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Significant Trends in the Trust Law of the United States

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I. INTRODUCTION

In examining significant trends in American trust law, several observations are worth mentioning at the outset. First, trust law in the United States is primarily a matter of state law; thus, the trends discussed below may appear in some states but

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not in others.[1] Second, procedural merger of law and equity in this country has been substantially accomplished in nearly all states, but this should not be understood as eliminating the importance of equitable doctrine and remedies. Third, without abandoning the basic definition of a trust as a fiduciary relationship,[2] there appear to be subtle but practically significant departures from the traditional concept that a trust is not an "entity."[3] Certainly, the tax law has long treated the typical trust as an entity separate from the trustee.[4] In addition, an increasing number of states draw a distinction for various purposes between the trustee personally and the trustee's fiduciary or "representative" capacity.[5]

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1. The promulgation of a "uniform act" by the National Conference of Commissioners on Uniform State Laws merely recommends the act to the various states; the act must then be enacted by the legislatures of individual states in order to become law in those jurisdictions.

2. This continues to be a fundamental aspect of attempts to define the trust concept. For example, RESTATEMENT (THIRD) OF TRUSTS section 2 simply restates the oft-quoted definition of prior Restatements: "[A] trust . . . is a fiduciary relationship with respect to property, arising as a result of 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 the benefit of charity or for one or more persons, at least one of whom is not the sole trustee."

3. Courts continue to deny in dictum that trusts are legal entities, as in the recent *McBee v. Vandecnocke Revocable Trust*, No. WD 54506, 1998 WL 201743 (Mo. Ct. App. Apr. 28, 1998), although the holding that the trustee was an indispensable party to a third party's action could just as well have applied to the trustee in a representative capacity. For a thoroughly sensible recent decision made difficult by this traditional notion, see *Ziegler v. Nickel*, 64 Cal. App. 4th 545 (Cal. Ct. App. 1998).

4. I.R.C. (Subchapter J) §§ 641-79 (West 1994).

5. These purposes range from: (1) the awkward traditional view that a trustee's note to the trust cannot be trust property (after all, one cannot be indebted to oneself!), on which RESTATEMENT (SECOND) OF TRUSTS section 87 is superseded not only by RESTATEMENT (THIRD) OF TRUSTS section 2 cmt. i, and 40 cmt. b, but also by widespread, accepted practice (see Reporter's Notes to RESTATEMENT (THIRD) § 2 cmt. i); to (2) the traditional view that trustees can neither sue nor be sued in their fiduciary capacity; when successful, a third party's suit results in a judgment against the trustee personally, with the trustee to seek reimbursement from the trust estate. It is expected that RESTATEMENT (THIRD) will reverse the position of the prior RESTATEMENTS OF TRUSTS (sections 261-65) by providing that third parties' suits against trustees normally result in a judgment against the trustee *in a representative capacity* (i.e., "against the trust"). Beginning in 1969, the shift in this direction was significantly stimulated by UNIF. PROB. CODE section 7-306 (amended 1993). *See also, e.g.*, CAL. PROB. CODE §§ 18000-18003 (West 1991), GA. CODE ANN. § 53-12-199(b) (1993); MASS. GEN. LAWS ANN. ch. 203, § 14A (West 1997). See more generally on trusts as entities, *Tatarian v. Commercial Union Ins. Co.*, 672 N.E.2d 997, 1000 (Mass. App. Ct. 1996) (although the "entity" in a prior case "was a corporation rather than a trust", the court was not "persuade(d) . . . that a different analysis should therefore apply"); RESTATEMENT (THIRD) OF TRUSTS section 2 cmt. a, and Reporter's Notes thereto; and Jeffrey Schoenblum, *The Hague Convention on Trusts: Much Ado About Very Little,*

Property owners in the United States and elsewhere are generally living longer, often into longer periods of diminished physical or mental health. In addition, it is generally accepted that today broader segments of society than in the past are using trusts, and with a greater diversity of objectives,[6] but increasingly without the aid of legal counsel who are highly skilled in estate planning and trust practice.[7] Perhaps these factors are playing some role in the "user friendly" responses below, making the trust law more sympathetic to the results of error or oversight and more sensitive to the broad variety of trusts, trusteeships, settlor objectives, and beneficiary circumstances.

Part II of this Article will describe substantive trust law in the United States, in particular the creation, interpretation, and reformation of trusts, as well as trust termination and modification. Revocable inter vivos trusts, spendthrift trusts, and related topics will also be addressed. Part III will discuss fiduciary standards, focusing on the duties of the trustee and the rights of beneficiaries.

II. SUBSTANTIVE TRUST LAW

A. *Creation of Trusts*

The new and developing *Restatements*[8] *of Property* and *Trusts* (*Property Third* and *Trusts Third*), the Uniform Probate Code (UPC), and early but distinct trends in other statutory and common law authorities are moving American law in the direction of upholding property owners' attempts to establish trusts in

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3 INT'L TR. & CORP. PLAN. 5, 14 (1994) ("The Convention . . . requires recognition of the trust as a distinct legal entity . . . . Article 11 sets forth certain attributes of the trust that must be recognized. These essentially pertain to the distinction between the trustee acting as a fiduciary and the trustee acting in his individual capacity.").

6. These objectives range from tax and probate avoidance, highly sophisticated plans of disposition, to property management late in life.

7. *See* Joel Dobris, *Changes in the Role and the Form of the Trust at the New Millennium, or, We Don't Have to Think of England Anymore*, 62 ALB. L. REV. 543 (1998).

8. Restatements are produced under the auspices and with the approval of the American Law Institute (ALI) and purport to state a proper or recommended view of current American common law. The RESTATEMENT (THIRD) OF TRUSTS tentative draft no. 2, 1999, containing sections 26 through 60, was approved in May 1999, and tentative draft no. 1, 1996, containing sections 1 through 25, was approved in May 1996. The RESTATEMENT (THIRD) OF PROPERTY (Wills & Other Donative Transfers) was published in 1999 (sections 1 through 5.5 were approved in 1998, and all sections with higher section numbers were approved in May 1995).

situations in which traditional law would have found a transfer defective or an expression of trust intent deficient on some technical or formal ground. This tendency exists whether the transfer is made during life or at death, as long as there is evidentiary and circumstantial security that the trust represents the settlor's properly considered, final intention. Moreover, this trend is evident in various other areas: in legislative or judicial acceptance of some form of "harmless error," "substantial compliance," or "dispensing power" doctrine;[9] in increased tolerance of certain failures to satisfy the Statute of Frauds[10] or the requirements for a completed inter vivos transfer;[11] and in increasingly sympathetic views of attempts to create "semi-secret" testamentary trusts.[12]

American law is finally beginning to clarify and refine rules concerning capacity to create, amend, and revoke inter vivos trusts, recognizing that the degree of capacity to create a revocable trust should be no higher than that to execute a will.[13] The creation of an irrevocable inter vivos trust should depend on whether the trust is purely donative, in which case a gift standard is appropriate,[14] or whether it is part of a negotiated or adversary transaction, for which the higher contract standard would be appropriate.[15]

Similarly, state law throughout the country is beginning to come to grips with issues concerning the creation, amendment, and revocation of trusts on behalf of incapacitated persons by their personal fiduciaries. Examples include agents acting under express provisions of durable powers of attorney and conservators exercising substituted judgment with court

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9. *See, e.g.*, UNIF. PROBATE CODE § 2-503; Will of Ranney, 589 A.2d 1339 (N.J. 1991); Faith v. Singleton, 692 S.W.2d 239 (Ark. 1985). *Cf.* Hickox v. Wilson, 496 S.E.2d 711 (Ga. 1998). *See also* RESTATEMENT (THIRD) OF PROPERTY: DONATIVE TRANSFERS § 3.3 (1999); John Langbein, *Excusing Harmless Error in Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1 (1987).

