

Stricken language would be deleted from and underlined language would be added to the law as it existed prior to this session of the General Assembly.

1 State of Arkansas  
2 85th General Assembly  
3 Regular Session, 2005  
4

*As Engrossed: H3/10/05*

# A Bill

SENATE BILL 336

5 By: Senator Luker  
6 By: Representatives Maloch, Bond  
7

## For An Act To Be Entitled

10 AN ACT TO ADOPT THE ARKANSAS TRUST CODE; AND FOR  
11 OTHER PURPOSES.

### Subtitle

14 AN ACT TO ADOPT THE ARKANSAS TRUST CODE.

17 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

19 SECTION 1. Arkansas Code Title 28 is amended to add an additional  
20 chapter to read as follows:

#### CHAPTER 73

#### ARKANSAS TRUST CODE

#### Subchapter 1 – General Provisions and Definitions

25 28-73-101. Short title.

26 This chapter may be cited as the "Arkansas Trust Code".

28 28-73-102. Scope.

29 (a) This chapter applies to express trusts, charitable or  
30 noncharitable, and trusts created pursuant to a statute, judgment, or decree  
31 that requires the trust to be administered in the manner of an express trust.

32 (b) Notwithstanding subsection (a) of this section, this chapter does  
33 not apply to public trusts that are governed by §§ 28-72-201 -- 28-72-207.

35 28-73-103. Definitions.

36 In this chapter:



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

3           (2) “Ascertainable standard” means a standard relating to an  
4 individual’s health, education, support, or maintenance within the meaning of  
5 Sections 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code of 1986, as  
6 in effect on September 1, 2005.

7           (3) “Beneficiary” means a person that:

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

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

12           (4) “Charitable trust” means a trust, or portion of a trust,  
13 created for a charitable purpose described in § 28-73-405(a).

14           (5) “Community property” means all personal property, wherever  
15 situated, which was acquired as or became, and remained, community property  
16 under the laws of another jurisdiction, and all real property situated in  
17 another jurisdiction which is community property under the laws of that  
18 jurisdiction.

19           (6) “Conservator” means a person appointed by the court pursuant  
20 to §§ 28-67-101 – 28-67-111 to administer the estate of an individual who by  
21 reason of advanced age or physical disability is unable to manage his or her  
22 property.

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

25           (8) “Guardian” means a person appointed by a court pursuant to  
26 §§ 28-65-101 – 28-65-603 to have the care and custody of the estate of an  
27 incapacitated person.

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

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

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

36           (12) “Power of withdrawal” means a presently exercisable general

1 power of appointment other than a power exercisable by a trustee which is  
2 limited by an ascertainable standard, or which is exercisable by another  
3 person only upon consent of the trustee or a person holding an adverse  
4 interest.

5 (13) "Property" means anything that may be the subject of  
6 ownership, whether real or personal, legal or equitable, or any interest  
7 therein.

8 (14) "Qualified beneficiary" means a living beneficiary who, on  
9 the date the beneficiary's qualification is determined:

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

12 (B) would be a distributee or permissible distributee of  
13 trust income or principal if the interests of the distributees described in  
14 subdivision (14)(A) of this section terminated on that date, but the  
15 termination of those interests would not cause the trust to terminate; or

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

18 (15) "Revocable", as applied to a trust, means revocable by the  
19 settlor without the consent of the trustee or a person holding an adverse  
20 interest.

21 (16) "Settlor" means a person, including a testator, who  
22 creates, or contributes property to, a trust. If more than one (1) person  
23 creates or contributes property to a trust, each person is a settlor of the  
24 portion of the trust property attributable to that person's contribution  
25 except to the extent another person has the power to revoke or withdraw that  
26 portion.

27 (17) "Spendthrift provision" means a term of a trust which  
28 restrains both voluntary and involuntary transfer of a beneficiary's  
29 interest.

30 (18) "State" means a State of the United States, the District of  
31 Columbia, Puerto Rico, the United States Virgin Islands, or any territory or  
32 insular possession subject to the jurisdiction of the United States. The  
33 term includes an Indian tribe or band recognized by federal law or formally  
34 acknowledged by a state.

35 (19) "Terms of a trust" means the manifestation of the settlor's  
36 intent regarding a trust's provisions as expressed in the trust instrument or

1 as may be established by other evidence that would be admissible in a  
2 judicial proceeding.

3 (20) "Trust instrument" means an instrument executed by the  
4 settlor that contains terms of the trust, including any amendments thereto.  
5 and

6 (21) "Trustee" includes an original, additional, successor  
7 trustee, and a co-trustee.

8  
9 28-73-104. Knowledge.

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

12 (1) has actual knowledge of it;

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

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

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

28  
29 28-73-105. Default and mandatory rules.

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

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

35 (1) the requirements for creating a trust;

36 (2) the duty of a trustee to act in good faith and in accordance

1 with the purposes of the trust;

2 (3) the requirement that a trust and its terms be for the  
3 benefit of its beneficiaries, and that the trust have a purpose that is  
4 lawful, not contrary to public policy, and possible to achieve;

5 (4) the power of a court to modify or terminate a trust under  
6 §§ 28-73-410 – 28-73-416;

7 (5) the effect of a spendthrift provision and the rights of  
8 certain creditors and assignees to reach a trust as provided in subchapter 5  
9 of this chapter;

10 (6) the power of a court under § 28-73-702 to require, dispense  
11 with, or modify or terminate a bond;

12 (7) the power of a court under § 28-73-708(b) to adjust a  
13 trustee's compensation specified in the terms of the trust which is  
14 unreasonably low or high;

15 (8) the rights under §§ 28-73-1010 – 28-73-1013 of a person  
16 other than a trustee or beneficiary;

17 (9) periods of limitation for commencing a judicial proceeding;

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

20 (11) the subject-matter jurisdiction of a court for commencing a  
21 proceeding as provided in § 28-73-203.

22  
23 28-73-106. Common law of trusts – Principles of equity.

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

27  
28 28-73-107. Governing law.

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

30 (1) the law of the jurisdiction designated in the terms unless  
31 the designation of that jurisdiction's law is contrary to a strong public  
32 policy of the jurisdiction having the most significant relationship to the  
33 matter at issue; or

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

1  
2 28-73-108. Principal place of administration.

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

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

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

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

13 (c) Without precluding the right of a court to order, approve, or  
14 disapprove a transfer, the trustee, in furtherance of the duty prescribed by  
15 subsection (b) of this section, may transfer the trust's principal place of  
16 administration to another state or to a jurisdiction outside of the United  
17 States.

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

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

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

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

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

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

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

36 (f) In connection with a transfer of the trust's principal place of

1 administration, the trustee may transfer some or all of the trust property to  
2 a successor trustee designated in the terms of the trust or appointed  
3 pursuant to § 28-73-704.

4 (g) Subsections (d) and (e) of this section apply only to irrevocable  
5 trusts created on or after September 1, 2005 and to revocable trusts which  
6 become irrevocable on or after September 1, 2005.

7  
8 28-73-109. Methods and waiver of notice.

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

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

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

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

24  
25 28-73-110. Others treated as qualified beneficiaries.

