust director may reject such designation, and that a failure to accept such designation within a reasonable time shall be deemed to be a rejection.

§ 7-B-4.5 Compensation.

Unless the terms of a trust provide otherwise, the trust director, other than one described in section 7-B-3.1(b), and trustee shall be entitled to such compensation as may be reasonable, to be paid pursuant to the provisions of SCPA 2312(5), and the court, upon application of a person interested in the trust, may review the reasonableness of such compensation. This section supersedes any other compensation provision in the SCPA.

Section 7-B-4.5 provides that trust directors (other than certain health-care professionals) and trustees are entitled to reasonable compensation, and that the reasonableness of such compensation is reviewable by the court upon application by a person interested in the trust.

§ 7-B-4.6 Trust director's bond.

(a) Except as provided by paragraph (c), a trust director shall give bond to secure performance of the trust director's duties only if the court finds that a bond is needed to protect the interests of the beneficiaries or is required by the terms of the trust and the court has not dispensed with the requirement.

(b) The court may specify the amount of a bond, its liabilities, and whether sureties are necessary. The court may modify or terminate a bond at any time.

(c) A trust company, as defined by banking law section 2(2), any bank authorized to exercise fiduciary powers and any national bank having a principal, branch or trust office in this state and duly authorized to exercise fiduciary powers need not give a bond unless a bond is expressly required of the trust company or bank by the terms of the trust.

Section 7-B-4.6 provides that a trust director will only be required to give bond if either the court finds that such bond is needed to protect the interests of the beneficiaries, or bond is required by the terms of the trust and the court has not dispensed with such requirement. It further provides that a trust company, as defined by banking law section 2(2), will not be required to give a bond unless expressly required by the terms of the trust.

§ 7-B-4.7 Vacancy in the position of trust director; appointment of successor.

(a) A vacancy in the position of trust director occurs if:

- (1) a person designated as trust director rejects the position of trust director;
- (2) a person designated as trust director cannot be identified or does not exist;
- (3) a trust director resigns;
- (4) a trust director is disqualified or removed;
- (5) a trust director dies;
- (6) a guardian is appointed for an individual serving as trust director; or
- (7) a trust instrument so provides.

(b) A vacancy in the position of trust director shall be filled only if expressly required by the terms of the trust, or if the terms of the trust expressly provide that trustees, other trust directors, or other persons may fill the vacancy in their discretion. If the terms of the trust do not expressly require that a vacancy be filled, and there is no other trust director then serving that is authorized to exercise the same power of direction as that held by the trust director that is no longer serving, the trustee or co-trustee is authorized to exercise the power or powers authorized by that power of direction.

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

- (1) by a person designated in the terms of the trust to act as successor trust director;
- (2) by a person appointed by unanimous agreement of the qualified beneficiaries; or
- (3) by a person appointed by the court.

(d) A vacancy in the position of trust director of a charitable trust that is required to be filled must be filled in the following order of priority:

- (1) by a person designated in the terms of the trust to act as successor trust director;
- (2) by a person selected by the charitable organizations expressly designated to receive distributions under the terms of the trust if the attorney general concurs in the selection; or
- (3) by a person appointed by the court.

Section 7-B-4.7 provides that vacancies in a trust directorship need not be filled unless required or authorized by the terms of the trust, and further provides an order of priority for filling such vacancies.

§ 7-B-4.8 Resignation of trust director.

(a) Unless the terms of a trust provide otherwise, a trust director may resign:

(1) upon at least 30 days' notice, as provided in section 7-A-1.9, to (i) the trust contributor, all co-trustees and all other trust directors in the case of a revocable trust or (ii) the qualified beneficiaries, all co-trustees and all other trust directors, in the case of any other trust; or

(2) with the approval of the court.

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

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

Section 7-B-4.8 provides that trust directors may resign upon 30 days' notice or with approval of the court.

§ 7-B-4.9 Removal of trust director.

(a) In addition to any provision for removal in the trust instrument, the settlor, a co-trustee, co-trust director or a beneficiary may request the court to remove a trust director or a trust director may be removed by the court on its own initiative.

(b) The court may remove a trust director if:

(1) the trust director has committed a serious breach of trust;

(2) lack of cooperation among co-trust directors substantially impairs the administration of the trust;

(3) because of unfitness, unwillingness, or persistent failure of the trust director to effectively exercise the power of direction held by the trust director the court determines that removal of the trust director best serves the interests of the beneficiaries; or

(4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, provided that the court finds that removal of the trust director best serves the interests of all of the beneficiaries and is not inconsistent with the purposes of the trust, and a suitable co-trust director or successor trust director is available.

(c) Pending a final decision on a request to remove a trust director, or in lieu of or in addition to removing a trust director the court may order such appropriate relief under section 7-A-10.1(b) as may be necessary to protect the trust property or the interests of the beneficiaries.

Section 7-B-4.9 provides that, in addition to the methods prescribed in the trust, a settlor, trust director or beneficiary may request the court to remove a trust director, and further provides that a trust director may be removed by the court on its own initiative.

PART 5. Application to Co-Trustee

§ 7-B-5.1 Application to co-trustee.

Unless the terms of the trust provide otherwise, a co-trustee that is required to accept direction from another co-trustee is relieved from duties and liabilities with respect to the exercise or non-exercise of a power held by a co-trustee to direct another co-trustee to the same extent that a directed trustee is relieved from duties and liabilities with respect to a trust director's power of direction as provided in sections 7-B-3.2, 7-B-3.3(c) and 7-B-3.4 (a).

Section 7-B-5.1 provides that as a matter of default a co-trustee is relieved from liability to the same extent that a directed trustee may be relieved from liability as provided in Sections 7-B-3.2, 7-B-3.3(c) and 7-B-3.4(a) of this Article.

PART 6. Miscellaneous Provisions

§ 7-B-6.1 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 7-B-6.1 provides that in applying and construing this Article, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact the Uniform Directed Trust Act.

§ 7-B-6.2 Severability clause.

If any provision of this article or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

Section 7-B-6.2 provides that if any provisions of this Article are held invalid, such invalidity shall not affect the other provisions or applications of this Article.

§ 7-B-6.3 Effective date.

This article takes effect 180 days after enactment.

Section 7-B-6.3 sets forth that the effective date for EPTL Article 7-B.