10. *See* RESTATEMENT (THIRD) OF TRUSTS § 24.

11. *See id.* § 16; *see also* Vasquez v. Vasquez, 973 S.W.2d 330 (Tex. Ct. App. 1998).

12. *See* RESTATEMENT (THIRD) OF TRUSTS § 18 cmt. c. American law on both "secret" (*id.* § 18 cmt. b) and semi-secret trusts draws no distinction between a trust intention that is communicated inter vivos before and one communicated after the execution of the testator's will.

13. *See* RESTATEMENT (THIRD) OF TRUSTS § 11(2) cmt. b (*quoted with approval in* Estate of Aronoff, 177 n.6, 653 N.Y.S.2d 844, 847 n.6 (Surr. Ct. 1996)).

14. *See* RESTATEMENT (THIRD) OF TRUSTS § 11(3) cmt. c (*will* standard plus "ability to understand the effects the disposition may have on the future financial security" of the settlor and her dependents).

15. *See id.* (referring to the standard of capacity in RESTATEMENT (SECOND) OF CONTRACTS § 12).

approval. The tendency here, subject to proper safeguards, is to avoid wholly denying incapacitated persons and their families the benefits of updated estate plans and the ability to adapt to changed legal, financial, and family circumstances.[16]

B. *Interpretation, Reformation, and Policy Limitations*

Analogous trends are discernible in a tendency to lessen traditional obstacles to discovering and carrying out the specific intentions or general objectives of settlors. Evolving doctrine, however, continues to seek reasonable evidentiary reliability in these matters while also insisting that purposes be lawful and within the acceptable limits of dead hand control.

Policy limits on the dead hand begin with the rules regulating perpetuities, the unnecessarily destructive features of which have been removed or at least greatly curtailed in nearly all states in the last several decades. More recent and extreme—and of dubious policy merit—are statutes in several states abolishing the rule against perpetuities as part of an effort to attract trust business from elsewhere by enhancing certain tax-motivated arrangements.[17] Perhaps moving in an understandably more restrictive direction is the inevitably more subjective body of doctrine concerning trust provisions that may be contrary to public policy on grounds other than duration. A lengthy *Trusts Third* section[18] has just received ALI approval. It is designed to clarify, with the general effect of limiting, the extent to which settlors may subject interests of trust beneficiaries to conditions that tend seriously to intrude upon significant personal decisions and the private lives of beneficiaries and their families. These rules, however, would also recognize a court's equitable discretion in appropriate cases to reform objectionable provisions to accommodate reasonable concerns a settlor may have.[19]

Subject to such policy limits, the trend of current *Restatements*, the UPC, and other recent legislative and common law authorities is to lower the barriers to admission of extrinsic evidence and to grant more flexible remedies as needed to give

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16. *See* RESTATEMENT (THIRD) OF TRUSTS § 11(5) cmts. e, f (on preserving, perfecting, or altering an existing estate plan, including one established by operation of law). For a recent case considering and discussing substituted judgment, see *Estate of Berry*, 972 S.W.2d 324 (Mo. Ct. App. 1998).

17. *See, e.g.*, Douglas Blattmachr & Richard Hompesch II, *Alaska v. Delaware, Heavyweight Competition in New Trust Laws*, 12 PROB. & PROP. 32 (1998) (allowing unlimited life for trusts that are exempt under the generation skipping transfer tax); *see infra* text accompanying notes 71-72 (noting the asset protection aspect of these statutes).

18. *See* RESTATEMENT (THIRD) OF TRUSTS § 29(b) cmts. d-h.

19. *See id.* § 29 cmt. e.

effect to settlor intentions. For example, in addition to the traditional use of extrinsic evidence to clarify ambiguities, *Property Third* leads the way in allowing reformation of unambiguous instruments[20] to cure scriveners' errors and other mistakes that are shown by clear and convincing evidence.[21] Courts are also becoming more willing to supply gifts by implication in the trust context.[22]

C. *Non-Charitable Purposes; Absence of Definite Beneficiaries*

Both *Trusts Third* and a modest trend in caselaw and legislation show a growing willingness to give some effect to traditionally invalid attempts to create trusts for indefinite classes of beneficiaries or for specific or trustee-selected non-charitable purposes. Although recognizing dead hand policy limitations and practical enforcement concerns, trust law has thus begun to reject the notion that "because we can't force you to do it, we can't allow you to do it."[23] Under *Trusts Third*, intended trusts, or mandatory provisions of trusts, that cannot be enforced as such may be allowed as "adapted trusts."[24] That is, the intended purpose may be carried out within reasonable time limits, if the devisee or legatee will exercise a generally personal, non-mandatory "power," to appoint or expend funds that are otherwise held in trust for distribution in default of appointment to beneficiaries implied by law—that is, for the testator's successors in interest or for the other beneficiaries of the trust.[25]

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20. *See* RESTATEMENT (THIRD) OF PROPERTY: DONATIVE TRANSFERS § 12.1; *see also* UNIF. TR. ACT §§ 411, 412(b).

21. A much noted earlier case of this type is *Engle v. Siegel*, 377 A.2d 892 (N.J. 1977). *See also* Estate of Robinson, 720 So.2d 540 (Fla. 1998). *Cf.* Erickson v. Erickson, 716 A.2d 92 (Conn. 1998); Ike v. Doolittle, 61 Cal. App. 4th 51 (Cal. Ct. App. 1998). Mistakes are increasingly being held correctible in tax contexts, as in *Griffin v. Griffin*, 832 P.2d 810 (Okla. 1992), and *Simches v. Simches*, 671 N.E.2d 1226 (Mass. 1996), the latter of which is only one among several recent Massachusetts cases. Even the I.R.S. recognizes that unambiguous trusts may properly be reformed in some states to correct a drafter's error. *See* Priv. Ltr. Rul. 9805025 (Nov. 3, 1997); Priv. Ltr. Rul. 9743033 (July 25, 1997).

22. *See, e.g.*, Matter of Bieley, 695 N.E.2d 1119 (N.Y. 1998).

23. This seems a fair paraphrase of the "statement" that *Morice v. Bishop of Durham*, 32 Eng. Rep. 947 (Ch. 1805), made to the willing legatee in that influential classic.

24. *See* RESTATEMENT (THIRD) OF TRUSTS §§ 40-47.

25. The adapted trust for reversionary beneficiaries, subject to the trustee's power of distribution, avoids the complete failure of the decedent's purpose under traditional doctrine, which has required the devisee to hold immediately on the resulting trust. Compare RESTATEMENT (THIRD) OF TRUSTS, with *Leach v. Hyatt*, 423 S.E.2d 165 (Va. 1992), and modern English decisions, such as the apparent change of course in *McPhail v. Doulton*, [1971] App. Cas. 422, [1970] 2 All E.R. 228, and *Re Baden's Deed Trusts* (No. 2), [1972] 2 All E.R. 1304.

Examples include intended trusts for "friends and relatives" to be selected by the intended trustee,[26] intended trusts for "such benevolent, charitable or non-charitable, purposes as T may select,"[27] and the so-called "honorary trusts" for pets, monuments, and other more-or-less worthy, non-capricious purposes that fall short of charity.[28]

D. *Revocable Inter Vivos Trusts*

Earlier concerns and uncertainties about the permissibility and role of revocable living trusts have been gradually resolved over the last half-century or are currently being rapidly resolved in nearly all of the states.