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

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

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

35 (2) would be a distributee or permissible distributee of trust  
36 income or principal upon termination of the interests of other distributees

1 or permissible distributees then receiving or eligible to receive  
2 distributions; or

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

5 (c) A person appointed to enforce a trust created for the care of an  
6 animal or another noncharitable purpose as provided in § 28-73-408 or § 28-  
7 73-409 has the rights of a qualified beneficiary under this chapter.

8 (d) The Attorney General of this state has the rights of a qualified  
9 beneficiary with respect to a charitable trust having its principal place of  
10 administration in this state.

11  
12 28-73-111. Nonjudicial settlement agreements.

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

16 (b) Except as otherwise provided in subsection (c) of this section,  
17 interested persons may enter into a binding nonjudicial settlement agreement  
18 with respect to any matter involving a trust.

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

23 (d) Matters that may be resolved by a nonjudicial settlement agreement  
24 include:

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

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

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

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

32 (5) transfer of a trust's principal place of administration; and

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

34 (e) Any interested person may request a court to approve a nonjudicial  
35 settlement agreement, to determine whether the representation as provided in  
36 subchapter 3 of this chapter was adequate, and to determine whether the



1 agreement contains terms and conditions a court could have properly approved.

2  
3 28-73-112. Rules of construction.

4 The rules of construction that apply in this state to the  
5 interpretation of and disposition of property by will also apply as  
6 appropriate to the interpretation of the terms of a trust and the disposition  
7 of the trust property.

8  
9 Subchapter 2 – Judicial Proceedings

10 28-73-201. Role of court in administration of trust.

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

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

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

19  
20 28-73-202. Jurisdiction over trustee and beneficiary.

21 (a) By accepting the trusteeship of a trust having its principal place  
22 of administration in this state or by moving the principal place of  
23 administration to this state, the trustee submits personally to the  
24 jurisdiction of a court of this state regarding any matter involving the  
25 trust.

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

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

35  
36 28-73-203. Subject-matter jurisdiction.

1       The circuit court has exclusive jurisdiction of proceedings in this  
2 state brought by a trustee or beneficiary concerning the administration of a  
3 trust or of other proceedings involving a trust.

4  
5                   Subchapter 3 – Representation

6       28-73-301. Representation – Basic effect.

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

10       (b) The consent of a person who may represent and bind another person  
11 under this subchapter is binding on the person represented unless the person  
12 represented objects to the representation before the consent would otherwise  
13 have become effective.

14       (c) Except as otherwise provided in §§ 28-73-411 and 28-73-602, a  
15 person who under this subchapter may represent a settlor who lacks capacity  
16 may receive notice and give a binding consent on the settlor's behalf.

17       (d) A settlor may not represent and bind a beneficiary under this  
18 subchapter with respect to the termination or modification of a trust under §  
19 28-73-411(a).

20  
21       28-73-302. Representation by holder of general testamentary power of  
22 appointment.

23       To the extent there is no conflict of interest between the holder of a  
24 general testamentary power of appointment and the persons represented with  
25 respect to the particular question or dispute, the holder may represent and  
26 bind persons whose interests, as permissible appointees, takers in default,  
27 or otherwise, are subject to the power.

28  
29       28-73-303. Representation by fiduciaries and parents.

30       To the extent there is no conflict of interest between the  
31 representative and the person represented or among those being represented  
32 with respect to a particular question or dispute:

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

35               (2) a guardian may represent and bind the ward if a conservator  
36 of the ward's estate has not been appointed;

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

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

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

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

9  
10           28-73-304. Representation by person having substantially identical  
11 interest.

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

18  
19           28-73-305. Appointment of representative.

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

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

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

32  
33           Subchapter 4 – Creation, Validity, Modification,  
34 and Termination of Trust

35           28-73-401. Methods of creating trust.

36           A trust may be created by:

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

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

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

7  
8           28-73-402. Requirements for creation.

9           (a) A trust is created only if:

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

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

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

13                   (A) a charitable trust;

14                   (B) a trust for the care of an animal, as provided in  
15 § 28-73-408; or

16                   (C) a trust for a noncharitable purpose, as provided in  
17 § 28-73-409;

18           (4) the trustee has duties to perform; and

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

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

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

27  
28           28-73-403. Trusts created in other jurisdictions.

29           A trust not created by will is validly created if its creation complies  
30 with the law of the jurisdiction in which the trust instrument was executed,  
31 or the law of the jurisdiction in which, at the time of creation:

32           (1) the settlor was domiciled, had a place of abode, or was a  
33 national;

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

35           (3) any trust property was located.

36

1       28-73-404. Trust purposes.

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

5  
6       28-73-405. Charitable purposes – Enforcement.

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

11       (b) If the terms of a charitable trust do not indicate a particular  
12 charitable purpose or beneficiary, the court may select one (1) or more  
13 charitable purposes or beneficiaries. The selection must be consistent with  
14 the settlor's intention to the extent it can be ascertained.

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

17  
18       28-73-406. Creation of trust induced by fraud, duress, or undue  
19 influence.

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

22  
23       28-73-407. Evidence of oral trust.

24       Except as required by a statute other than this chapter, a trust need  
25 not be evidenced by a trust instrument, but the creation of an oral trust and  
26 its terms may be established only by clear and convincing evidence.

27  
28       28-73-408. Trust for care of animal.

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

34       (b) A trust authorized by this section may be enforced by a person  
35 appointed in the terms of the trust or, if no person is so appointed, by a  
36 person appointed by a court. A person having an interest in the welfare of

1 the animal may request the court to appoint a person to enforce the trust or  
2 to remove a person appointed.

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

9  
10 28-73-409. Noncharitable trust without ascertainable beneficiary.

11 Except as otherwise provided in § 28-73-408 or by another statute, the  
12 following rules apply:

13 (1) a trust may be created for a noncharitable purpose without a  
14 definite or definitely ascertainable beneficiary or for a noncharitable but  
15 otherwise valid purpose to be selected by the trustee. The trust may not be  
16 enforced for more than twenty-one (21) years;

17 (2) a trust authorized by this section may be enforced by a  
18 person appointed in the terms of the trust or, if no person is so appointed,  
19 by a person appointed by a court; and

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

26  
27 28-73-410. Modification or termination of trust – Proceedings for  
28 approval or disapproval.

29 (a) In addition to the methods of termination prescribed by §§ 28-73-  
30 411 – 28-73-414, a trust terminates to the extent the trust is revoked or  
31 expires pursuant to its terms, no purpose of the trust remains to be  
32 achieved, or the purposes of the trust have become unlawful, contrary to  
33 public policy, or impossible to achieve.

34 (b) A proceeding to approve or disapprove a proposed modification or  
35 termination under §§ 28-73-411 – 28-73-416, or trust combination or division  
36 under § 28-73-417, may be commenced by a trustee or beneficiary, and a

1 proceeding to approve or disapprove a proposed modification or termination  
2 under § 28-73-411 may be commenced by the settlor. The settlor of a  
3 charitable trust may maintain a proceeding to modify the trust under § 28-73-  
4 413.

5  
6 28-73-411. Modification or termination of noncharitable irrevocable  
7 trust by consent.

8 (a)(1) A noncharitable irrevocable trust may be modified or terminated  
9 upon consent of the settlor and all beneficiaries, even if the modification  
10 or termination is inconsistent with a material purpose of the trust.