With solid and consistent support in statutes and caselaw, the *Trusts Third* section on the "Validity and Effect of Revocable Inter Vivos Trusts" states:[29]

> [A] trust that is created by the settlor's declaration of trust, by his or her inter vivos transfer to another, or by beneficiary designation or other payment under a life insurance policy, employee benefit or retirement arrangement, or other contract is not rendered testamentary merely because the settlor retains extensive rights such as a beneficial interest for life, powers to revoke and modify the trust, and the right to serve as or control the trustee, or because the trust is funded in whole or in part or comes into existence at or after the death of the settlor, or because the trust is intended to serve as a substitute for a will.[30]

Trusts Third section 25(2) continues with the related and similarly well established proposition[31] that a trust that is "not testamentary"—i.e., not literally created by will—"is not subject to the formal requirements of section 17 (the Wills Act) or to procedures for the administration of a decedent's estate." Although representing an ongoing trend of authority, the rest of section 25(2) presently lacks consistent support from state to state.[32] It continues by stating: "nevertheless, a revocable inter vivos trust is ordinarily subject to substantive restrictions on

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26. *See* RESTATEMENT (THIRD) OF TRUSTS § 46(2) cmts. c-g; UNIF. TR. ACT § 402(b) (Draft 1998).

27. RESTATEMENT (THIRD) OF TRUSTS § 47(1) (providing a different result for the intention that failed in *Morice*); *see also* UNIF. TR. ACT § 406(a) (Draft 1998).

28. *See* RESTATEMENT (THIRD) OF TRUSTS § 47(2). *Cf.* UNIF. PROB. CODE § 2-907(b).

29. *See* RESTATEMENT (THIRD) OF TRUSTS § 25(1) cmts. a-c reporter's notes (authorities collected).

30. *Id.* § 25(2).

31. *See id.*

32. *See* RESTATEMENT (THIRD) OF TRUSTS § 29(2) cmts. d-e reporter's notes (extensive collection and discussion of case and statutory authorities).

testation[33] and to rules of construction[34] and other rules[35] applicable to testamentary dispositions, and in other respects the property of such a trust is ordinarily treated as if it were owned by the settlor."[36]

E. *Termination and Modification of Trusts*

The modern trend in American law is to liberalize the rules governing the termination and modification of trusts by agreement of the beneficiary or by the exercise of judicial authority. In most American states, there is no counterpart of England's Variation of Trusts Act 1958;[37] nor does England[38] recognize a rule like the *Claflin* doctrine, discussed *infra,* that is generally accepted throughout the United States.[39]

The law of most American states on termination and modification by consent of the beneficiaries can be briefly and reasonably well summarized. A trust may be prematurely terminated or modified by the unanimous action of all beneficiaries, provided that to do so will not interfere with a "material purpose" of the settlor, unless the settlor is alive and consents.[40] Two visible, but so far modest, tendencies in the United States are as follows. First, there is a tendency to allow some form of vicarious consent, by guardian *ad litem*[41] or virtual

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33. For example, spousal forced share and creditors' rights. On the latter, see *Estate of Nagel v. Rose,* 520 N.W.2d 810 (Iowa 1998), recently joining cases supporting the RESTATEMENT (THIRD) OF TRUSTS position allowing creditors of a deceased settlor's estate to reach assets in his/her previously revocable inter vivos trust. *Compare id., with* Dunnewind v. Cook, 697 N.E.2d 485 (Ind. Ct. App. 1998) (finding "fraud on the widow's share"). *But cf.* Pezza v. Pezza, 690 A.2d 345 (R.I. 1997) (finding trust not "illusory").

34. For example, pretermitted heir and anti-lapse statutes. *See also* Wasserman v. Cohen, 606 N.E.2d 901 (Mass. 1993) (applying the doctrine of ademption to a revocable trust).

35. *See* RESTATEMENT (THIRD) OF TRUSTS § 25 illus. 11 (provisions in revocable trust revoked by divorce under *wills* statute).

36. *See id.* illus. 12 (on limits per "applicant" in statutes granting public privileges or benefits); *see also* University Nat'l Bank v. Harsh, 833 P.2d 846 (Colo. Ct. App. 1992) (holding that homestead exemption was available for debtor's residence held in his revocable trust).

37. 6 & 7 Eliz. 2, ch. 53 (Eng.). *Compare id., with* MO. REV. STAT. § 456.590.2 (1986).

38. *See* Saunders v. Vautier, 4 Beav. 115, *aff'd,* 41 Eng. Rep. 482 (1841).

39. *But see Hamerstrom v. Commerce Bank,* 808 S.W.2d 434 (Mo. Ct. App. 1991), decided under MO. REV. STAT. § 456.590.2 (1988).

40. *See* IV WILLIAM F. FRATCHER, SCOTT ON TRUSTS § 337-340.2 (4th ed. 1989).

41. *See* Hatch v. Riggs Nat'l Bank, 361 F.2d 559 (D.C. Cir. 1966).

representation,[42] to be given on behalf of unborn or unascertainable beneficiaries.[43] Otherwise, the consent of *all* beneficiaries could never be obtained in typical trusts, such as a trust for X for life, remainder to X's issue living at her death.[44] The second tendency is an attempt to clarify,[45] and perhaps to provide some flexibility in,[46] the material purpose *Claflin*[47] qualification.

In the absence of beneficiary consent, the authority of courts is very limited and can be simply stated with reasonable accuracy. A court may authorize deviation from the administrative terms of the trust if, by reason of changed circumstances not contemplated by the settlor, adherence to those terms would prevent or jeopardize fulfillment of trust purposes.[48] Again, there is a modest or beginning trend toward liberalization of this rule, as long as the settlor's objectives and probable intentions are respected, because of two concerns: (1) the standard involved, essentially one of emergency, may be unnecessarily and undesirably demanding;[49] and (2) that confining equitable deviation to administrative provisions may be

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42. *Cf.* Estate of Lange, 383 A.2d 1130 (N.J. 1978) (stating that consent of parties in interest effectively exonerates executors from liability).

43. *See* UNIF. PROB. CODE § 1-403; CAL. PROB. CODE § 15405 (West 1991) (guardian *ad litem* may give consent based on "general family benefit"); *see also* UNIF. TR. ACT § 408 (Draft 1998), 301-09; Eun C. Han, *Premature Termination of Non-Spendthrift Trusts: Reconciling a Dead Settlor's Intent with a Living Beneficiary's Needs*, 3 TEX. WESLEYAN L. REV. 191, 206-07 (1996).

44. *See, e.g., In re* Lewis' Estate, 79 A. 921 (Pa. 1911); *see also* Levy v. Crocker-Citizens Nat'l Bank, 14 Cal. App. 3d 102 (Cal. Ct. App. 1971) (not allowing termination despite request of settlor who held testamentary general power of appointment over the interests of the unborn potential beneficiaries).

45. *See* Rust v. Rust, 176 F.2d 66, 67 (D.C. Cir. 1949) (distinguishing "material purpose" from mere "intent").

46. *See, e.g.*, CAL. PROB. CODE § 15403(b) (allowing for judicial discretion, in effect, to waive settlor's material purpose); RESTATEMENT (SECOND) OF TRUSTS § 337 cmt. f (1959) (merely providing for enjoyment by successive beneficiaries does not constitute a material purpose that would prevent termination by consent); *see also* UNIF. TR. ACT § 408(a) (Draft 1998) ("inclusion of a spendthrift provision . . . not presumed to constitute a material purpose of the settlor").

47. Claflin v. Claflin, 20 N.E. 454 (Mass. 1889).

48. *See* IIA WILLIAM F. FRATCHER, SCOTT ON TRUSTS § 167-167.2 (4th ed. 1987). *Cf. id.* § 168, 335-36. The standard is less severe when only division of a trust is sought. Quick, easy "splitting" by a trustee without court authorization became particularly important with the 1986 version of the generation-skipping transfer tax. *See* I.R.C. ch. 13 (West 1989); *see, e.g.*, BankBoston v. Marlow, 701 N.E.2d 304 (Mass. 1998); UNIF. TR. ACT § 413 (Draft 1998) (on combining and dividing trusts).

49. *See, e.g.*, Bank of Delaware v. Clark, 249 A.2d 442 (Del. Ch. 1968) (adopting more lenient "substitution of judgment approach"); *see also* UNIF. TR. ACT § 409(a) (Draft 1998) (if deviation "will substantially further the settlor's purposes in creating the trust").

too narrow a restriction because the need to cure inadequate foresight in drafting sometimes extends to distributive details.[50] There is also some thought that it is sufficient that the troublesome circumstances be "unanticipated" by the settlor, even if the circumstances have not "changed."[51]

Modification of charitable trusts under the cy pres doctrine is also a subject of some limited concern,[52] although it would be overstating the case to say that significant developments have occurred to date.[53] Nevertheless, the doctrine has received some attention in the development of a proposed Uniform Trust Act that is likely to be promulgated soon by the National Conference of Commissioners on Uniform State Laws for possible adoption in the individual states; attention will also be given to a few concerns as the American Law Institute's Trusts 3d project proceeds. Experience suggests, however, that some clarification would be useful with respect to how such traditional terms as "impossible or impracticable"[54] might be applied to the increasingly frequent problem of trust funds that become excessive for their stated charitable purposes. The term "wasteful" might be appropriate to describe the point at which some of the trust's funds should cease to be expended for a particular purpose and should be diverted cy pres to another, even though the original purpose could in fact, readily if not wisely, absorb more expenditures.[55] More fundamentally, however, there is increased doubt about the need or duration of a requirement that a "general charitable purpose"—i.e., one broader than the settlor's stated purpose(s)[56]—be found in order to apply cy pres rather than to have the property revert to the

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50. *See* CAL. PROB. CODE § 15409(a) (West 1991) (applying to "dispositive" as well as administrative provisions). *Cf.* MO. REV. STAT. § 456.590.2 (stating that with consent a court may change the terms of a trust). *See also* UNIF. TR. ACT § 409(a) (Draft 1998) ("administrative or dispositive terms").

51. *See* UNIF. TR. ACT § 409(a) (Draft 1998) (analogizing this situation to liberalized mistake doctrine, discussed *supra* notes 20-22).

52. One of the articles expressing concern is Roger Sisson, *Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres*, 74 VA. L. REV. 635 (1988).

53. *But see* MINN. STAT. ANN. § 501.12(3) (West 1991) (softening the initial element of the doctrine to "impracticable, *inexpedient*, or impossible") (emphasis added). *See also* WIS. STAT. ANN. § 701.10 (West 1981).

54. *See, e.g.*, RESTATEMENT (SECOND) OF TRUSTS §§ 399-400 (1959).

55. See the UNIF. TR. ACT § 414(a) (Draft 1998), which would add the word "wasteful" to this initial requirement for the exercise of cy pres. The same word can be expected to be used when the Trusts Third project reaches the matter.

56. *See, e.g.*, RESTATEMENT (SECOND) OF TRUSTS § 399; § 400 (on purposes "fully accomplished without exhausting the trust property").

successors in interest of a settlor who is probably long since deceased.[57]

F. *Creditors and Spendthrift or Discretionary Trusts*

Nearly all jurisdictions in the United States, unlike England, permit voluntary and involuntary restraints on the alienation of the interests of trust beneficiaries in at least some manner or within some limits.[58] Both the exceptions to and the inherent limitations of spendthrift protections lead to the frequent use of "protective" provisions[59] of types that are apparently even more common in England.[60]

It is fair to say that there is no foreseeable likelihood that the basic policy of tolerating spendthrift restraints will change in this country. There is, however, some continuing activity to modify or fine-tune the specifics of spendthrift trust rules in the various states, although one can hardly say that there is a recognizable direction in this "stirring around."[61] On the other hand, because spendthrift protections do not validly apply to interests retained by settlors,[62] various modern developments in the use and design

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57. See UNIF. TR. ACT § 414(a)(2) (Draft 1998), which would simply do away with this requirement and with the possibility that the property might revert. RESTATEMENT (THIRD) OF TRUSTS is more likely to settle for an explicit presumption against the resulting trust, with the presumption to be more difficult to rebut as time passes, and to become conclusive after twenty-one years (by analogy to a perpetuities period without measuring lives, even though reversionary interests are not subject to the common law rule against perpetuities).

58. *See* RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. a reporter's notes.

59. *See* RESTATEMENT (THIRD) OF TRUSTS § 57 & reporter's notes. The most important of the "inherent limitations," under standard doctrine, is that spendthrift protection ends upon distribution, when income or other funds are distributed to a beneficiary. *See* RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. d.

60. See Trustee Act, 1925, 15 Geo. 5, ch. 19, § 33 (Eng.), under which "protective trusts" are regularly created simply by use of that expression.

61. An almost amusing reversal of direction was the prompt 1998 legislation, MISS. CODE ANN. § 91-9-503 (1998), passed to overturn the widely acclaimed *Sligh v. First Nat'l Bank*, 704 So.2d 1020, 1027 (Miss. 1997), which had introduced a policy-based spendthrift exception for the benefit of victims of a beneficiary's gross negligence. Also, even lengthy and vigorous debates in the last few years have eventually led to no significant changes or trends in rules identifying privileged claimants who can penetrate the spendthrift shield. *Compare* RESTATEMENT (THIRD) OF TRUSTS § 59, *with* RESTATEMENT (SECOND) OF TRUSTS § 157 (1959); and UNIF. TR. ACT § 503, *with* ERWIN N. GRISWOLD, SPENDTHRIFT TRUSTS §§ 331-76, at 387-462 (2d ed. 1947).

62. *See* RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. e.

of trusts[63] have required some elaboration and refinement of rules about when a beneficiary is or may become a settlor.[64]

Much more needs to be done concerning the nature of discretionary interests[65] and their susceptibility to attachment by creditors. Much of this need stems from the deficiencies of traditional analyses based on an artificial distinction between "discretionary" and "support" trusts,[66] and from the overly simplistic notion that beneficiaries of discretionary interests have no enforceable rights, so that their creditors have nothing to reach.[67] Gradually, the caselaw is exposing and beginning to confront these generally fallacious ideas.[68] The current *Trusts Third* project seeks to clarify and develop the law in this area,[69] including with respect to modern trusts in which beneficiaries frequently serve as trustees or co-trustees or as holders of non-fiduciary powers of withdrawal, often limited by fairly objective standards for tax reasons.[70]

Some mention should be made of recent legislation in several states to do away with the traditional rule[71] allowing a settlor's creditors to reach the maximum amount a settlor with a retained discretionary interest might receive in the proper exercise of the trustee's discretion.[72] Such legislation is unlikely to spread

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63. These developments have been primarily stimulated by tax planning, with the widespread use of powers of appointment, withdrawal powers, and beneficiaries as trustees or cotrustees.