11 (2) A settlor's power to consent to a trust's modification or  
12 termination may be exercised by:

13 (A) an agent under a power of attorney only to the extent  
14 expressly authorized by the power of attorney or the terms of the trust;

15 (B) the settlor's conservator with the approval of the  
16 court supervising the conservatorship if an agent is not so authorized; or

17 (C) the settlor's guardian with the approval of the court  
18 supervising the guardianship if an agent is not so authorized and a  
19 conservator has not been appointed.

20 (b) A noncharitable irrevocable trust may be:

21 (1) terminated upon consent of all of the beneficiaries if a  
22 court concludes that continuance of the trust is not necessary to achieve any  
23 material purpose of the trust; or

24 (2) modified upon consent of all of the beneficiaries if a court  
25 concludes that modification is not inconsistent with a material purpose of  
26 the trust.

27 (c) A spendthrift provision in the terms of the trust is presumed to  
28 constitute a material purpose of the trust.

29 (d) Upon termination of a trust under subsections (a) or (b) of this  
30 section, the trustee shall distribute the trust property as agreed by the  
31 beneficiaries.

32 (e) If not all of the beneficiaries consent to a proposed modification  
33 or termination of the trust under subsections (a) or (b) of this section, the  
34 modification or termination may be approved by a court if the court is  
35 satisfied that:

36 (1) if all of the beneficiaries had consented, the trust could

1 have been modified or terminated under this section; and

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

4  
5 28-73-412. Modification or termination because of unanticipated  
6 circumstances or inability to administer trust effectively.

7 (a) In addition to the procedure available under §§ 28-69-401 – 28-69-  
8 403, a court may modify the administrative or dispositive terms of a trust or  
9 terminate the trust if, because of circumstances not anticipated by the  
10 settlor, modification or termination will further the purposes of the trust.  
11 To the extent practicable, the modification must be made in accordance with  
12 the settlor's probable intention.

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

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

19  
20 28-73-413. Cy Pres.

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

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

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

27 (3) a court may apply cy pres to modify or terminate the trust  
28 by directing that the trust property be applied or distributed, in whole or  
29 in part, in a manner consistent with the settlor's charitable purposes.

30 (b) A provision in the terms of a charitable trust that would result  
31 in distribution of the trust property to a noncharitable beneficiary prevails  
32 over the power of a court under subsection (a) of this section to apply cy  
33 pres to modify or terminate the trust only if, when the provision takes  
34 effect:

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



1           (2) less than thirty (30) years have elapsed since the date of  
2 the trust's creation.

3  
4           28-73-414. Modification or termination of uneconomic trust.

5           (a) After notice to the qualified beneficiaries, the trustee of a  
6 trust consisting of trust property having a total value less than one hundred  
7 thousand dollars (\$100,000) may terminate the trust if the trustee concludes  
8 that the value of the trust property is insufficient to justify the cost of  
9 administration.

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

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

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

18  
19           28-73-415. Reformation to correct mistakes.

20           A court may reform the terms of a trust, even if unambiguous, to  
21 conform the terms to the settlor's intention if it is proved by clear and  
22 convincing evidence that both the settlor's intent and the terms of the trust  
23 were affected by a mistake of fact or law, whether in expression or  
24 inducement.

25  
26           28-73-416. Modification to achieve settlor's tax objectives.

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

31  
32           28-73-417. Combination and division of trusts.

33           (a)(1) After notice to the qualified beneficiaries, a trustee may  
34 combine two (2) or more trusts into a single trust or divide a trust into two  
35 (2) or more separate trusts, if the result does not impair rights of any  
36 beneficiary or adversely affect achievement of the purposes of the trust.

1           (2) A trustee may exercise the authority granted in this section  
2 without court approval.

3           (b) This section does not repeal §§ 28-69-701 – 28-69-706.

4  
5                   Subchapter 5 – Creditor’s Claims – Spendthrift  
6                               and Discretionary Trusts

7  
8           28-73-501. Rights of beneficiary’s creditor or assignee.

9           To the extent a beneficiary’s interest is not protected by a  
10 spendthrift provision, a court may authorize a creditor or assignee of the  
11 beneficiary to reach the beneficiary’s interest by attachment of present or  
12 future distributions to or for the benefit of the beneficiary or other means.  
13 The court may limit the award to such relief as is appropriate under the  
14 circumstances.

15  
16           28-73-502. Spendthrift provision.

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

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

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

28  
29           28-73-503. (Reserved).

30  
31           28-73-504. Discretionary trusts – Effect of standard.

32           (a) Whether or not a trust contains a spendthrift provision, a  
33 creditor of a beneficiary may not compel a distribution that is subject to  
34 the trustee’s discretion, even if:

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

1           (2) the trustee has abused the discretion.

2           (b) This section does not limit the right of a beneficiary to maintain  
3 a judicial proceeding against a trustee for an abuse of discretion or failure  
4 to comply with a standard for distribution. Under § 26-78-814(a), a trustee  
5 must always exercise a discretionary power in good faith and with regard to  
6 the purposes of the trust and the interests of the beneficiaries.

7           (c) A creditor may not reach the interest of a beneficiary who is also  
8 a trustee or co-trustee, or otherwise compel a distribution, if the trustee's  
9 discretion to make distributions for the trustee's own benefit is limited by  
10 an ascertainable standard.

11  
12           28-73-505. Creditor's claim against settlor.

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

15           (1) during the lifetime of the settlor, the property of a  
16 revocable trust is subject to claims of the settlor's creditors; and

17           (2) with respect to an irrevocable trust, a creditor or assignee  
18 of the settlor may reach the maximum amount that can be distributed to or for  
19 the settlor's benefit. If a trust has more than one (1) settlor, the amount  
20 the creditor or assignee of a particular settlor may reach may not exceed the  
21 settlor's interest in the portion of the trust attributable to that settlor's  
22 contribution.

23           (b) For purposes of this section:

24           (1) during the period the power may be exercised, the holder of  
25 a power of withdrawal is treated in the same manner as the settler of a  
26 revocable trust to the extent of the property subject to the power; and

27           (2) upon the lapse, release, or waiver of the power, the holder  
28 is treated as the settlor of the trust only to the extent the value of the  
29 property affected by the lapse, release, or waiver exceeds the greater of the  
30 amount specified in Section 2041(b)(2) or 2514(e) of the Internal Revenue  
31 Code of 1986 or Section 2503(b) of the Internal Revenue Code of 1986, in each  
32 case as in effect on January 1, 2005.

33  
34           28-73-506. Overdue distribution.

35           Whether or not a trust contains a spendthrift provision, a creditor or  
36 assignee of a beneficiary may reach a mandatory distribution of income or

1 principal, including a distribution upon termination of the trust, if the  
2 trustee has not made the distribution to the beneficiary within a reasonable  
3 time after the designated distribution date.

4  
5 28-73-507. Personal obligations of trustee.

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

8  
9 Subchapter 6 – Revocable Trusts

10 28-73-601. Capacity of settlor of revocable trust.

11 The capacity required to create, amend, revoke, or add property to a  
12 revocable trust, or to direct the actions of the trustee of a revocable  
13 trust, is the same as that required to make a will.

14  
15 28-73-602. Revocation or amendment of revocable trust.

16 (a) Unless the terms of a trust expressly provide that the trust is  
17 irrevocable, the settlor may revoke or amend the trust. This subsection does  
18 not apply to a trust created under an instrument executed before September 1,  
19 2005.

20 (b) If a revocable trust is created or funded by more than one (1)  
21 settlor:

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

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

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

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

33 (1) by substantial compliance with a method provided in the  
34 terms of the trust; or

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

1           (A) executing a later will or codicil that expressly  
2 refers to the trust or specifically devises property that would otherwise  
3 have passed according to the terms of the trust; or

4           (B) any other method manifesting clear and convincing  
5 evidence of the settlor's intent.

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

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

12           (f) A conservator of the settlor or, if no conservator has been  
13 appointed, a guardian of the settlor may exercise a settlor's powers with  
14 respect to revocation, amendment, or distribution of trust property only with  
15 the approval of the court supervising the conservatorship or guardianship.

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

20  
21           28-73-603. Settlor's powers – Powers of withdrawal.

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

25           (b) During the period the power may be exercised, the holder of a  
26 power of withdrawal has the rights of a settlor of a revocable trust under  
27 this section to the extent of the property subject to the power.

28  
29           28-73-604. Limitation on action contesting validity of revocable  
30 trust – Distribution of trust property.

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

34           (1) three (3) years after the settlor's death; or

35           (2) ninety (90) days after the trustee sent the person a notice  
36 informing the person of the trust's existence, the settlor's name, the

1 trustee's name and address, the time allowed for commencing a proceeding, and  
2 a description of the beneficiary's interest, if any.

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

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

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

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

15  
16 Subchapter 7 – Office of Trustee

17 28-73-701. Accepting or declining trusteeship.

18 (a) Except as otherwise provided in subsection (c) of this section, a  
19 person designated as trustee accepts the trusteeship:

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

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

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

30 (c) A person designated as trustee, without accepting the trusteeship,  
31 may:

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

36 (2) inspect or investigate trust property to determine potential

1 liability under environmental or other law or for any other purpose.

2  
3 28-73-702. Trustee's bond.

4 (a) A trustee shall give bond to secure performance of the trustee's  
5 duties only if a court finds that a bond is needed to protect the interests  
6 of the beneficiaries or is required by the terms of the trust and the court  
7 has not dispensed with the requirement.

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

11 (c) A regulated financial service institution qualified to do trust  
12 business in this State need not give bond, even if required by the terms of  
13 the trust.

14  
15 28-73-703. Co-trustees.

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

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

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

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

30 (e) A trustee may not delegate to a co-trustee the performance of a  
31 function the settlor reasonably expected the trustees to perform jointly.  
32 Unless a delegation was irrevocable, a trustee may revoke a delegation  
33 previously made.

34 (f) Except as otherwise provided in subsection (g) of this section, a  
35 trustee who does not join in an action of another trustee is not liable for  
36 the action.

1 (g) Each trustee shall exercise reasonable care to:

2 (1) prevent a co-trustee from committing a serious breach of  
3 trust; and

4 (2) compel a co-trustee to redress a serious breach of trust.

5 (h) A dissenting trustee who joins in an action at the direction of  
6 the majority of the trustees and who notified any co-trustee of the dissent  
7 at or before the time of the action is not liable for the action unless the  
8 action is a serious breach of trust.

9  
10 28-73-704. Vacancy in trusteeship – Appointment of successor.

11 (a) A vacancy in a trusteeship occurs if:

12 (1) a person designated as trustee rejects the trusteeship;

13 (2) a person designated as trustee cannot be identified or does  
14 not exist;

15 (3) a trustee resigns;

16 (4) a trustee is disqualified or removed;

17 (5) a trustee dies; or

18 (6) a guardian of the person or conservator is appointed for an  
19 individual serving as trustee.

20 (b) If one (1) or more co-trustees remain in office, a vacancy in a  
21 trusteeship need not be filled. A vacancy in a trusteeship must be filled if  
22 the trust has no remaining trustee.

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

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

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

29 (3) by a person appointed by a court.

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

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

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



1           (3) by a person appointed by a court.

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

6  
7           28-73-705. Resignation of trustee.

8           (a) A trustee may resign:

9                   (1) upon at least thirty (30) days' notice to the qualified  
10 beneficiaries, the settlor, if living, and all co-trustees; or

11                   (2) with the approval of a court.

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

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

17           (d) Subsection (a) of this section applies only to irrevocable trusts  
18 created on or after September 1, 2005, and to revocable trusts which become  
19 irrevocable on or after September 1, 2005.

20  
21           28-73-706. Removal of trustee.

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

25           (b) A court may remove a trustee if:

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

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

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

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

1       (c) Pending a final decision on a request to remove a trustee, or in  
2 lieu of or in addition to removing a trustee, the court may order such  
3 appropriate relief under § 28-73-1001(b) as may be necessary to protect the  
4 trust property or the interests of the beneficiaries.

5  
6       28-73-707. Delivery of property by former trustee.

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

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

14  
15       28-73-708. Compensation of trustee.

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

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

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

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

26  
27       28-73-709. Reimbursement of expenses.

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

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

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

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

1 reasonable interest.

2

3

Subchapter 8 – Duties and Powers of Trustee

4

28-73-801. Duty to administer trust.

5

Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this chapter.

6

7

28-73-802. Duty of loyalty.

8

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

9

10

(b) Subject to the rights of persons dealing with or assisting the trustee as provided in § 28-73-1012, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:

11

12

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

13

(2) the transaction was approved by a court;

14

(3) the beneficiary did not commence a judicial proceeding

15

within the time allowed by § 28-73-1005;

16

(4) the beneficiary consented to the trustee's conduct, ratified

17

the transaction, or released the trustee in compliance with § 28-73-1009; or

18

(5) the transaction involves a contract entered into or claim

19

acquired by the trustee before the person became or contemplated becoming trustee.

20

21

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

22

23

(1) the trustee's spouse;

24

(2) the trustee's descendants, siblings, parents, or their

25

spouses;

26

(3) an agent or attorney of the trustee; or

27

(4) a corporation or other person or enterprise in which the

28

trustee, or a person who owns a significant interest in the trustee, has an

1 interest that might affect the trustee's best judgment.

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

7 (e) A transaction not concerning trust property in which the trustee  
8 engages in the trustee's individual capacity involves a conflict between  
9 personal and fiduciary interests if the transaction concerns an opportunity  
10 properly belonging to the trust.

11 (f)(1) An investment by a trustee in securities of an investment  
12 company or investment trust to which the trustee, or its affiliate, provides  
13 services in a capacity other than as trustee is not presumed to be affected  
14 by a conflict between personal and fiduciary interests if the investment  
15 complies with the prudent investor rule of subchapter 9 of this chapter.

16 (2) The trustee may be compensated by the investment company or  
17 investment trust for providing those services out of fees charged to the  
18 trust.

19 (3) If the trustee receives compensation from the investment  
20 company or investment trust for providing management services, the trustee  
21 shall at least annually notify the persons entitled under § 28-73-813 to  
22 receive a copy of the trustee's annual report of the rate and method by which  
23 the compensation was determined.