64. *See* RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. f.

65. *See infra* Part III.E.

66. The positions of RESTATEMENT (SECOND) OF TRUSTS §§ 154-55 are abandoned in RESTATEMENT (THIRD) OF TRUSTS § 60. *See* RESTATEMENT (THIRD) OF TRUSTS § 60 cmt. a reporter's notes (providing criticism and explanation of the new position); *see also* UNIF. TR. ACT § 504 (Draft 1998).

67. RESTATEMENT (SECOND) OF TRUSTS § 155 cmt. b (1959). The supposed lack of enforceable rights, however, is inconsistent with that Restatement's own section 187 (on remedying abuse of discretion). See further discussion of abuse of discretion *infra* Part III.E.

68. *See* RESTATEMENT (THIRD) OF TRUSTS § 50 reporter's notes, § 60 cmt. e reporter's notes.

69. *See* RESTATEMENT (THIRD) OF TRUSTS § 50 & cmts. b, c (on judicial review of trustees' exercise of discretion, and on the effects and limits of grants of "absolute" discretion), cmt. d (on the meaning of standards commonly used by settlors), cmt. e (on the significance of beneficiaries' other resources, including others' duties of support and the relationship to the availability of need-based public benefit programs, such as Medicaid), and cmt. f (on the rights and presumptive priorities among multiple beneficiaries and classes as concurrent beneficiaries).

70. *See id.* § 60 cmt. g.

71. *See, e.g.*, Matter of Shurley, 115 F.3d 333, 337-38 (5th Cir. 1997); RESTATEMENT (SECOND) OF TRUSTS § 156 (1959); RESTATEMENT (THIRD) OF TRUSTS § 60 cmt. f.

72. *See* Blattmachr & Hompesch, *supra* note 17 (discussing the perpetuities features of these statutes).

much further, but one should not underestimate the business protection or attraction incentives and lobbying effectiveness of bankers associations as the perceived threat from offshore havens is joined by a threat from new onshore competitors.

III. FIDUCIARY STANDARDS: TRUSTEES' DUTIES AND BENEFICIARIES' RIGHTS

A. *Some Aspects of the Trustee's Office*

Traditional common law has required unanimity of action by multiple trustees of private trusts, although the law of charitable trusts has provided for majority rule when a charitable trust has three or more trustees. The terms of private trusts often provide for decision making by majority vote and a few statutes prescribe majority control as the default rule. The *Trusts Third* project states the majority-control rule as the preferred common law view in the absence of a contrary provision in the terms of the trust. The Uniform Trust Act will also provide for majority control as the statutory default rule for private as well as charitable trusts.[73] There has been no sign of opposition from advisory groups for these projects or form lawyers' or bankers' organizations.

The normal presumption is that trustees of both charitable and private trusts in this country are entitled to compensation. The widespread use of statutory fee schedules for executors and administrators in this country has generally been supplanted by a rule of "reasonable compensation."[74] The need and justification for abandoning statutory schedules in favor of reasonable compensation is even stronger in the case of trustees.[75] The Uniform Trust Act[76] and *Trusts Third* will reinforce the present trend in this direction.[77] An accompanying trend recognizes that courts have equitable authority to require departures from fee schedules prescribed either by statutes or by trust instruments when circumstances show those schedules to be distinctly excessive or inadequate.[78] The need for greater flexibility and

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73. *See* UNIF. TR. ACT § 703(a)(1) (Draft 1998).

74. This process was accelerated by the promulgation of the UNIF. PROB. CODE (specifically § 3-719) in 1969.

75. In California, for example, although CAL. PROB. CODE section 10800 (West 1991) still provides a statutory fee schedule for personal representatives, section 15681 provides a "reasonable compensation" rule for trustees.

76. *See* UNIF. TR. ACT § 709(a) (Draft 1998).

77. *See* RESTATEMENT (THIRD) OF TRUSTS § 38.

78. *See, e.g.*, DEL. CODE ANN. tit. 12, § 3560 (1995); *see also* RESTATEMENT (THIRD) OF TRUSTS § 38 cmts. c, e; UNIF. TR. ACT § 709(b) (Draft 1998). *Cf.* Andrews

room for the exercise of sound discretion is also being recognized in statutes, cases, and treatises with respect to the determination of compensation entitlements of multiple trustees[79] and the effects on fiduciary compensation of a trustee's employment of advisers or agents.[80] Arbitrary doctrine or statutory rules have often impeded the exercise of common sense in these situations, and flexibility and guidance is offered by an increasing number of modern statutes, cases, and treatise discussions.[81]

B. *Trust Investment Law*

Probably the most significant and pervasive influence on fiduciary standards in this country in the last decade has been, and into the future probably will be, the new "prudent investor rule." It originated in a special, initial volume of the *Trusts Third* project,[82] approved by the American Law Institute in 1990, and was soon codified in several states and then made into a Uniform Act. The Uniform Prudent Investor Act was promulgated in 1994 by the National Conference of Commissioners on Uniform State Laws and is thereby recommended by N.C.C.U.S.L. for codification in all states. The modernized rule has already been enacted or otherwise recognized as law in more than half of the American jurisdictions.

In earlier periods of the twentieth century, the so-called "prudent man rule" gradually became the dominant rule of trust investment law in the various states, generally displacing less flexible approaches, such as "legal lists" of permissible investments. The classic prudent man dictum, subsequently quoted or paraphrased in other cases and treatises, appeared in *Harvard College v. Amory*[83] more than a century and a half ago. More recently, with slight paraphrasing of that dictum, the *Restatement (Second) of Trusts* instructed trustees "to make such investments and only such investments as a prudent man would make of his own property having in view the preservation of the estate and the amount and regularity of the income to be

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v. Gorby, 675 A.2d 449 (Conn. 1996) (an interesting case involving a trust drawn by the fiduciary).

79. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 38 cmt. i.

80. *See, e.g., id.* § 38 cmt. c, illus. 1.

81. *See supra* notes 76-78; *see also* RESTATEMENT (THIRD) OF TRUSTS § 38 reporter's notes.

82. RESTATEMENT (THIRD) OF TRUSTS still (temporarily) presents the main provisions of its Prudent Investor Rule in sections 227-29, but the content of the volume, with its accompanying modifications of other sections of the prior RESTATEMENT, will eventually be incorporated, renumbered, and relocated as the comprehensive RESTATEMENT (THIRD) OF TRUSTS project continues.

83. 26 Mass. (9 Pick.) 446, 461 (1830).

derived . . . ."[84] This and earlier statements of general principles of care, skill, and caution (collectively, "prudence") were developed, applied, and elaborated in the caselaw. Generalizations were articulated and efforts were made to provide guidance to trustees, with the result that over time the prudent man rule lost much of its generality and adaptability as applied in most states.

America's leading trust law scholar, the late Professor Austin Scott, acknowledged that "what was decided in one case as a question of fact tend[ed] to be treated as a precedent establishing a rule of law,"[85] although his own work contributed significantly to this unfortunate tendency.[86] Thus, the tendency was "to lay down definite subsidiary rules on what is and what is not a prudent investment"[87] and to treat a case disapproving a particular investment by a trustee "as a precedent holding that no investment of that type is proper."[88] As a result, general standards often became crystallized into doctrine prescribing, with varying degrees of specificity and usually with some recognition of the benefits of diversification, the permissible types and characteristics of trust investments. These were usually based on some perceived but undefined degree of risk that exceeded the limits of caution. With investments so classified and judged in isolation, and with broad categories of assets or courses of action branded as "speculative," trustees in surcharge actions have found it difficult, if allowable at all, to show that a particular investment or strategy falling outside the approved categories was prudent in a particular case.

Knowledge, experience, and practices in the modern investment world demonstrate that many prohibitions under the traditional prudent man rule are unwarranted and likely to be counterproductive, inhibiting the exercise of sound judgment by skilled fiduciaries and creating risks of unjustified liability for all trustees. Well-documented and generally compelling bodies of theoretical and empirical research (including scholarship recognized by a Nobel Prize in economics), as well as considerable professional literature, support these criticisms of the traditional prudent man rule.[89]

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84. RESTATEMENT (SECOND) OF TRUSTS § 227 (1959).

85. 3 AUSTIN W. SCOTT, THE LAW OF TRUSTS § 227, at 431 (2d ed. 1956).

86. To that end, see *id.*, as well as the first and second RESTATEMENTS OF TRUSTS, for which Scott was the reporter. *See* RESTATEMENT (SECOND) OF TRUSTS § 227 (1959).

87. III WILLIAM F. FRATCHER, SCOTT ON TRUSTS § 227, at 434 (4th ed. 1988).

88. *See id.* at 435.

89. *See generally* BEVIS LONGSTRETH, MODERN INVESTMENT MANAGEMENT AND THE PRUDENT MAN RULE (1986); Harvey E. Bines, *Modern Portfolio Theory and Investment Management Law: Refinement of Legal Doctrine*, 76 COLUM. L. REV. 721 (1976).

Section 227 of *Trusts Third: Prudent Investor Rule* states the "General Standard of Prudent Investment" as follows: "[t]he trustee is under a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements and other circumstances of the trust." It continues:

> [T]his standard requires the exercise of reasonable care, skill and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust.[90]

Section 227(b) imposes a forceful but nevertheless flexible duty to diversify trust investments, while section 227(c) requires compliance with the "fundamental fiduciary duties of loyalty and impartiality"[91] and of prudence in delegation,[92] as well as emphasizing the increasingly important duty of the trustee to be cost-conscious in the discharge of trust investment responsibilities. These various principles are explained and illustrated through almost one hundred pages of official commentary and reporter's notes.[93]

The traditional rule generally prohibiting the offsetting of gains against losses from breaches of trusts is widely misunderstood to hinder reliance on modern portfolio theory in trust investment. Nevertheless, *Trusts Third* revisits this subject and provides some fine-tuning for this so-called "no-netting rule." More important is a change of direction in Trusts 3d calling for a trustee's liability for improper investment conduct to be based on a *total return*, positive or negative, measure of damages.[94] This change would generally allow surcharge recoveries to reflect gains and losses in value that reasonably should have been expected from an appropriate investment program, rejecting the traditional notion that such liability is necessarily too speculative.[95] The new rule should ensure that trustees who have ignored important aspects of their fiduciary obligations through inadequate investment strategies will not be insulated from liability merely

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90. RESTATEMENT (THIRD) OF TRUSTS § 227.

91. *See* discussion of impartiality *infra* Part III.D.

92. *See* discussion of delegation *infra* Part III.C.

93. *See* TRUSTS (THIRD): PRUDENT INVESTOR RULE § 227 (1992).

94. *See id.* §§ 205, 208-11 (containing partial, preliminary modifications of §§ 205, 208-11 of the prior RESTATEMENT).

95. Why and how this modernized approach would be used is explained, and relevant experience and authorities are cited, in *id.* reporter's notes at 166-73. *See also* Edward C. Halbach, Jr., *Trust Investment Law in the Third Restatement*, 27 REAL PROP., PROB. & TR. J. 407, 458-62 (1992). This approach was recently adopted, correctly and with no apparent difficulty, in *Estate of Wilde*, 708 A.2d 273, 276 (Me. 1998).

because their investment programs have escaped loss of dollar value during periods of significantly rising markets.

A fundamental premise of the prudent investor rule is that no investment or course of action is per se impermissible.[96] Counterparts of this principle can be expected to apply pervasively to matters of trust administration and to appear throughout the administration chapters of *Trusts Third.* Traditional questions about whether a trustee possesses particular powers will be replaced by a recognition that, absent a contrary trust provision, a trustee has all the powers of other property owners but with a duty of prudent exercise. The prudence of a trustee's conduct in a particular case thus will be judged in full context, in light of the terms, purposes, and other circumstances of the trust as well as the trustee's general fiduciary duties.

C. *Delegation*

Illustrative of the foregoing observation is the default rule concerning a trustee's authority to delegate. The trust law of the future will not ask whether or for what purposes the power exists, but will simply focus on the circumstances and manner of its exercise. In the last decade, the law's negative attitude toward delegation by trustees has been substantially reversed.

Traditionally, absent a contrary trust provision, cases and treatises have grudgingly accepted delegation on a narrowly confined basis. Prior *Restatements* have allowed it only for "ministerial" acts or to the extent that the trustee has no reasonable alternative,[97] and they have specifically forbidden delegation of the "power to select investments."[98]

The prudent investor rule of *Trusts Third* requires only that a trustee "act with prudence in deciding whether and how to delegate authority and in the selection and supervision of agents."[99] In official commentary on investment activities, *Trusts Third* observes that "the trustee has power, and may sometimes have a duty, to delegate such functions and in such manner as a

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96. *See* UNIF. PRUDENT INVESTOR ACT § 2(e), 7B U.L.A. 61 (Supp. 1998), and accompanying comments (especially "[a]brogating categoric restrictions"); RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE, at 5 (1992) (explaining "[p]rinciples of prudence" in the Introduction). On the extension of such a principle to administrative powers generally, see Trusts of Land and Appointment of Trustees Act, 1996, § 6(1) (Eng.).

97. *See* RESTATEMENT (SECOND) OF TRUSTS § 171 (1959).

98. *See id.* cmt. h.

99. RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 227(c)(2) (1992). *See generally* John H. Langbein, *Reversing the Nondelegation Rule of Trust-Investment Law*, 59 MO. L. REV. 105 (1994).

prudent investor would delegate under the circumstances."[100] The Uniform Prudent Investor Act offers a codification of the rule of *Trusts Third* with respect to investment "and management" functions,[101] and expressly provides that a trustee who complies with the requirements of proper delegation[102] "is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated."[103]

D. *Duty of Impartiality*

Trust law has long recognized the trustee's duty of impartiality and the companion duty to make the trust estate reasonably "productive"—i.e., of trust accounting income—for the benefit of income beneficiaries. These duties obligate the trustee to balance the competing objectives and concerns associated with the diverse beneficial interests in typical private trusts. Counterparts to these issues exist in charitable trusts, in which productivity is a concern whenever (as in typical institutional endowments) "income" is to be expended, or whenever the interests of the "present" must be balanced against the interests of the "future."[104]

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100. RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 227 cmt. j (1992). An appendix to this volume partially and preliminarily amends the rule of RESTATEMENT (SECOND) OF TRUSTS section 171 (on delegation generally) to state: "A trustee has a duty personally to perform the responsibilities of the trusteeship except as a prudent person might delegate those responsibilities to others," adding that in "deciding whether, to whom and in what manner to delegate fiduciary authority in the administration of a trust, and thereafter in supervising agents, the trustee is under a duty . . . to exercise fiduciary discretion and to act as a prudent person would act in similar circumstances." *Id.* app. § 171. Amended Comment f of that appendix section adds:

> Delegation is not limited to the performance of ministerial acts. In appropriate circumstances delegation may extend, for example, to discretionary acts, to the selection of trust investments or the management of specialized investment programs, and to other activities of administration involving significant judgment. . . . The trustee's exercise of this discretionary authority is judicially reviewable only for abuse, based on failure to exercise the required degree of care, skill, or caution.