24 (g) In voting shares of stock or in exercising powers of control over  
25 similar interests in other forms of enterprise, the trustee shall act in the  
26 best interests of the beneficiaries. If the trust is the sole owner of a  
27 corporation or other form of enterprise, the trustee shall elect or appoint  
28 directors or other managers who will manage the corporation or enterprise in  
29 the best interests of the beneficiaries.

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

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

34 (2) payment of reasonable compensation to the trustee;

35 (3) a transaction between a trust and another trust, decedent's  
36 estate, or conservatorship of which the trustee is a fiduciary or in which a

1 beneficiary has an interest;

2 (4) a deposit of trust money in a regulated financial service  
3 institution operated by the trustee; or

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

6 (i) A court may appoint a special fiduciary to make a decision with  
7 respect to any proposed transaction that might violate this section if  
8 entered into by the trustee.

9 (j) Subsections (b) – (e) of this section apply only to irrevocable  
10 trusts created on or after September 1, 2005, and to revocable trusts which  
11 become irrevocable on or after September 1, 2005.

12  
13 28-73-803. Impartiality.

14 If a trust has two (2) or more beneficiaries, the trustee shall act  
15 impartially in investing, managing, and distributing the trust property,  
16 giving due regard to the beneficiaries' respective interests.

17  
18 28-73-804. Prudent administration.

19 A trustee shall administer the trust as a prudent person would, by  
20 considering the purposes, terms, distributional requirements, and other  
21 circumstances of the trust. In satisfying this standard, the trustee shall  
22 exercise reasonable care, skill, and caution.

23  
24 28-73-805. Costs of administration.

25 In administering a trust, the trustee may incur only costs that are  
26 reasonable in relation to the trust property, the purposes of the trust, and  
27 the skills of the trustee.

28  
29 28-73-806. Trustee's skills.

30 A trustee who has special skills or expertise, or is named trustee in  
31 reliance upon the trustee's representation that the trustee has special  
32 skills or expertise, shall use those special skills or expertise.

33  
34 28-73-807. Delegation by trustee.

35 (a) A trustee may delegate duties and powers that a prudent trustee of  
36 comparable skills could properly delegate under the circumstances. The

1 trustee shall exercise reasonable care, skill, and caution in:

2 (1) selecting an agent;

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

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

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

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

13 (d) By accepting a delegation of powers or duties from the trustee of  
14 a trust that is subject to the law of this state, an agent submits to the  
15 jurisdiction of a court of this state.

16  
17 28-73-808. Powers to direct.

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

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

27 (c) The terms of a trust may confer upon a trustee or other person a  
28 power to direct the modification or termination of the trust.

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

34  
35 28-73-809. Control and protection of trust property.

36 A trustee shall take reasonable steps to take control of and protect

1 the trust property.

2  
3 28-73-810. Recordkeeping and identification of trust property.

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

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

8 (c) Except as otherwise provided in subsection (d) of this section, a  
9 trustee shall cause the trust property to be designated so that the interest  
10 of the trust, to the extent feasible, appears in records maintained by a  
11 party other than a trustee or beneficiary.

12 (d) If the trustee maintains records clearly indicating the respective  
13 interests, a trustee may invest as a whole the property of two (2) or more  
14 separate trusts.

15  
16 28-73-811. Enforcement and defense of claims.

17 A trustee shall take reasonable steps to enforce claims of the trust  
18 and to defend claims against the trust.

19  
20 28-73-812. Collecting trust property.

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

24  
25 28-73-813. Duty to inform and report.

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

31 (b) A trustee:

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

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

1           (3) within sixty (60) days after the date the trustee acquires  
2 knowledge of the creation of an irrevocable trust, or the date the trustee  
3 acquires knowledge that a formerly revocable trust has become irrevocable,  
4 whether by the death of the settlor or otherwise, shall notify the qualified  
5 beneficiaries:

6                   (A) of the trust's existence;

7                   (B) of the identity of the settlor or settlors;

8                   (C) of the right to request a copy of the trust  
9 instrument; and

10                   (D) of the right to a trustee's report as provided in  
11 subsection (c) of this section; and

12                   (E) in advance of any change in the method or rate of the  
13 trustee's compensation.

14           (c)(1) A trustee shall send to the distributees or permissible  
15 distributees of trust income or principal, and to other qualified or  
16 nonqualified beneficiaries who request it, at least annually and at the  
17 termination of the trust, a report of the trust property, liabilities,  
18 receipts, and disbursements, including the source and amount of the trustee's  
19 compensation, a listing of the trust assets and, if feasible, their  
20 respective market values.

21           (2) Upon a vacancy in a trusteeship, unless a co-trustee remains  
22 in office, a report must be sent to the qualified beneficiaries by the former  
23 trustee.

24           (3) A personal representative, conservator, or guardian may send  
25 the qualified beneficiaries a report on behalf of a deceased or incapacitated  
26 trustee.

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

31           (e) Subsections (a) – (c) of this section apply only to an irrevocable  
32 trust created on or after September 1, 2005, and to a revocable trust which  
33 becomes irrevocable on or after September 1, 2005.

34  
35           28-73-814. Discretionary powers – Tax savings.

36           (a) Notwithstanding the breadth of discretion granted to a trustee in



1 the terms of the trust, including the use of such terms as “absolute”,  
2 “sole”, or “uncontrolled”, the trustee shall exercise a discretionary power  
3 in good faith and in accordance with the terms and purposes of the trust and  
4 the interests of the beneficiaries.

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

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

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

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

19 (d) Subsection (b) of this section does not apply to:

20 (1) a power held by the settlor’s spouse who is the trustee of a  
21 trust for which a marital deduction, as defined in Section 2056(b)(5) or  
22 Section 2523(e) of the Internal Revenue Code of 1986, as in effect on January  
23 1, 2005, was previously allowed;

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

26 (3) a trust if contributions to the trust qualify for the annual  
27 exclusion under Section 2503(c) of the Internal Revenue Code of 1986, as in  
28 effect on January 1, 2005.

29  
30 28-73-815. General powers of trustee.

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

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

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

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

36 (B) any other powers appropriate to achieve the proper

1 investment, management, and distribution of the trust property; and

2 (C) any other powers conferred by this chapter.

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

5  
6 28-73-816. Specific powers of trustee.

7 Without limiting the authority conferred by § 28-73-815, a trustee may:

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

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

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

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

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

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

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

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

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

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

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

36 (8) with respect to an interest in real property, construct, or

1 make ordinary or extraordinary repairs to, alterations to, or improvements  
2 in, buildings or other structures, demolish improvements, raze existing or  
3 erect new party walls or buildings, subdivide or develop land, dedicate land  
4 to public use or grant public or private easements, and make or vacate plats  
5 and adjust boundaries;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

30                   (B) paying it to the beneficiary's custodian under the  
31 Uniform Transfers to Minors Act, § 9-26-201 et seq. or custodial trustee  
32 under §§ 28-72-401 – 28-72-422, and, for that purpose, creating a  
33 custodianship or custodial trust;

34                   (C) if the trustee does not know of a conservator,  
35 guardian, custodian, or custodial trustee, paying it to an adult relative or  
36 other person having legal or physical care or custody of the beneficiary, to

1 be expended on the beneficiary's behalf; or

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

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

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

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

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

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

21  
22 28-73-817. Distribution upon termination.

23 (a) Upon termination or partial termination of a trust, the trustee  
24 may send to the beneficiaries a proposal for distribution. The right of any  
25 beneficiary to object to the proposed distribution terminates if the  
26 beneficiary does not notify the trustee of an objection within thirty (30)  
27 days after the proposal was sent but only if the proposal informed the  
28 beneficiary of the right to object and of the time allowed for objection.

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

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

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

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

3  
4           Subchapter 9 – Uniform Prudent Investor Act

5           28-73-901. Prudent investor rule.

6           (a) Except as otherwise provided in subsection (b) of this section, a  
7 trustee who invests and manages trust assets owes a duty to the beneficiaries  
8 of the trust to comply with the prudent investor rule set forth in this  
9 subchapter.

10           (b) The prudent investor rule, a default rule, may be expanded,  
11 restricted, eliminated, or otherwise altered by the provisions of a trust. A  
12 trustee is not liable to a beneficiary to the extent that the trustee acted  
13 in reasonable reliance on the provisions of the trust.

14  
15           28-73-902. Standard of care – Portfolio strategy – Risk and return  
16 objectives.

17           (a) A trustee shall invest and manage trust assets as a prudent  
18 investor would, by considering the purposes, terms, distribution  
19 requirements, and other circumstances of the trust. In satisfying this  
20 standard, the trustee shall exercise reasonable care, skill, and caution.

21           (b) A trustee's investment and management decisions respecting  
22 individual assets must be evaluated not in isolation but in the context of  
23 the trust portfolio as a whole and as a part of an overall investment  
24 strategy having risk and return objectives reasonably suited to the trust.

25           (c) Among circumstances that a trustee shall consider in investing and  
26 managing trust assets are such of the following as are relevant to the trust  
27 or its beneficiaries:

28                   (1) general economic conditions;

29                   (2) the possible effect of inflation or deflation;

30                   (3) the expected tax consequences of investment decisions or  
31 strategies;

32                   (4) the role that each investment or course of action plays  
33 within the overall trust portfolio, which may include financial assets,  
34 interests in closely held enterprises, tangible and intangible personal  
35 property, and real property;

36                   (5) the expected total return from income and the appreciation

1 of capital;

2 (6) other resources of the beneficiaries;

3 (7) needs for liquidity, regularity of income, and preservation  
4 or appreciation of capital; and

5 (8) an asset's special relationship or special value, if any, to  
6 the purposes of the trust or to one or more of the beneficiaries.

7 (d) A trustee shall make a reasonable effort to verify facts relevant  
8 to the investment and management of trust assets.

9 (e) A trustee may invest in any kind of property or type of investment  
10 consistent with the standards of this subchapter.

11  
12 28-73-903. Diversification.

13 A trustee shall diversify the investments of the trust unless the  
14 trustee reasonably determines that, because of special circumstances, the  
15 purposes of the trust are better served without diversifying.

16  
17 28-73-904. Duties at inception of trusteeship.

18 Within a reasonable time after accepting a trusteeship or receiving  
19 trust assets, a trustee shall review the trust assets and make and implement  
20 decisions concerning the retention and disposition of assets, in order to  
21 bring the trust portfolio into compliance with the purposes, terms,  
22 distribution requirements, and other circumstances of the trust, and with the  
23 requirements of this subchapter.

24  
25 28-73-905. Reviewing compliance.

26 Compliance with the prudent investor rule is determined in light of the  
27 facts and circumstances existing at the time of a trustee's decision or  
28 action and not by hindsight.

29  
30 28-73-906. Language invoking standard of subchapter.

31 The following terms or comparable language in the provisions of a  
32 trust, unless otherwise limited or modified, authorizes any investment or  
33 strategy permitted under this subchapter: "investments permissible by law for  
34 investment of trust funds", "legal investments", "authorized investments",  
35 "using the judgment and care under the circumstances then prevailing that  
36 persons of prudence, discretion, and intelligence exercise in the management

1 of their own affairs, not in regard to speculation but in regard to the  
2 permanent disposition of their funds, considering the probable income as well  
3 as the probable safety of their capital”, “prudent man rule”, “prudent  
4 trustee rule”, “prudent person rule”, and “prudent investor rule”.

5  
6 28-73-907. Application to existing trusts.

7 This subchapter applies to trusts existing on and created after  
8 September 1, 2005.

9  
10 28-73-908. Uniformity of application and construction.

11 This subchapter shall be applied and construed to effectuate its  
12 general purpose to make uniform the law with respect to the subject of this  
13 subchapter among the states enacting it.

14  
15 Subchapter 10 - Liability of Trustees and Rights  
16 of Persons Dealing With Trustees

17 28-73-1001. Remedies for breach of trust.

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

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

22 (1) compel the trustee to perform the trustee’s duties;

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

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

26 (4) order a trustee to account;

27 (5) appoint a special fiduciary to take possession of the trust  
28 property and administer the trust;

29 (6) suspend the trustee;

30 (7) remove the trustee as provided in § 28-73-706;

31 (8) reduce or deny compensation to the trustee;

32 (9) subject to § 28-73-1012, void an act of the trustee, impose  
33 a lien or a constructive trust on trust property, or trace trust property  
34 wrongfully disposed of and recover the property or its proceeds; or

35 (10) order any other appropriate relief.

36



1           28-73-1002. Damages for breach of trust.

2           (a) A trustee who commits a breach of trust is liable to the  
3 beneficiaries affected for the greater of:

4                   (1) the amount required to restore the value of the trust  
5 property and trust distributions to what they would have been had the breach  
6 not occurred; or

7                   (2) the profit the trustee made by reason of the breach.

8           (b) Except as otherwise provided in this subsection, if more than one  
9 (1) trustee is liable to the beneficiaries for a breach of trust, a trustee  
10 is entitled to contribution from the other trustee or trustees. A trustee is  
11 not entitled to contribution if the trustee was substantially more at fault  
12 than another trustee or if the trustee committed the breach of trust in bad  
13 faith or with reckless indifference to the purposes of the trust or the  
14 interests of the beneficiaries. A trustee who received a benefit from the  
15 breach of trust is not entitled to contribution from another trustee to the  
16 extent of the benefit received.

17  
18           28-73-1003. Damages in absence of breach.

19           (a) A trustee is accountable to an affected beneficiary for any profit  
20 made by the trustee arising from the administration of the trust, even absent  
21 a breach of trust.

22           (b) Absent a breach of trust, a trustee is not liable to a beneficiary  
23 for a loss or depreciation in the value of trust property or for not having  
24 made a profit.

25  
26           28-73-1004. Attorney's fees and costs.

27           In a judicial proceeding involving the administration of a trust, a  
28 court, as justice and equity may require, may award costs and expenses,  
29 including reasonable attorney's fees, to any party, to be paid by another  
30 party or from the trust that is the subject of the controversy.

31  
32           28-73-1005. Limitation of action against trustee.

33           (a) A beneficiary may not commence a proceeding against a trustee for  
34 breach of trust more than one (1) year after the date the beneficiary or a  
35 representative of the beneficiary was sent a report that adequately disclosed  
36 the existence of a potential claim for breach of trust and informed the

1 beneficiary of the time allowed for commencing a proceeding.