101. *See* UNIF. PRUDENT INVESTOR ACT § 9(a), 7B U.L.A. 69 (Supp. 1998).

102. *See id.* § 9(a)(1)-(3) (requiring prudence in selecting an agent, in establishing the scope and terms of the delegation, and in monitoring the agent's performance and compliance with the terms of the delegation).

103. *Id.* § 9(c).

104. The UNIF. MANAGEMENT OF INSTITUTIONAL FUNDS ACT, 7A U.L.A. 475 (1999), attempts, reasonably successfully, to address concerns of this type, mainly with respect to investment and distributions.

The most important trend in these matters is a growing professional understanding, or at least awareness, of the subtle issues inherent in the duty of impartiality and in the duty with respect to productivity. Unfortunately, the true nature and implications of the duty of impartiality have been little explained, and vaguely defined at best, in the cases and literature. This is true even in the Internal Revenue Service's hazy insistence upon a normal, state law degree of "productivity" in trusts that are intended to qualify for such privileges as the marital deduction and the gift tax annual exclusion.[105]

The prudent investor rule of *Trusts Third* includes a comprehensive but flexible duty of impartiality and seeks to clarify and in some respects to broaden the contents of the duty, or at least to create sensitivity to the breadth of its potential application.[106] The rule also identifies trust situations in which the "productivity" feature of this duty has little or no relevance.[107] In addition, the commentary makes clear that a trustee's productivity concerns relate to the trust portfolio as a whole, rather than to each individual investment.[108]

The *Trusts Third* prudent investor rule also attempts to make clear that impartiality does not require an *equal* balancing of diverse interests, which may involve not only the obvious conflicting interests of income and remainder beneficiaries, but also the conflicting needs and objectives of multiple income beneficiaries or of multiple remainder beneficiaries.[109] Rather, this duty calls for the balancing of interests in a manner consistent with the terms and purposes of the trust, including a settlor's ascertainable or inferred preferences for some beneficiaries over others, such as the priority frequently intended for a surviving spouse over descendants or other future interest holders. Essentially, the duty of impartiality ordinarily forbids a trustee from injecting its own "substantive" favoritism in making discretionary distributions or investment decisions and, in "procedural" matters, from consulting with or providing information to the life beneficiary to the exclusion of persons interested in the remainder. Thus, the concerns and wishes and

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105. *See, e.g.*, I.R.C. §§ 2056, 2503 (1994).

106. The author has explained this in his article, as well as in *Trusts (Third)'s Prudent Investor Rule* volume. *See* Halbach, *Trust Investment Law, supra* note 95; RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 227 cmt. i, cmt. c (1992) & app. §§ 181, 183, and especially 232; *see also id.* §§ 239, 240.

107. This is the case with respect to wholly discretionary trusts, annuity or unitrust arrangements, and, to a lesser degree, trusts with flexible powers to invade principal.

108. *See* RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 227 cmt. i (1992).

109. *See id.* § 227, cmt. i & app. § 232.

the personal, financial, and tax circumstances of the various beneficiaries are all to be taken into account in a manner consistent with the terms and purposes of the particular trust.

Finally, *Trusts Third* makes clear that a trustee must take account of the risks inflation might pose to purchasing power and real values, again in a manner and to an extent consistent with the nature and objectives of the particular trust.[110]

The prudent investor rule's emphasis on strategies and objectives that are consistent with the purposes of each individual trust and on portfolio theory and the benefits of investing for total return[111] has stimulated trust practitioners' interest in understanding finance.[112] Some particularly useful materials for the foreseeable future will be the recent professional writings concerning the importance of and techniques for avoiding conflicts between productivity requirements and optimal total-return investment objectives through creative trust design, often emphasizing unitrust life interests,[113] and through revision of statutes governing trust principal and income accounting to include some form of special adjustment power.[114]

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110. *Id.; see also* § 227 cmt. c and especially cmt. e.

111. Essentially, income yield plus increase in corpus value.

112. Grants from the The American College of Trust and Estate Counsel Foundation have resulted in a valuable, concise text for a lawyer audience, already in its second edition. *See* JONATHAN R. MACEY, AN INTRODUCTION TO MODERN FINANCIAL THEORY (2d ed. 1998); *see also* Burton G. Malkiel, *An Update on Modern Financial Theory*, 24 ACTEC NOTES 127 (1998) (ACTEC's 1998 Joseph Trachtman Lecture).

113. An opening piece in the growing "dialogue" was Robert B. Wolf, *Defeating the Duty to Disappoint Equally—The Total Return Trust*, 23 ACTEC Notes 46 (1997). Then came William L. Hoisington, *Modern Trust Design: New Paradigms for the 21st Century*, 31 U. MIAMI INST. ON EST. PLAN. ch. 6, ¶¶ 600-10) (1997); Joel C. Dobris, *Why Trustee Investors Often Prefer Dividends to Capital Gain and Debt Investments to Equity—A Daunting Principal and Income Problem*, 32 REAL PROP., PROB. & TR. J. 255 (1997); Robert B. Wolf, *Total Return Trust—Can Your Clients Afford Anything Less?*, 33 REAL PROP., PROB. & TR. J. 131 (1998); and Jerold I. Horn, *Prudent Investor Rule, Modern Portfolio Theory, and Private Trusts: Drafting and Administration Including the "Give-Me-Five" Unitrust*, 33 REAL PROP. PROB. & TR. J. 1 (1998). On charitable trusts, see Stanley Lebergott, *Nonprofits Should Rethink Investment Strategies*, Public Affairs Report (U. of Calif., Sept. 1996).

114. See the power of the recently promulgated UNIF. PRINCIPAL & INCOME ACT § 506 (revised 1997), 7B U.L.A. 35 (Supp. 1998), which has not only stimulated legislative and law reform commission interest in developing other alternatives for adjustment, but also consideration of a default rule that would attribute a unitrust construction to a grant of a right to "income" (the likely outcome of current deliberations in New York).

E. *Judicial Review of Discretion*

The use of trust powers and the discharge of trusteeship responsibilities regularly involve the exercise of fiduciary judgment, or discretion, with which courts generally do not interfere except to prevent abuse or the misinterpretation of trust provisions.[115]

The growing use and variety of discretionary trusts—or more properly, trusts that grant the trustee discretion with respect to some or all of the distributions that one or more of the beneficiaries are to receive—give rise to increasingly common and increasingly diverse issues about discretionary powers and benefits. Discretion may relate to invasion of principal for an income beneficiary, distributions of income or principal to or for the benefit of either a primary beneficiary or a secondary (or lower priority) beneficiary, or distributions that are to be sprinkled among a class of beneficiaries, such as the settlor's surviving spouse and descendants. Judicial decisions, practitioners, and authors of articles and treatises increasingly recognize and attempt to respond to the need to provide guidance to trustees, beneficiaries, and judges.