2 (b) A report adequately discloses the existence of a potential claim  
3 for breach of trust if it provides sufficient information so that the  
4 beneficiary or representative knows of the potential claim or should have  
5 inquired into its existence.

6 (c) If subsection (a) of this section does not apply, a judicial  
7 proceeding by a beneficiary against a trustee for breach of trust must be  
8 commenced within five (5) years after the first to occur of:

9 (1) the removal, resignation, or death of the trustee;

10 (2) the termination of the beneficiary's interest in the trust;

11 or

12 (3) the termination of the trust.

13  
14 28-73-1006. Reliance on trust instrument.

15 A trustee who acts in reasonable reliance on the terms of the trust as  
16 expressed in the trust instrument is not liable to a beneficiary for a breach  
17 of trust to the extent the breach resulted from the reliance.

18  
19 28-73-1007. Event affecting administration or distribution.

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

25  
26 28-73-1008. Exculpation of trustee.

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

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

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

34 (b) An exculpatory term drafted or caused to be drafted by the trustee  
35 is invalid as an abuse of a fiduciary or confidential relationship unless the  
36 trustee proves that the exculpatory term is fair under the circumstances and

1 that its existence and contents were adequately communicated to the settlor.

2 (c) This section applies only to irrevocable trusts created on or  
3 after September 1, 2005, and to revocable trusts which become irrevocable on  
4 or after September 1, 2005.

5  
6 28-73-1009. Beneficiary's consent, release, or ratification.

7 A trustee is not liable to a beneficiary for breach of trust if the  
8 beneficiary consented to the conduct constituting the breach, released the  
9 trustee from liability for the breach, or ratified the transaction  
10 constituting the breach, unless:

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

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

16  
17 28-73-1010. Limitation on personal liability of trustee.

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

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

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

32  
33 28-73-1011. Interest as general partner.

34 (a) Except as otherwise provided in subsection (c) of this section or  
35 unless personal liability is imposed in the contract, a trustee who holds an  
36 interest as a general partner in a general or limited partnership is not

1 personally liable on a contract entered into by the partnership after the  
2 trust's acquisition of the interest if the fiduciary capacity was disclosed  
3 in the contract or in a statement previously filed pursuant to §§ 4-46-101 –  
4 4-46-1207 or §§ 4-43-101 – 4-43-1206.

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

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

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

17  
18 28-73-1012. Protection of person dealing with trustee.

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

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

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

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

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

36

1           28-73-1013. Certification of trust.

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

5                   (1) a statement that the trust exists and the date the trust  
6 instrument was executed;

7                   (2) the identity of the settlor;

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

9                   (4) the powers of the trustee;

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

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

15                   (7) the manner of taking title to trust property.

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

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

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

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

27           (f)(1) A person who acts in reliance upon a certification of trust  
28 without knowledge that the representations contained therein are incorrect is  
29 not liable to any person for so acting and may assume without inquiry the  
30 existence of the facts contained in the certification.

31                   (2) Knowledge of the terms of the trust may not be inferred  
32 solely from the fact that a copy of all or part of the trust instrument is  
33 held by the person relying upon the certification.

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

1 correct.

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

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

8  
9 Subchapter 11 – Miscellaneous Provisions

10 28-73-1101. Uniformity of application and construction.

11 In applying and construing this chapter consideration must be given to  
12 the need to promote uniformity of the law with respect to its subject matter  
13 among states that enact it.

14  
15 28-73-1102. Electronic records and signatures.

16 The provisions of this chapter governing the legal effect, validity, or  
17 enforceability of electronic records or electronic signatures, and of  
18 contracts formed or performed with the use of such records or signatures,  
19 conform to the requirements of Section 102 of the Electronic Signatures in  
20 Global and National Commerce Act (15 U.S.C. Section 7002) and supersede,  
21 modify, and limit the requirements of the Electronic Signatures in Global and  
22 National Commerce Act.

23  
24 28-73-1103. Severability clause

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

30  
31 28-73-1104. Effective date.

32 This chapter takes effect on September 1, 2005.

33  
34 28-73-1105. Application to existing relationships.

35 (a) Except as otherwise provided in this chapter, on September 1,  
36 2005:

1           (1) this chapter applies to all trusts created before, on, or  
2 after September 1, 2005;

3           (2) this chapter applies to all judicial proceedings concerning  
4 trusts commenced on or after September 1, 2005;

5           (3) this chapter applies to judicial proceedings concerning  
6 trusts commenced before September 1, 2005 unless the court finds that  
7 application of a particular provision of this chapter would substantially  
8 interfere with the effective conduct of the judicial proceedings or prejudice  
9 the rights of the parties, in which case the particular provision of this  
10 chapter does not apply and the superseded law applies;

11           (4) any rule of construction or presumption provided in this  
12 chapter applies to trust instruments executed before September 1, 2005,  
13 unless there is a clear indication of a contrary intent in the terms of the  
14 trust; and

15           (5) an act done before September 1, 2005, is not affected by  
16 this chapter.

17           (b) If a right is acquired, extinguished, or barred upon the  
18 expiration of a prescribed period that has commenced to run under any other  
19 statute before September 1, 2005, that statute continues to apply to the  
20 right even if it has been repealed or superseded.

21  
22           SECTION 2. Arkansas Code § 23-51-192 is amended to read as follows:

23           23-51-192. Delegation and fiduciary responsibility.

24           (a) Any person acting as a trustee or as any other fiduciary under the  
25 laws of this state may delegate any investment, management or administrative  
26 function if such person exercises reasonable care, judgment and caution in:

27                   (1) Selecting the delegate, taking into account the delegate's  
28 financial standing and reputation;

29                   (2) Establishing the scope and other terms of any delegation;  
30 and

31                   (3) Reviewing periodically the delegate's actions in order to  
32 monitor overall performance and compliance with the scope and other terms of  
33 the delegation.

34           (b) Notwithstanding any delegation permitted by subsection (a) of this  
35 section, any person acting as a trustee, except as provided in ~~§ 23-51-208~~  
36 28-73-807, or in any other fiduciary capacity under the laws of this state

1 shall retain responsibility for the due performance of any delegated  
2 fiduciary function.

3  
4 SECTION 3. Arkansas Code § 28-71-105 is amended to read as follows:

5 28-71-105. Standard of judgment and care - Prudent investor rule.

6 In acquiring, investing, reinvesting, exchanging, retaining, selling,  
7 and managing property held in a fiduciary capacity, other than trusts subject  
8 to the prudent investor rule as set forth in ~~§§ 23-51-200—23-51-211~~the  
9 Arkansas Trust Code, § 28-73-101 et seq., the fiduciary shall exercise the  
10 judgment and care under the circumstances then prevailing which persons of  
11 prudence, discretion, and intelligence exercise in the management of their  
12 own affairs, not in regard to speculation, but in regard to the permanent  
13 disposition of their funds, considering the probable income as well as the  
14 probable safety of their capital.

15  
16 SECTION 4. Arkansas Code §§ 23-51-200 through 23-51-211 are repealed.