Issues addressed in recent years include: the presumed construction of recurring standards (for example, "support") or of discretionary powers in the absence of express standards;[116] whether and in what manner a trustee is to take account of a beneficiary's other resources that could be used for the settlor's intended purpose(s);[117] the extent to which the trustee's discretion, judicial supervision, and the beneficiaries' rights of enforcement are affected by the settlor's use of such language as "sole and uncontrolled" or "absolute" discretion;[118] and how all of this applies, including the priority and impartiality-related preferences to be attributed to settlors, when a discretionary power is for multiple individuals or classes as concurrent beneficiaries.[119] Statutes and decisions increasingly make clear that language such as "absolute" and the like in a grant of discretion, or a provision under which the trustee is to determine whether a particular beneficiary is to receive anything, is not to be taken literally; such language does not dispense with the trustee's normal duty to act in

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115. II WILLIAM F. FRATCHER, SCOTT ON TRUSTS §§ 128-128.7 (4th ed. 1987).

116. *See* RESTATEMENT (THIRD) OF TRUSTS § 50 cmts. b, d.

117. *See id.* cmt. e. Also considered in this comment are such matters as another's duty to support the beneficiary and, of growing importance, the potential availability of need-based public benefit programs.

118. *See id.* cmt. c.

119. *See id.* cmt. f.

good faith and in a manner consistent with the terms and purposes of the discretionary power.[120]

F. *Duty with Respect to Accounting and Disclosure*

A trustee's duty to provide information to beneficiaries on a reasonable basis has long been recognized.[121] Nevertheless, practice, experience, and litigation in the United States clearly demonstrate that there is considerable reluctance, and at least a fair amount of uncertainty, among fiduciaries concerning the applicability and performance of this general duty. It is well recognized that principles of accountability and disclosure do not apply to donees (holders) of powers of appointment, the exercise of which may be arbitrary and need not be justified or explained as long as the scope of the power is not exceeded.[122] It is not so clear, however, to whom the *trustee's* duties run when a trust contains powers of appointment; but it would seem clear enough that potential takers in default (although probably not other objects of an unexercised power) are "beneficiaries" and as such are entitled to notices and information, and that the donee of a power should also be so viewed.[123]

Some duty to account is fundamental to the fiduciary relationship. This, however, has not and should not be taken to mean that the terms of a trust cannot narrow, lower, or otherwise alter the duty to render accountings, particularly routine or formal accountings.[124] On the other hand, the increased emphasis on the accepted principle that trusts are for the benefit of the beneficiaries has led in recent years to increased emphasis on and clarification of the rights of beneficiaries to obtain information and copies of trust provisions,[125] except to the extent the trust is subject to revocation by a legally competent settlors.[126] Some recent legislation has been so strong in recognizing and perhaps expanding the rights of beneficiaries that protests have been heard from some members of

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120. *See, e.g., id.* cmt. c reporter's notes (containing an extensive collection and discussion of authorities); *see also* UNIF. TR. ACT § 815 (Draft 1998). For a more general provision on discretion, see section 801 of the Uniform Trust Act.

121. *See, e.g.,* GEORGE T. BOGERT, TRUSTS §§ 140-42 (6th ed. 1987).

122. *See, e.g.,* RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. a. As that comment notes, however, it is not always easy to draw a line between fiduciary and non-fiduciary powers. *See id.*

123. See definition of "beneficiary" in UNIF. TR. ACT § 105(1) (Draft 1998).

124. *See id.* § 142; RESTATEMENT (SECOND) OF TRUSTS §§ 172 cmt. b, 173 cmt. c (1959).

125. *See* UNIF. TR. ACT § 814 (Draft 1998).

126. *See, e.g., id.* § 814(f).

the Bar,[127] particularly those whose practice includes representation of trustees but also some concerned about the wishes of client-settlors. Nevertheless, the trend of legislation and judicial decisions likely will continue to favor increased openness and disclosure in most situations involving irrevocable trusts, even discretionary trusts.[128]

A popular, related development is the adoption or recommendation of statutes that authorize and facilitate informal accountings, and that authorize and simplify certain other actions out of court. Some recent legislative efforts of this type raise significant due process issues, but sound models for legislation (and guides even for parties wishing to proceed without specific statutory blessing) have been formulated in the last several years.[129]

G. *Trust Protectors*

An important recent development in trust and estate planning practice, especially in connection with offshore trusts, has been the use of trust "protectors." The protector may be one of several trustees or a beneficiary, but often is neither, and may have extensive authority or a narrowly defined power to change trustees or the situs of administration. Some protectors with broader authority are granted powers to clarify or modify trust terms for purposes such as: qualifying for or accomplishing some specific tax or non-tax objective(s); improving administration or otherwise promoting the settlor's general purposes or the beneficiaries' best interests; or even adding or eliminating beneficiaries or rearranging their rights.

The diverse types of protectors and the sheer variety of their uses and powers create serious difficulties in attempting to generalize about the nature of the protector's role and obligations. Under what circumstances and to what extent is a trust protector a fiduciary? Might some powers of some protectors be more like powers of appointment, perhaps even exercisable for the protector's personal or family benefit, with little accountability to others? There are also choice of law and even jurisdictional

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127. This has been true with respect to CAL. PROB. CODE sections 16061, 16061.5, 16061.7 (West. 1991).

128. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. b (stating that discretionary beneficiaries are entitled "not only to accounting information but also to relevant information concerning the bases upon which the trustee's discretionary judgments have been or will be made").

129. *See* UNIF. PROB. CODE § 1-403, 8 U.L.A. 69 (1998); *see also* UNIF. TR. ACT art. 3, §§ 301-09 (Draft 1998).

issues to be explored, often in relatively novel circumstances.[130] Unfortunately, trust law in the United States shows virtually no appellate experience with the protector concept or other legal development of it.

The present void in American trust doctrine aggravates the difficulty of interpretation and the issues of fiduciary responsibility that are an inevitable result of the novelty and diversity of trust protector provisions—not to mention the risk of unanticipated, adverse tax consequences. This uncertainty creates an immense challenge for American estate planners, who may find it helpful to look to England or elsewhere for legal developments or professional guidance on trust design and drafting. One might reasonably speculate that in the United States, absent some clear indication of contrary intent, the powers granted to a protector will be deemed to be held in a fiduciary capacity, even if not that of trustee,[131] with considerable breadth of freedom to act in the collective best interests of the beneficiaries, in good faith, with a general duty of impartiality, and in a manner consistent with the settlor's purposes in creating the trust and the office of trust protector. One might further speculate that, presumptively at least, it would be appropriate to treat a trust protector who has broad, "sole and uncontrolled," and "binding" discretion essentially as the trust law would treat a *trustee* with such an "absolute" discretion.[132]

IV. CONCLUSION

The foregoing discussion has not attempted to review all recent developments in American trust law. It does, however, reflect the author's perceptions of current and continuing trends that are significant to trust and estate planning lawyers in the United States and of interest to comparative and international law scholars and practitioners elsewhere.

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130. A somewhat analogous problem arose in a recent case, *District of Columbia v. Chase Manhattan Bank*, 689 A.2d 539 (D.C. App. 1997), which held that continuing contact between a D.C. domiciliary's testamentary trust and D.C. courts sufficed to satisfy the due process requirement of a significant link between the District and the trust to allow it to be treated by the District as a resident for income tax purposes.

131. *Cf.* UNIF. TR. ACT § 809 (Draft 1998) (concerning powers granted to others to direct trustees).

132. *See supra* Part III.E; notes 118, 120 and accompanying text; *see also* Antony Duckworth, *Protectors—Fish or Fowl? Part II*, 5 J. OF INT'L TR. & CORP. PLAN. 18, 18-19 (1996) ("Administrative Powers—Purpose Restrictions"). *But cf.* UNIF. TR. ACT § 815 cmt. (Draft 1998) (explaining that the section applies only to powers held in a fiduciary capacity).