17 ~~23-51-200. Prudent investor rule.~~

18 ~~(a) Except as otherwise provided in subsection (b) of this section, a~~  
19 ~~trustee who invests and manages trust assets owes a duty to the beneficiaries~~  
20 ~~of the trust to comply with the prudent investor rule set forth in this~~  
21 ~~chapter.~~

22 ~~(b) The prudent investor rule, a default rule, may be expanded,~~  
23 ~~restricted, eliminated, or otherwise altered by the provisions of a trust. A~~  
24 ~~trustee is not liable to a beneficiary to the extent that the trustee acted~~  
25 ~~in reasonable reliance on the provisions of the trust.~~

26  
27 ~~23-51-201. Standard of care—Portfolio strategy—Risk and return~~  
28 ~~objectives.~~

29 ~~(a) A trustee shall invest and manage trust assets as a prudent~~  
30 ~~investor would, by considering the purposes, terms, distribution~~  
31 ~~requirements, and other circumstances of the trust. In satisfying this~~  
32 ~~standard, the trustee shall exercise reasonable care, skill and caution.~~

33 ~~(b) A trustee's investment and management decisions respecting~~  
34 ~~individual assets must be evaluated not in isolation but in the context of~~  
35 ~~the trust portfolio as a whole and as a part of an overall investment~~  
36 ~~strategy having risk return objectives reasonably suited to the trust.~~



1           ~~(c) Among circumstances that a trustee shall consider in investing and~~  
2 ~~managing trust assets are such of the following as are relevant to the trust~~  
3 ~~or its beneficiaries;~~

4                     ~~(1) General economic conditions;~~

5                     ~~(2) The possible effect of inflation or deflation;~~

6                     ~~(3) The expected tax consequences of investment decisions or~~  
7 ~~strategies;~~

8                     ~~(4) The role that each investment or course of action plays~~  
9 ~~within the overall trust portfolio, which may include financial assets,~~  
10 ~~interests in closely held enterprises, tangible and intangible personal~~  
11 ~~property, and real property;~~

12                    ~~(5) The expected total return from income and the appreciation~~  
13 ~~of capital;~~

14                    ~~(6) Other resources of the beneficiaries;~~

15                    ~~(7) Needs for liquidity, regularity of income, and preservation~~  
16 ~~or appreciation of capital; and~~

17                    ~~(8) An asset's special relationship or special value, if any, to~~  
18 ~~the purpose of the trust or to one or more of the beneficiaries.~~

19           ~~(d) A trustee shall make a reasonable effort to verify facts relevant~~  
20 ~~to the investment and management of trust assets.~~

21           ~~(e) A trustee may invest in any kind of property or type of investment~~  
22 ~~consistent with the standards of this chapter.~~

23           ~~(f) A trustee who has special skills or expertise, or is named trustee~~  
24 ~~in reliance upon the trustee's representation that the trustee has special~~  
25 ~~skills or expertise, has a duty to use those special skills or expertise.~~

26  
27           ~~23-51-202. Diversification.~~

28           ~~A trustee shall diversify the investments of the trust unless the~~  
29 ~~trustee reasonably determines that, because of special circumstances, the~~  
30 ~~purposes of the trust are better served without diversifying.~~

31  
32           ~~23-51-203. Duties at inception of trusteeship.~~

33           ~~Within a reasonable time after accepting a trusteeship or receiving~~  
34 ~~trust assets, a trustee shall review the trust assets and make and implement~~  
35 ~~decisions concerning the retention and disposition of assets, in order to~~  
36 ~~bring the trust portfolio into compliance with the purposes, terms,~~

1 ~~distribution requirements, and other circumstances of the trust, and with the~~  
2 ~~requirements of this chapter.~~

3  
4 ~~23-51-204. Loyalty.~~

5 ~~A trustee shall invest and manage the trust assets solely in the~~  
6 ~~interest of the beneficiaries. This duty is consistent with and shall not be~~  
7 ~~construed to abrogate the powers granted to banks and trust companies~~  
8 ~~pursuant to § 28-71-104.~~

9  
10 ~~23-51-205. Impartiality.~~

11 ~~If a trust has two or more beneficiaries, the trustee shall act~~  
12 ~~impartially in investing and managing the trust assets, taking into account~~  
13 ~~any differing interests of the beneficiaries.~~

14  
15 ~~23-51-206. Investment costs.~~

16 ~~In investing and managing trust assets, a trustee may only incur costs~~  
17 ~~that are appropriate and reasonable in relation to the assets, the purposes~~  
18 ~~of the trust, and the skills of the trustee.~~

19  
20 ~~23-51-207. Reviewing compliance.~~

21 ~~Compliance with the prudent investor rule is determined in light of the~~  
22 ~~facts and circumstances existing at the time of a trustee's decision or~~  
23 ~~action and not by hindsight.~~

24  
25 ~~23-51-208. Delegation of agent.~~

26 ~~(a) A trustee may delegate investment and management functions that a~~  
27 ~~prudent trustee of comparable skills could properly delegate under the~~  
28 ~~circumstances. The trustee shall exercise reasonable care, skill and caution~~  
29 ~~in:~~

30 ~~(1) Selecting an agent;~~

31 ~~(2) Establishing the scope and terms of the delegation,~~  
32 ~~consistent with the purposes and terms of the trust; and~~

33 ~~(3) Periodically reviewing the agent's actions in order to~~  
34 ~~monitor the agent's performance and compliance with the terms of the~~  
35 ~~delegation.~~

36 ~~(b) In performing a delegated function, an agent owes a duty to the~~

1 ~~trust to exercise reasonable care to comply with the terms of the delegation.~~

2 ~~(c) A trustee who complies with the requirements of subsection (a) of~~  
3 ~~this section is not liable to the beneficiaries or to the trust for the~~  
4 ~~decisions or actions of the agent to whom the function was delegated.~~

5 ~~(d) By accepting the delegation of a trust function from the trustee~~  
6 ~~of a trust that is subject to the law of this state, an agent submits to the~~  
7 ~~jurisdiction of the courts of this state.~~

8  
9 ~~23-51-209. Language invoking standard of chapter.~~

10 ~~The following terms or comparable language in the provisions of a~~  
11 ~~trust, unless otherwise limited or modified, authorizes any investment or~~  
12 ~~strategy permitted under this chapter: "investments permissible by law for~~  
13 ~~investment of trust funds," "legal investments," "authorized investments,"~~  
14 ~~"using the judgment and care under the circumstances then prevailing that~~  
15 ~~persons of prudence, discretion, and intelligence exercise in the management~~  
16 ~~of their own affairs, not in regard to speculation but in regard to the~~  
17 ~~permanent disposition of their funds, considering the probable income as well~~  
18 ~~as the probable safety of their capital," "prudent man rule," "prudent~~  
19 ~~trustee rule," "prudent person rule," and "prudent investor rule."~~

20  
21 ~~23-51-210. Application to existing trusts.~~

22 ~~This chapter applies to trusts existing on and created after August 1,~~  
23 ~~1997. As applied to trusts existing on August 1, 1997, this chapter governs~~  
24 ~~only decisions or actions occurring after that date.~~

25  
26 ~~23-51-211. Uniformity of application and construction.~~

27 ~~This chapter shall be applied and construed to effectuate its general~~  
28 ~~purpose to make uniform the law with respect to the subject of this chapter~~  
29 ~~among the states enacting it.~~

30  
31 */s/ Luker*  
32  
33  
34  
35  
36